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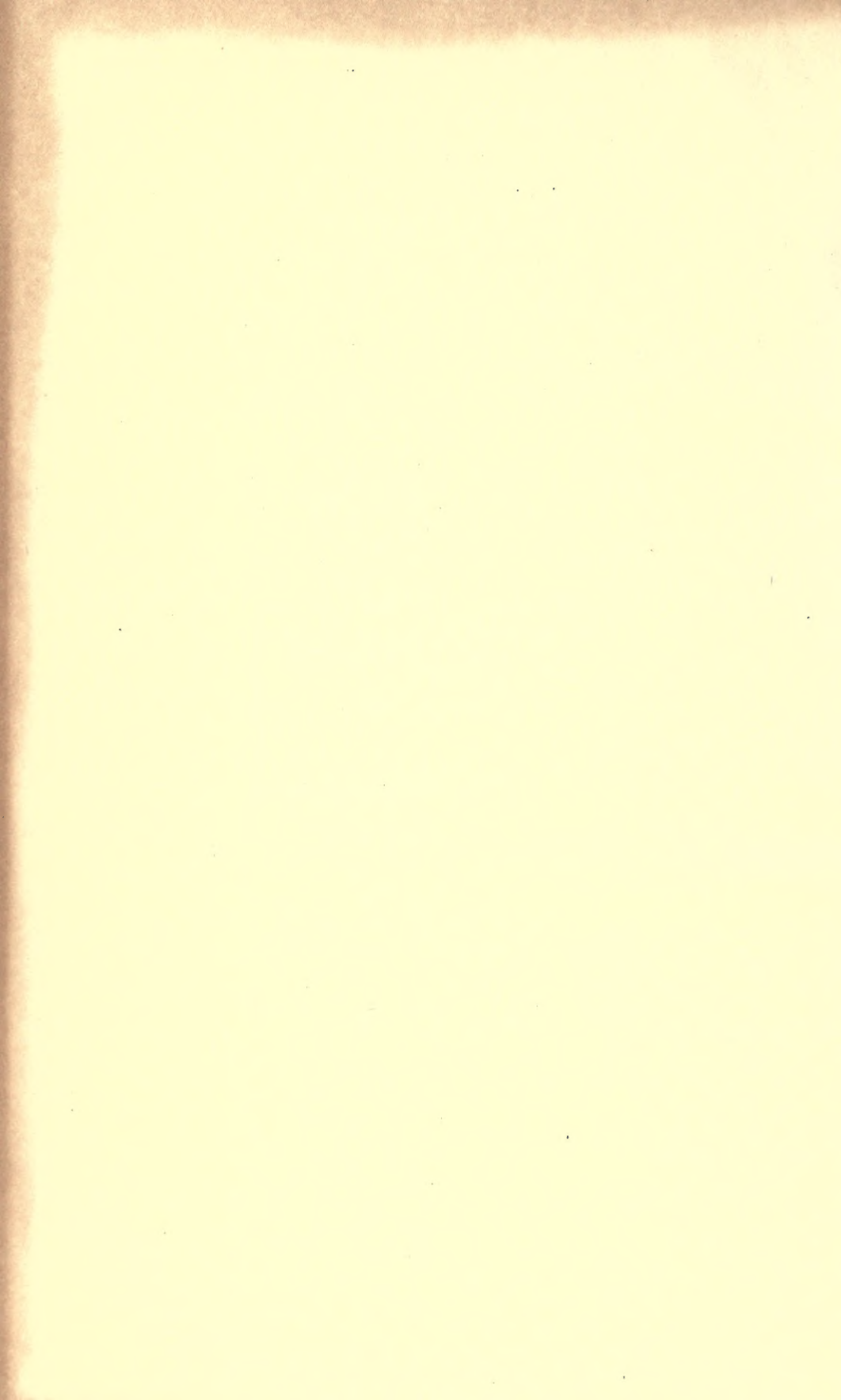
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THE
ENGLISH REPORTS

VOLUME CIVIII

CONSTITUTIVE COMMITTEE

THE HON. LORDS OF THE GREAT BRETAIN

THE ENGLISH REPORTS

EXCHEQUER DIVISION

PRINTED

WILLIAM JOHNSON, LONDON

CONSULTATIVE COMMITTEE

THE RIGHT HONOURABLE THE EARL OF HALSBURY,
LATELY LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE RIGHT HONOURABLE SIR R. B. FINLAY, G.C.M.G., K.C.,
LATELY ATTORNEY-GENERAL

EDITOR

MAX. ROBERTSON, BARRISTER-AT-LAW

THE
ENGLISH REPORTS

VOLUME CLVIII

EXCHEQUER DIVISION

XIV

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CHAMBER. Trinity Vacation, 24 VICT., to
Easter Vacation, 24 VICT., both inclusive. By
E. T. HURLSTONE, of the Inner Temple, and
J. P. NORMAN, of the Inner Temple, Esquires,
Barristers-at-Law. Vol. VI. London, 1862.

[Pp. ix. to lxii. contain Regulæ Generales (Court of Exchequer, Revenue Side).]

[1] EXCHEQUER REPORTS. TRINITY VACATION, 24 VICT.

MARSACK v. WEBBER. July 5, 1860.—Where two parties employ an arbitrator, and one pays the arbitrator's fees to enable him to take up the award, (there being no event of the award to entitle either party to costs), the party so paying is entitled to recover from the other a moiety of the sum paid as money paid to his use.

[S. C. 4 L. T. 553.]

Declaration for money paid. Plea: Never indebted.

At the trial, which took place before Martin, B., without a jury, at the Middlesex Sittings in Easter Term, it appeared that the action was brought to recover 56l., being a moiety of the sum of 112l. paid by the plaintiff under the following circumstances.

By an agreement of reference, dated the 8th of July, 1857, a certain action, and all matters in difference between the plaintiff and the defendant, were referred to the award of G. Goodwin, and G. B. Childs, or in case of their disagreement to such person as they should by a memorandum in writing appoint, the costs of and incident to the reference and award, including therein such costs as might be taxed by the officer of the Court in the action, to abide the event of the arbitration or umpirage. On the 10th of October, 1857, upon a summons at Chambers, Channell, B., on hearing counsel on both sides, ordered "that John Raymond, Esq., barrister at law, be appointed an umpire therein, pursuant to the Common Law Procedure Act, 1854." On the 1st of March, 1859, the umpire made his award, and thereby awarded that the defendant should pay to the plaintiff 156l. 18s. in respect of certain accounts; and that as to certain false and malicious representations, alleged to have been made by the defendant to the plaintiff, that the defendant was not guilty. Notice having been given to both parties that the award was ready to be delivered to them on payment of the fees, amounting to 112l., the plaintiff paid that sum in order to take up the award.

On these facts the learned Judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a nonsuit, or verdict in his favour.

Lush, in Easter Term, having obtained a rule nisi accordingly,

Hance now shewed cause. Under the order of reference and award made in

pursuance of it, neither party is entitled to the costs of the reference and award. That was decided by the Court of Queen's Bench in this case: *In re Marsack and Webber* (2 El. & El. 637). The plaintiff, however, having paid the whole of the umpire's charges in order to take up the award, is entitled to recover a moiety thereof from the defendant. There are several dicta which shew that the parties to a reference are jointly liable to the arbitrator. If so, in this case the umpire might have maintained an action against both the plaintiff and the defendant. In *Bates v. Townley* (2 Exch. 152), by agreement between the plaintiff and the defendant certain differences between them were referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrators. The arbitrators, after finding a sum of money due from the defendant to the plaintiff, awarded that the costs [3] of the reference and award, including compensation to the arbitrators, should be borne as follows: that is to say one moiety thereof by the plaintiff, and the other moiety thereof by the defendants. The plaintiff took up the award, and paid the whole costs of it, and it was held that he could not recover a moiety of the sum paid by him as money paid for the use of the defendants. But that was because the award was bad. Parke, B., in delivering the judgment of the Court intimated that if the award had been good the plaintiff might have recovered. He said "the plaintiff must shew that both the parties became jointly liable to the arbitrators for the sum that was paid to them," &c. Again, "this contract of the two parties is evidence, by their own admission, that the arbitrators were to be paid for their trouble, and might be used for that purpose if the arbitrators had to sue the parties for their services. . . ." "Both the parties having jointly employed the arbitrators, would, as between them and the arbitrators, be jointly liable to pay a reasonable compensation." In *Re Coombs* (4 Exch. 839), Parke, B., said:—"No doubt an arbitrator has a lien upon the award for his services, or, perhaps, he might maintain an action for work and labour; and as to the supposed difficulty to which the party may be subjected who has taken up the award and paid the money, I am inclined to think that he might maintain an action for money had and received, on the ground that the payment was not voluntary." [Bramwell, B. In agreeing to submit their differences to arbitration, both parties must have contemplated that the award would be taken up.]

Lush, in support of the rule. In the present case there was no evidence of any promise to pay the umpire. The [4] award might have been taken up by either party. When the plaintiff took it up, he did so for his own purposes, and must be deemed to have taken his chance of being reimbursed. The Court of Queen's Bench have held that there was no event of this award entitling the plaintiff to the costs of it. [Martin, B. The umpire has done work for both the plaintiff and the defendant jointly; therefore, *prima facie*, he was entitled to be paid. Does it not follow that there was a debt jointly due by these two persons to a third, which has been paid by one?] It is submitted that it is not correct to say that the fee paid to the umpire was a debt. A barrister may sue for his fees, if there has been an express promise to pay them: *Hoggins v. Gordon* (3 Q. B. 466), *Egan v. The Guardians of the Kensington Union* (3 Q. B. 935, note); but not otherwise. In *Virany v. Warne* (4 Esp. 46), Lord Kenyon ruled that this doctrine applied to the case of an arbitrator suing for his fees. [Channell, B. Suppose it had been expressly agreed that all matters should be referred to arbitration and that the arbitrator or umpire should be paid, could it be contended that the plaintiff could not sue?] The agreement regulates the rights of the parties; but here that which has taken place has not been provided for. [Channell, B. The agreement of reference contemplates that the arbitrator shall be paid; it provides how the costs are to be borne by the parties.] *Bates v. Townley* (2 Exch. 152) does not shew that arbitrators have a right of action for their fees. In the present case each party must bear his own costs, and neither party can recover from the other any part of the expenses he has voluntarily paid: *Yates v. Knight* (2 Bing. N. C. 277), *Gribble v. Buchanan* (18 C. B. 691). The fee paid to the umpire is a part of the expenses of the reference. The observations of Parke, B., [5] in *Bates v. Townley* (2 Exch. 152), and in *Re Coombs* (4 Exch. 839), must be taken to refer to a case where there is an express promise to pay the arbitrator. [Martin, B. Surely, if the parties place before an arbitrator an agreement of reference, stating that the expenses of the reference and award are to abide the event of the arbitration, that is an express representation to the arbitrator that he shall be paid.] That cannot alter the nature of the employment, if in point of law it is merely honorary. [Channell, B.

Suppose an arbitrator is asked to act upon a submission which shews that the arbitrator is to be paid, does not that amount to an express contract that he shall be paid ?]

Cur. adv. vult.

MARTIN, B., now said—In this case there was a reference of all matters in difference to arbitration, the costs of the reference and award to abide the event. After the argument of a rule obtained by one of the parties for the taxation of his costs, the Court of Queen's Bench was of opinion that there had been no event on which such costs could be taxed. One of the parties, however, has paid a considerable sum to the umpire, on taking up the award. It was suggested that his right to recover a moiety was governed by the case in the Court of Queen's Bench. But we are of opinion the cases are distinguishable. The costs, under the circumstances which have taken place, are not provided for by the agreement of reference. Then it was contended that the payment to the umpire was a voluntary payment; not such a payment by compulsion as would enable one party who had paid the whole to recover a moiety from the other; and that the right of the umpire to his fees was not a legal debt. Without going into that [6] question, we think that when two parties agree to employ an arbitrator, and one pays a sum of money to take up the award, in reason, justice and law he is entitled to recover from the other a moiety of the sum so paid. Therefore, the rule to enter a nonsuit must be discharged.

Rule discharged.

THOMAS JOHNSON v. SIMCOCK AND JACKSON. July 6, 1860.—A testator devised as follows:—"As to my real estate if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real property to my brother J. and D. H. equal between them, &c. But in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs, assigns and executors for ever." The daughter having attained twenty-one, married, and settled the property in question on her husband, but died without ever having had a child. Held, that on attaining twenty-one she took an estate in fee by descent, and that therefore the devise to J. and D. H. never took effect: per Pollock, C. B., Bramwell, B., and Channell, B., dissentiente Martin, B.

[S. C. 29 L. J. Ex. 478: affirmed 1861, 7 H. & N. 344.]

This was an action of ejectment to recover possession of a farm and lands called Wormlow Cross.

At the trial, before Bramwell, B., at the Spring Assizes at Stafford, it appeared that Thomas Johnson, the uncle of the plaintiff, being seised in fee of the said farm and lands, made his will as follows:—

"I give and bequeath to my wife, Hannah Johnson, the sum of 20l. yearly out of my real estate; likewise I give to my wife the interest of 400l. during her natural life, in case she does not marry; but if she should marry, then to have only the interest of 400l., and not any of the 20l. above mentioned. And should my daughter Margery Johnson, happen to die without issue, then I will that the 400l. be at my wife's disposal in case she survives my daughter; but should my wife happen to die before my daughter, then the said 400l. to be at my daughter's disposal. . . . Likewise I will, in case my daughter should marry during my wife's life, that my daughter shall give to my wife 30l. to buy her household furniture: and in case my daughter should have no lawful issues (sic), after her death [7] I will that my property that shall be remaining to return to my relations, &c. The remainder of my personalty I leave to my daughter's disposal, if she lives to maturity. As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to my brother, John Johnson, and Dorothy Harris, equal between them, they paying all the legacies and expenses as before mentioned; but in case my daughter shall have lawful issue, I leave the whole of my property, real and personal, to her and her heirs, assigns and executors for ever, provided she pays to my wife and my nephew Thomas Johnson, and my brother John Johnson, their legacies mentioned at beginning of this my will," &c.

The testator died in 1812, leaving John Johnson and Dorothy Harris surviving him. Dorothy Harris died in 1814; John Johnson died in 1838, leaving the plaintiff

his eldest son and heir at law. Margery Johnson, who was the only child of the testator, died in 1849 without issue.

The defendant's case was, that after Margery Johnson came of age, she executed a disentailing deed, and the property was afterwards, upon her marriage with the defendant Jackson, conveyed to trustees, under whom the defendants claimed.

Upon these facts the learned Judge directed a verdict for the plaintiff, giving leave to the defendants to move to enter a nonsuit.

Whateley, for the defendant Jackson, in Easter Term obtained a rule nisi to enter a nonsuit, on the ground that by the true construction of the testator's will the property vested in Margery, his daughter, when she attained the age of twenty-one years, and passed by the settlement made on her marriage.

[8] M'Mahon and J. E. Davis shewed cause. (a) The intention of the testator was that if Margery Johnson died under twenty-one years of age, or had no lawful issue, the estate should go to the testator's brother John Johnson, and Dorothy Harris, with a proviso that if Margery had a child, she should take an estate in fee. There is no devise of any estate for life to her, but she took an estate in fee by descent, subject to the executory devise over in the event of her dying without ever having had a child. The cases of *Weakley d. Knight v. Rugg* (7 T. R. 322), and *Doe d. Barnfield v. Wetton* (2 Bos. & P. 324), cited in Jarman on Wills, vol. 1, p. 473, 2nd ed., shew that there is nothing to give to Margery Johnson an estate tail, either expressly or by implication. *Gardner v. Sheldon* (Vin. Ab. Devise (L. 2), pl. 9) shews that, where an estate is devised over after the death of the testator, upon condition, the heir takes by descent until the condition is performed. Therefore this case does not fall within the terms of the rule as stated in Jarman on Wills, vol. 1, p. 422, which applies to cases where the testator begins by devising his real estate to the party whose estate is to be defeated on the contingency taking effect. *Soulle v. Gerrard* (Cro. Eliz. 525) was commented upon by Lord Cranworth, C., in *Grey v. Pearson* (6 H. L. 61, 79), who points out that the construction adopted in that and other cases has been for the purpose of preserving the estate, which would otherwise go over, in case of the death of the first taker under age, leaving issue. But no such reason for changing the natural meaning of the words exists in the present case. In *Mortimer v. Hartley* (6 Exch. 47), the testator, after giving estates tail to his children John and Anne, proceeded as follows:—[9] "If it should please God to take John and Anne under age, or without leaving lawful issue, I give and bequeath to my brother Joseph Westerman, and his heirs for ever, all these cottages," &c. The Court of Exchequer held that "the disposition of the Courts should always be to abide by the words of a will, and read them in their ordinary grammatical sense;" and accordingly they refused to change "or" into "and" for the purpose of effecting the conjectured intention of the testator. That opinion was approved and acted upon by Vice Chancellor Knight Bruce (3 De Gex & S. 316). In *Hilliard v. Gennings* (12 Moo. 276; see 2 Vern. 377), Lord Holt denied the case of *Soulle v. Gerrard* (Cro. Eliz. 525) to be law. In *Woodward v. Glasbrook* (2 Vern. 388), where one devised several parcels of land to his several children in tail, and if any of them die before twenty-one, or unmarried, such child's part to go to the surviving children, Lord Holt held that, one child dying unmarried, though he attained the age of twenty-one, his share went over to the survivors. The Courts will not change "or" into "and," where such a change would lead to intestacy. In the present case, if "or" be changed into "and," neither the executory devise over, nor the conditional gift of the fee to the daughter, would take effect. It would, therefore, in the events which have taken place, violate the expressed intention of the testator. It may be doubted whether "lawful age" is to be construed as meaning "full age," that is, twenty-one. A woman is of lawful age to contract a marriage at twelve years old, and the testator may have meant to say, "if my daughter never arrives at womanhood or if having arrived at that age she dies without ever having had a child, the estate is to go over."

Whateley and Manley Smith, in support of the rule. The [10] present case falls within the rule thus stated in Jarman on Wills, vol. 1, p. 422:—"By far the most numerous class of cases exhibiting the change of the testator's words are those in which the disjunctive, 'or,' has been changed into the copulative, 'and,' and vice

(a) In Trinity Term, June 7. Before Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.

versâ. It is obvious that these words are often used orally without due regard to their respective import; and it could not be difficult to adduce instances of the inaccuracy even in written compositions of some note. It is not, therefore, surprising that this inaccuracy should have found its way into wills. Accordingly, we find that the Courts have often been called upon to rectify blunders of this nature, &c. It has long been settled that a devise of real estate to A. and his heirs, or, which would be the same in effect, to A. indefinitely, and in case of his death under twenty-one, or without issue, over, the word 'or' is construed 'and'; and consequently the estate does not go over, unless both the specified events happen." Here the testator's daughter, Margery Johnson, took an absolute vested interest on attaining the age of twenty-one years. Suppose she had died under that age, leaving children, it is impossible to suppose that the testator did not mean that the property should go to her children. To carry out the testator's intention, the word "or" must be read "and." Unless "or" be construed "and," the estate would go over to the testator's brother in either of the events specified. In *Eastman v. Baker* (1 Taunt. 174, 182) the words were: "I give unto my daughter Jane all the right, &c., I now have in a certain messuage to her and her heirs; but if my daughter shall happen to die, and not attain the full age of twenty-one years, or having no such issue, then I give and devise the same premises to my dear wife." Mansfield, C. J., in delivering the judgment of the Court, said: "The question is whether 'or' in this place means 'and.' According to *Fairfield v. Mor-*[11]-*gun* (2 New Rep. 38), and the other cases cited, it must mean 'and'; because, if it does not, it follows that, upon the contingency of the daughter dying, having issue, but not having attained the age of twenty-one years, the estate would pass over from her children, which could never be the testator's intention." In *Soulle v. Gerrard* (Cro. Eliz. 525) there was a devise to one of four sons and his heirs for ever, and if he die within age or without issue, to his three other sons jointly. The devisee had issue, a daughter, and died within age; and the Court held that he took an estate tail. In *Price v. Hunt* (Pollex. 645) there was a similar limitation, and the Court held that the grammatical sense of the word "or" might be rejected, and the word read as if it were "and." *Walsh v. Peterson* (3 Atk. 193), *Barker v. Suretees* (2 Str. 1175), and *Right, Lessee of Day v. Day* (16 East, 67), are authorities in favour of this mode of construing the devise.

The learned Judges differing in opinion, the following judgments were now delivered.

MARTIN, B. This is an action of ejectment which was tried before my brother Bramwell, at Stafford, when he directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit. A rule was granted for this purpose, and cause has been shewn against it. The question depends upon the will of Thomas Johnson, dated the 9th of March 1810. He had an only child, a daughter, Margery Johnson; after his death she married, and died some short time ago, never having had a child. After she came of age, and during her marriage, she and her husband executed a disentailing deed, and the defendant claims [12] title under it, and if she had either an estate in fee simple absolute, or an estate tail in the real property devised, the defendant's title is good, and he is entitled to have this rule made absolute. The plaintiff claims title under John Johnson, the brother of the testator, named in the will, and his contention is, that upon the events which have happened he became entitled to a moiety of the property upon the death of the daughter. The duty of Courts of law, in construing wills, is to give effect to the intention of testators, as expressed by them in writing. Very many rules have been enunciated to aid the Courts in giving the proper construction; but their primary duty is to read the will itself and endeavour to ascertain what its words express taken in their plain, natural, ordinary, grammatical sense. It plainly appears from the present will that a principal object which the testator had in contemplation was, that in the event of his daughter having issue, the great bulk of his property should go to her. He also expresses an intention that, in the event of her dying without issue, what then remained of his personalty should (as he expresses it) return to his relations.

The first part of the will relates to the personalty. The devise as to the property in question is as follows:—"As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real property to my brother John Johnson and Dorothy Harris equal between them, they paying all the legacies before mentioned; but, in case my daughter shall have lawful issue, then I

leave the whole of my property, real and personal, to her, and her heirs, assigns and executors for ever."

It was argued on behalf of the defendants, first, that by the legal operation of this will the daughter took an estate in fee simple, by descent conditional; that the word "or" [13] must be read "and"; that the devise to the brother John Johnson and Dorothy Harris were executory devises in the event of the daughter dying under age, and without having had issue; and that upon her attaining full age, her estate in fee simple became absolute, and that, if the will were construed otherwise, the consequence would follow that in the event of the daughter dying under age, and leaving a child, the property would go to the brother John Johnson and Dorothy Harris, in exclusion of the daughter's child, which would be contrary to the plainly expressed intention of the testator. Or, secondly, that the daughter took under the will an estate tail by implication. If either of these positions be maintainable the defendant's title would be good. If the will had stopped at the devise to John Johnson and Dorothy Harris, there would have been much weight in the argument on his behalf. But I think we are bound by law to read the whole devise together, and the next sentence is to the express effect that in case the daughter should have lawful issue the whole of his property was to go to her and her heirs for ever. This shews, first, that the estate devised to the daughter was not an estate tail; for the devise is, that, upon issue of her body being born, the estate should be to her and her heirs for ever, that is in fee simple absolute. Secondly, it shews that the testator expressly provided for the case of issue being born of his daughter, whether it was born when she was under age or above it. This displaces the argument as to the child or children being deprived of the inheritance upon the death of the daughter under age. I therefore think there is nothing to justify us in altering the words of the testator, and reading "or" for "and"; and the true legal result upon the intention of the testator expressed by him, in writing, in his will, seems to me to be, that upon his death an estate in fee simple by descent vested in his daughter, but conditional; that on the event of her having [14] a child the condition would be satisfied, and her estate would be one of fee simple absolute, but on the event of her dying without ever having had a child there was a valid executory devise in fee to the brother, John Johnson, and Dorothy Harris as tenants in common. This construction is in accordance with the plain, ordinary, grammatical construction of the words used, and gives effect to them without alteration; and were it of importance, such a disposition of property is, in my judgment, perfectly reasonable, that is to say, to an only child absolutely in fee simple provided she has a child, but if she dies without ever having had one, then to the testator's own relations.

CHANNELL, B. I have to deliver the judgment of the Lord Chief Baron, my brother Bramwell and myself.

The question in this case is whether "or" is to be read "and," in that clause of the will under which the plaintiff claims, and which is as follows:—"As to my real estate, if my daughter dies before she arrives at lawful age or have no lawful issue, then I leave my real and all my other property," &c. Now this word "or" should have its usual signification unless there is some reason making it necessary to read it otherwise. It seems to us that there is such a reason. We may observe that there is probably less difficulty in substituting "and" for "or" than for any other change of language. Instances of the necessity for doing so are numerous, the mistake of using one of those words for the other being one which persons very often do, and easily may, make. If in this case the words had been "does not arrive at legal age, nor have lawful issue," the phrase would have meant what the defendant says it means now, and yet the disjunctive conjunction would be used. Still, however easy it may be to suppose the testator made a mistake, a reason must be given for holding he did so. It seems [15] to us there is such a reason. Following the devise in question is this:—"but in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her, her heirs, assigns and executors for ever." Now in that event, viz., his daughter having lawful issue, though she dies before she arrives "at lawful age," she takes the estate in fee, and John Johnson and Dorothy Harris do not take at all. It is clear, therefore, that if she has lawful issue the word "or" cannot be so read, and must be read "and." But it is said, that if she has no lawful issue, then "or" may be read "or"; but that is (in truth) to say that the words, "if my daughter die before she arrives at lawful age," have no effect,

and might be left out of the will, which, according to this construction, means if she has issue she takes in fee, though she does not attain her age; and if she has not issue, she does not take in fee, though she does attain it: in other words, that her attaining her age is immaterial. This construction would be more obvious if the devise to her came first, viz., I give to her and her heirs for ever, if she has issue; but if she has no issue, or dies under twenty-one, &c. In that case "or" must be read "and"; and the effect of the will would be: "If she attains twenty-one, she will take by descent, with a power to alienate; if she has children, I give to her: but if neither of those events happen, I give to my brother and sister," that is, I give to them if she does not attain an age to alienate, nor leave issue to succeed her. Nor do we think this construction contrary to any intention of the testator, either presumably or to be collected from the will. It may very well be that the testator meant that if his daughter attained twenty-one, she should have the estate in fee, though she has no children. Of course, it would be a greater benefit to her and enable her to place herself better in life. It is true, he does not say so in words in the [16] devise to her; but it may be he did not think it necessary. He may have thought it necessary to say that if she had lawful issue, though she died under twenty-one, she should take in fee; and that his brother and sister should not, and that they should only take if she died under age and without issue. On these grounds we think the rule should be made absolute. (See *Fairfield v. Morgan* (1 Taunt. 174), *Right, Lessee of Day v. Day* (16 East, 67).)

Rule absolute.

FRASER AND OTHERS, Assignees of James M'Clure, a Bankrupt v. ELIAS LEVY AND SIMEON SAMPSON. June 21, 1860.—If a trader raises money by selling his goods at an under value, (not for the purpose of carrying on his business, but in contemplation of stopping payment, and for the purpose of cheating his creditors), to one who has notice either by express information, or from the nature of the transaction, that he is selling his goods not in order to carry on his business but with a fraudulent intention, the sale is an act of bankruptcy and void, and the assignees may recover the goods from the purchaser.

Trover for silks, calicoes and other goods. Pleas. Not guilty, and not possessed. At the trial, before Blackburn, J., at the Spring Assizes at Liverpool, it appeared, by the evidence for the plaintiff, that James M'Clure, the bankrupt, began business on his own account on the 18th August, 1859, and carried it on till the 23rd of September in the same year, having succeeded his uncle. During this period the bankrupt bought goods, to a very large amount from various persons, on credit, and sold them to the defendants for ready money. There were eight or nine sales to the defendants. The defendants generally bought all the goods which the bankrupt had in his possession at the time, within a few pounds' worth. On the 12th of August, while the bankrupt was clerk to his uncle (the uncle, who was known to the defendants, being absent from ill health), the defendant Sampson was introduced to the bankrupt as a person who would do business [17] for ready money, and the bankrupt sold him a parcel of calicoes and other goods at a very low price. On the 26th of August the bankrupt bought from one W. Bryan 200 pieces of grey shirtings, which were invoiced to him at 217l. 4s. 1d. These the bankrupt sold to the defendants within a day or two afterwards, and invoiced them as "job," at 170l. The bankrupt stated that this invoice was made out by the direction of the defendants; but the sum actually paid by them was little more than half of that mentioned in the invoice. On the 2nd of September the defendant Sampson went to the bankrupt and asked: "Can you not get me some silks?" The bankrupt purchased some silks of Messrs. Smith, and of Joynson and Co., which were invoiced to him at prices amounting to 384l. 15s. The defendants paid the bankrupt 150l., and by their direction a sham invoice was made out to the defendants, stating the price to be 338l. The defendant Sampson came to the warehouse several times on the same day, and asked if the silks had come in. All the transactions between the bankrupt and the defendants were of a similar character.

For the purpose of shewing the intent to become bankrupt and defraud his creditors, evidence was given that M'Clure had sold goods to other persons, in some cases in the presence of the defendant Sampson, under circumstances similar to those under

which the sales to the defendants took place. It was further shewn that the goods invoiced to the defendants as "job," that is unsaleable or damaged goods, were perfect, and that a reduction of 5 per cent. from the cost price would have insured an immediate sale in the market.

The defendants contradicted the evidence for the plaintiff, and, in particular, swore that the invoices to them represented the price actually paid.

[18] The plaintiff's counsel, at the instance of the learned Judge, elected to rely on the transaction of the 26th of August as an act of bankruptcy.

The learned Judge told the jury that if a sale or other disposition of the property of a trader takes place, at ever so ruinous a sacrifice, it is no act of bankruptcy if done for the purpose of providing funds to carry on the business, and the creditors are not delayed or defrauded of the money so substituted for the goods. Even if a trader gets goods on credit for the express purpose of immediately selling them for ready money, to carry on his business, it is not fraudulent in such a sense as to be an act of bankruptcy. But if a trader raises money by selling his goods at an under value, not with the intention, however hopeless, of making a struggle to carry on his business, but in contemplation that he will stop payment, and for the purpose of cheating his creditors, that is an act of bankruptcy. And if, in committing this act of bankruptcy, he sells at a price, whether ruinously or not ruinously low, to another, who at the time has notice, knowing, either from express information or the nature of the transaction, that the debtor is selling, not in order to make a struggle to carry on his business, but with a fraudulent intention, the sale is void as regards the purchaser, and the assignees may recover the goods from him. The learned Judge then asked the jury whether, under all the circumstances, the sale was such an act of bankruptcy as defined by him? And whether the defendants, at the time they gave the money for the goods, were aware that the sale was such as to make it an act of bankruptcy? What did the bankrupt mean on the 26th of August? And what did the defendants know he meant? His lordship pointed out that it was clear the defendants knew that the bankrupt was disposing of his goods on ruinous terms; but it did not follow that they knew he was raising money for any other [19] purpose than that of struggling to carry on his business: and told the jury that if they thought that the bankrupt, on the 26th of August, was contemplating stopping business and defrauding his creditors, it was an act of bankruptcy; and if the defendants knew that on the 26th of August, the verdict should be for the plaintiffs; if not, for the defendants. The jury found a verdict for the plaintiffs.

Overend, in Easter Term, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence, against which

Knowles and Wheeler now shewed cause. The facts shewed that the bankrupt sold the goods, not for the purpose of carrying on his business, but simply to put the money into his pocket, and place it out of the reach of his creditors. The learned Judge admitted the authority of *Lee v. Hart* (10 Exch. 555; 11 Exch. 880).

Overend and Milward, in support of the rule. The learned Judge misdirected the jury in telling them that if a trader sells goods below their value, in contemplation that he will stop payment, and for the purpose of cheating his creditors, it is an act of bankruptcy. In *Baxter v. Pritchard* (1 A. & E. 456) it was held that an assignment by a trader of his whole stock, with intent to abscond from his creditors and carry off the purchase money, is not an act of bankruptcy when the purchaser pays a fair price, and is ignorant of the trader's design. In *Lee v. Hart* (10 Exch. 555; 11 Exch. 880), Parke, B., said: "There may be a transfer of goods by sale, with a fraudulent intent on the part of the trader, which is, nevertheless, a valid transfer. Even when the trader intended, on a particular sale, to run away with the price and cheat his creditors, such sale is not an act of bankruptcy. But if the purchaser is a party to that intention, then it would be a [20] fraudulent transfer, within the statute." [Martin, B. It may be an act of bankruptcy, though, if the purchase be *bonâ fide*, and without notice, the purchaser may be protected.] The cases shew that it is no act of bankruptcy if the buyer has no notice that the sale is fraudulent: *Harwood v. Bartlett* (6 Bing. N. C. 61), *Cook v. Caldecott* (Moo. & M. 522), *Bentliff v. Garnett* (1 C. & K. 326). The verdict here may have proceeded on the ground that the jury thought themselves warranted in finding for the plaintiff, without finding that the defendants had notice of the fraudulent intention of the seller.

MARTIN, B. We are all of opinion that the rule must be discharged. (After going

through the facts and shewing that the verdict was not against the evidence, his lordship proceeded):—"The 12 & 13 Vict. c. 106, s. 67," enacts that if any trader, liable to become bankrupt, shall make "any fraudulent gift, delivery or transfer of any of his goods or chattels" with intent to defeat or delay his creditors, such trader shall be deemed to have thereby committed an act of bankruptcy. This, no doubt, is a re-enactment of the old provisions on the subject, and we must be bound by the decisions in construing it. It was contended by the defendants' counsel that in order to make the sale of goods an act of bankruptcy the buyer must be a party to the fraud. If I were to put a construction on the statute, I should think that the fraud pointed at is the fraud of the trader, and that what passes in his mind is the real criterion whether the sale is an act of bankruptcy or not. But it is not necessary to give an opinion as to the case of *Baxter v. Prichard* (1 A. & E. 456), because the summing up gives full effect to it; the learned Judge expressly told the jury to find for the defendants unless they thought that the defend-[21]-ants were aware of the fraudulent intent of the bankrupt. The case of *Lee v. Hart* (10 Exch. 555; 11 Exch. 880), as it appeared when tried before me, was very different to the present. It was no more than this—Peters, a needy man, was selling goods, the purchaser higgling and dealing as hard as he could.

BRAMWELL, B. It is clear that the question left by the learned Judge to the jury was a proper one. Even if he misstated the law, in saying that there might have been an act of bankruptcy though the defendants had no notice of the fraud of the bankrupt, that is no misdirection. I am not sure that the case of *Baxter v. Prichard* (1 A. & E. 456), is not absolutely correct. It may be that, to make a fraudulent transfer by sale, both the buyer and seller must be parties to the fraud.

CHANNELL, B. I agree that the rule must be discharged. I do not dissent from any of the authorities which have been cited, and I agree with the defendants' counsel in thinking that they would be applicable if the summing up of the learned Judge was open to criticism on the point. The effect of what he says is, if a trader turns his goods into money with the intention of getting them out of the creditor's reach, it is an act of bankruptcy; and if the purchaser had, at the time, notice of the intention, the sale would be void. If the words "it is an act of bankruptcy" had been left out, or inserted after the word "intention," no objection could have been made to the ruling. However, after having described what would constitute an act of bankruptcy, he tells the jury to find for the defendants unless they are satisfied that the defendants were aware that the transaction was such as to be an act of bankruptcy.

Rule discharged.

[22] CLEAVE v. HARWAR. June 22, 1860.—Where, upon the winding-up of a Joint Stock Bank, which was also adjudicated bankrupt, a contributory, against whom judgment had been signed on a scire facias, effected a compromise and obtained a certificate under the Joint Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78), the Court stayed all further proceedings on the judgment without imposing any terms.

[S. C. 6 Jur. (N. S.) 658.]

Beasley had obtained a rule calling on the plaintiff to shew cause why satisfaction should not be entered on the roll, or why all further proceedings should not be stayed.

The plaintiff had proceeded by scire facias against the defendant to recover the sum of 123l. 11s. 4d., being the amount of a judgment debt due from the Royal British Bank, of which the defendant was a shareholder, and on the 28th of March, 1857, signed judgment. Upon the winding-up of the Royal British Bank the defendant was placed on the list of contributories, and in order to be released from the claims of the creditors he effected a compromise under the Joint Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78). The compromise was with the authority and consent of the official manager and the official liquidator of the Royal British Bank, and of the assignees thereof; and was confirmed by Kindersley, V. C., the Judge charged with the winding-up of the Bank, and also by the Commissioner in bankruptcy. The defendant had paid 489l. 1s. 6d. upon the compromise. On the 30th of April, 1858, the defendant obtained the certificate of Kindersley, V. C., that such compromise was effected and that the defendant was released from all liability in

respect of the debts of the Royal British Bank. No execution had issued on the judgment against the defendant. An application similar to the present had been made to Wilde, B., at Chambers, who referred the matter to the Court.

Joyce shewed cause, in Trinity Term (June 11). This case is not within the terms of the "Joint Stock Com-[23]-panies Winding-up Amendment Act, 1857." That Act applies only to the debts and liabilities of the Company. A scire facias is a proceeding against the defendant on his personal responsibility. The first section provides for cases in which an order has been made for the dissolution or winding-up of the Company. The second section applies to cases where the Company has been declared bankrupt, and no winding-up order has been made. That section provides that the certificate shall operate "in discharge of any action, execution, or other proceeding by any creditor whose debt or claim is by law proveable under such bankruptcy;" but a judgment upon a proceeding by scire facias against a shareholder could not be proved under the bankruptcy. [Pollock, C. B. The fifth section preserves the rights and remedies of creditors against persons who were shareholders at the time the debts were contracted.] That remedy would not apply to the costs of the proceeding by scire facias. The seventh section also shews that the legislature was dealing with the debts and liabilities of the Company and not of the individual shareholders, for it provides that after the creditors have been called on to appoint a representative, "no such action as is mentioned in the 73rd section of the 'Joint Stock Companies Winding-up Act, 1848,' shall be commenced or proceeded with, otherwise than for the purpose of making the Company bankrupt, nor shall any execution or scire facias be issued or proceeded with against the person, property, or effects of any member for the time being or any former member." [Channell, B. It does not absolutely prohibit proceedings, but only those commenced without leave of the Court of Bankruptcy or a Judge or Master. The eighth section would seem to shew that the plaintiff cannot proceed with this scire facias without such leave.] If the construction of the statute is doubtful the Court will not decide upon motion, but leave the defendant to his *audita querelâ*.

[24] Beasley, in support of the rule. The intention of the legislature was, that compromises made by a shareholder with the creditors of a Joint Stock Company should operate as a release of the shareholder from all liability to those creditors. The second and third sections may be construed together. The second is retrospective; and it empowers the assignees (who by the first section are the representatives of the creditors) to accept a sum in satisfaction and discharge of the liability of the shareholders to the debts of the Company. By the third section the representatives may make any compromise they think fit, "whether for the discharge and satisfaction of the liability of all and every the shareholders and members, or any or either of them, to the debts and liabilities of such Company, or otherwise." The representatives have control not only over the individual creditors but over all proceedings in and about the winding-up of the Company: *In re the London and Eastern Banking Corporation* (2 De Gex & J. 484). The scire facias is only a process for the purpose of obtaining execution against the defendant upon the judgment against the Company. The defendant is as much a party to that judgment as if he had been sued by name. The certificate operated as an absolute release of the judgment, and therefore it is compulsory on the Court to enter satisfaction on the roll: *Catlin v. Kernott* (3 C. B. N. S. 796). [Pollock, C. B. There the defendant having been in custody under a writ of *ca. sa.*, his discharge was satisfaction of the judgment, so that no other execution could issue against his person, land, or goods. Here we can only stay the proceedings or leave the defendant to his writ of *audita querelâ*.] The eleventh section, which saves the rights of creditors who have actually levied execution, shews by implication that the plaintiff has no right to proceed in this case. The costs of the scire [25] facias must be considered as included in the sum paid on the compromise. [Channell, B. The words of the second section are very large, viz., that the certificate "may be pleaded and used in bar and in discharge of any action, execution, or other proceeding by any creditor," &c.]

POLLOCK, C. B. We are all disposed to give the fullest effect to the provisions of this statute. There is no doubt that the defendant is entitled to relief; and the only question is whether any and what terms ought to be imposed on him.

Cur. adv. vult.

BRAMWELL, B., now said—In this case Mr. Beasley had obtained a rule to enter

satisfaction on the roll or stay the proceedings. It was an application by a shareholder in the Royal British Bank, who had paid a sum of money in discharge of his liability, and obtained a certificate under the "Joint Stock Companies Winding-up Amendment Act, 1857." At the time of the argument we thought the case within the statute, and now we are clearly of that opinion. It seems to us that the Act was intended to comprehend cases both where there has been a bankruptcy and where there has not. The difficulty is to a great extent attributable to the difference in the wording of the statute where there is a bankruptcy and where there is not, and where the bankruptcy is before the winding-up and where it is afterwards—a difference arising from the necessity of providing representatives of creditors, the assignees being the representatives where there is a bankruptcy. We are satisfied that this case is within the Act, and therefore the question is which alternative of the rule ought to be absolute. We think that it ought not to be absolute to enter satisfaction on the roll, because although the judgment would be satis-[26]-fied as regards this defendant only, yet, in proceedings against other shareholders, the plaintiff would have to shew that the satisfaction was under the act of parliament, otherwise it would be presumed that the judgment was satisfied, in the ordinary way, by payment. We are therefore of opinion that the rule ought to be absolute to stay the proceedings, and the remaining question is upon what terms. It seems to us that we cannot impose any terms, because the statute has provided that the certificate shall be given on such terms as to the payment of the costs of any actions, suits, or other proceedings as the person granting the certificate shall think fit to direct. That may be a hardship on the plaintiff, who may not have been present when the certificate was granted, or have had an opportunity of being heard upon the matter; but looking at the discretion as to costs given to the persons who grant the certificate, we think it ought to be exercised by them, and if not, it ought not to be assumed by us. The rule will therefore be absolute to stay the proceedings.

Rule absolute accordingly.

WILLETT, *Appellant v. BOOTE AND ANOTHER, Respondents*. June 24, 1860.—By agreement in writing the appellant agreed to serve the respondents, potters, as a biscuit-oven placer, at daily wages, for twelve months. By another agreement of the same date R. agreed to serve the respondents for the same period as biscuit-oven fireman, to be paid by piece work, he paying the appellant wages out of what he earned.—Held, that the relation of master and servant subsisted between the respondents and the appellant, notwithstanding his wages were paid by R., and consequently he was properly convicted under the 4 Geo. 4, c. 34, for absenting himself from the respondents' service.

[S. C. 30 L. J. M. C. 6; 3 L. T. 276.]

The following case was stated for the opinion of this Court, pursuant to the 20 & 21 Vict. c. 43. The respondents are manufacturers of earthenware at Burslem in Staf-[27]-fordshire. The appellant is a journeyman ovenman. On the 20th March, 1860, the appellant was summoned before a justice of the county of Stafford upon a complaint, that "he, the appellant, having contracted and agreed with Thomas Boote and Richard Boote, under a written agreement, to serve them in their business of earthenware manufacturers as a biscuit-oven placer, at Burslem in the said county, from the 11th of November, 1859, to the 11th of November, 1860, did, on the 25th of February, and on subsequent days to the date of the complaint, unlawfully misdeemean, misbehave and misconduct himself in his said masters' service, (to wit) that he did unlawfully neglect and absent himself from his said masters' service without having given to his said masters any notice thereof, without the leave of his said masters, and did neglect to perform part of his said work and to obey the lawful commands of his said masters, and without any sufficient reasons for so doing, contrary to the statute," &c.

On the hearing of the complaint the following facts were proved:—By an agreement dated the 15th of November, 1859, the appellant agreed to serve the respondents as a biscuit-oven placer, from the 11th of November, 1859, to the 11th of November, 1860, at four shillings a day. The agreement was as follows:—

"This agreement, made this 15th day of November, 1859, between Thomas Boote and Richard Boote, copartners, of Burslem in the county of Stafford, potters, hereinafter called 'the said potters' of the one part, and the several other persons whose names are mentioned in the first Schedule hereto affixed, who are hereinafter described as 'the said workmen' of the other part: Whereby the said workmen (each of them agreeing for himself only, separately from the others of them, so as to constitute a separate contract) do hereby in consideration of the wages or prices [28] hereinafter mentioned or referred to, contract and agree to serve the said potters as potters, that is to say, in that branch of a potter's business mentioned opposite to their respective names in the first Schedule hereto, at Burslem, in the said county, faithfully, honestly, and diligently, from the 11th day of November, 1859, until the 11th day of November, 1860 (the usual holidays excepted); during all which period the said workmen agree to do and perform their work in a good, skilful and workmanlike manner, and to attend to the business of their said employers during the regular and usual working hours; to execute their lawful commands, preserve their secrets, advance their interests to the utmost of their power, and in all respects to behave as honest and faithful servants. And the said workmen agree to be satisfied with such work as the said potters can fairly and reasonably provide for them during the said term, and to be subject to the rules of their manufactory. And in consideration of the premises, the said potters hereby agree separately with the said workmen (and so as to constitute a separate contract with each workman) to receive the said workman into their employment as aforesaid, and to find them respectively a reasonable proportion of work, and to pay them for the same, in respect of the articles or things mentioned in the second Schedule hereto subjoined, the wages or prices expressed in the same Schedule, and in respect of any articles or things not specified in the same Schedule, the same wages or prices as have been paid by the said potters for the same work during the year, commencing on the 11th day of November last. And it is hereby agreed that if the said workmen, or any of them, shall, at any time during the existence of this agreement, be required by the said potters to execute any work (within their respective branches of a potter's business) not specified in the said Schedule hereto, and which has not been [29] executed at the manufactory of the said potters during the year commencing the 11th day of November last, the said workman or workmen shall execute such work on being paid a reasonable price for the same; such price, in case of disagreement, to be settled by arbitration in manner hereinafter expressed; and that, until the decision of the arbitrators shall be declared, the said workman or workmen shall continue to perform such work, and shall receive after the rate of four shillings per day on account of his or their wages in respect thereof. And further, that if any dispute arise between the said parties, or any of them, as to the prices or wages to be paid to the said workmen or any of them by virtue of this agreement, such dispute shall (on the request in writing of either of the parties in dispute, within fourteen days after the question shall have arisen) be referred to the decision of six arbitrators, three of whom shall be manufacturers and shall be chosen by the said potters, and the remaining three arbitrators shall be working potters and shall be chosen by the workman or workmen with whom the question shall have arisen; such arbitrators to appoint some impartial and competent person as umpire; and the decision of such arbitrators and umpire, or the majority of them, shall be final and conclusive on both parties. And if either party shall (for seven days after notice in writing from the other of them requiring him or them so to do) fail to appoint his or their arbitrators, the other party may proceed alone, and such referees or the majority of them shall have full power, on the application of either party, to fix the time and place for entering on such reference, and to proceed therein whether both parties shall attend or not. Provided always, that if at any time during the continuance of this agreement, the said potters shall not within the period of four successive weeks find and give to any of the said workmen such work as afore-[30]-said for at least sixteen days (unless prevented by the acts or neglect of any other workman at the said manufactory) the workmen or workman to whom such insufficient work shall be given shall be at liberty to terminate this agreement as between himself and themselves and the said potters, upon giving four weeks' notice to the said potters of his or their desire so to do. And lastly, it is hereby declared that if, during the continuance of this agreement, any number of workmen shall withdraw from the manufactory of the said potters in violation of existing agreements, so as to prevent the general business of the said

manufactory from being carried on, then and in such case it shall be lawful for the said potters to put an end to the several contracts hereby made or entered into or any of them. As witness," &c.

"Signed T. BOOTE.

"This agreement is subject to the rules and customs of last and former years."

"THE FIRST SCHEDULE ABOVE REFERRED TO.

"Signature of Workmen.

"William Willett."

(Then followed the signatures of nine other workmen.)

"All to receive as under-named opposite their respective names.

"BRANCH OR DEPARTMENT OF BUSINESS.

"4s. per day for each day's work done.

"Biscuit Oven Placers."

"THE SECOND SCHEDULE ABOVE REFERRED TO."

(This Schedule was blank.)

[31] By another agreement, also bearing date the 15th of November, 1859, Thomas Robinson and John Bowers entered into the service and employment of the respondents as biscuit-oven firemen, and they were to be paid by the respondents 1s. per score for placing and firing twenty dozen of ware to be delivered into the biscuit warehouse, and a further sum of 20s. per oven for odd work, it being understood that out of the price of one shilling per score of twenty dozen, and the extra charge for odd work, Robinson and Bowers should pay to the appellant Willett, and the other nine workmen, parties to the first mentioned agreement, the wages payable to them by virtue of such agreement, Willett and others being employed in placing the ware in the ovens to be fired by Robinson and Bowers. The agreement with Robinson and Bowers was in the same printed form as the other agreement. Robinson and Bowers were the only workmen who were parties to it; and they were described, in the first schedule, as "biscuit firemen." The second schedule was thus filled up: "This agreement is subject to the rule and custom of last year. To receive 1s. per score of twenty dozen of ware, delivered in the biscuit warehouse, and subject to count as heretofore: 20s. per oven odd work."

The entry of the work done, and the wages paid for the same work, is made in the book kept by the respondents for that purpose in the following manner:—

"Bowers & Co.

"6050 dozen, at 1s. per score }
dozen. Odd work for } 19l. 2s. 6d."
4 ovens, 20s. per oven, }

It was proved that the above sum of 19l. 2s. 6d. included the wages payable to the appellant and the other workmen; and it was proved that the respondents were in the habit of paying several workmen under one name, and so enter-[32]-ing it in their wages book; but no specific sum was reckoned in that as payable to the appellant.

On the 25th February the appellant, with the nine other workmen, parties to the first mentioned agreement, refused to carry out the dishes from the dish-makers' place to the oven, which they had always heretofore done, alleging, as a reason, that since their hiring extra work had been put upon them, namely, sanding the saucers. About the middle of the day of the 25th February, the appellant absented himself from work without the permission of the respondents, and did not return to his work, although required by the respondents to do so; but he returned on the 27th of February, and continued to work as theretofore, except carrying out the dishes, which he refused to do. The appellant and other workmen had offered to leave the question in dispute to arbitration, which the respondents refused. Some time after November, Robinson

gave the appellants a month's notice to leave; but, at the expiration of the month, Robinson agreed that the appellant should continue to work, which he did. On the examination of Robinson, on the part of the appellant, he admitted that there had not been any express contract of hiring of the appellant by Robinson and Bowers; but he stated that the appellant had performed part of the work comprised in the agreements.

It was objected, on behalf of the appellant, that the relation of master and servant did not subsist between the respondents and the appellant, notwithstanding the first mentioned agreement; and it was alleged, on his behalf, that he had worked under Robinson and Bowers, who had paid him the wages he was entitled to out of the money received under their agreement from the respondents.

It was further urged that the agreement was vague and indefinite, as the rules and regulations were not specified, and that any dispute about work could be referred to arbitration.

[33] The appellant was convicted and sentenced to one month's imprisonment in the House of Correction.

The questions for the opinion of the Court are: Whether, under the circumstances stated, the relation of master and servant did subsist between the respondents and the appellant, and whether there was an absents from the service within the meaning of the Act; whether the agreement was vague and indefinite, and therefore void; whether the dispute ought not to have been referred to arbitration, and whether the conviction was correct in point of law.

J. E. Davis argued for the respondents, in last Trinity Term (May 28). First, the relation of master and servant existed between the respondents and the appellant. The first agreement was a valid contract for service, and capable of being enforced under the 4 Geo. 4, c. 34, s. 3: *Regina v. Welch* (2 E. & B. 357). It will be contended that, inasmuch as the appellant worked under Robinson and Bowers, the relation of master and servant existed between him and them, and not between him and the respondents. But it is usual for a servant of this description to work under a foreman or other workmen. It is true that the appellant received his wages from Robinson and Bowers; but they were merely the hand which paid the wages due from the respondents. There was nothing in the second agreement to interfere with the relation of master and servant which existed between the respondents and the appellant. Robinson and Bowers engaged to work by the piece, and they were to receive what was earned, after deducting the wages of the appellant and other workmen. The effect of this arrangement was to give Robinson and Bowers an interest on the amount of work done. Suppose they had left or been dismissed, and the appellant and other workmen had sued the [34] respondents for their wages, would it be any answer to say, "We made an arrangement with Robinson and Bowers, by which you worked under them, and they were to pay you your wages out of the money which they earned?" There was clearly an absents from service, and a refusal to work. Secondly, the first agreement is not vague and indefinite. (Scotland, for the appellant, abandoned that objection.) Thirdly, this case is not within the provision for referring disputes to arbitration. That clause merely relates to disputes as to the prices or wages to be paid to the workmen; and in that case the agreement expressly provides that the workmen shall continue to perform the work and receive their wages at the rate of four shillings a day, until the decision of the arbitrator. Here the appellant refused to do the work which he contracted to perform. If the respondents had wrongfully discharged the appellant from their service, would it be any answer to an action against them that the agreement contained a stipulation for referring to arbitration disputes about wages?

Scotland, for the appellant. The conviction is bad. The 3rd section of the 4 Geo. 4, c. 34, provides for two distinct offences: first, where a person shall in writing contract to serve, and shall not enter into his service; secondly, where, having entered into the service, he shall absent himself, whether the contract be in writing or not. The relation of master and servant does not exist between the respondents and appellant, consequently there is no absents from service, within the meaning of that Act. The written contract under which the appellant entered the service was superseded by the implied contract which arose from the second agreement, by which the appellant and the other workmen worked under Robinson and Bowers, who paid them their wages. [Bramwell, B. Sup-[35]pose Robinson and Bowers failed to pay the appellant his wages, could he not maintain an action against the respondents?] The

contract being transferred, no action would lie; for the appellant was no longer the servant of the respondents, but of Robinson and Bowers. The case finds that Robinson gave the appellant a month's notice to leave, but afterwards agreed that he should continue to work. [Channell, B. The case does not state affirmatively that the appellant left with the consent of Robinson and Bowers, nor does it on the other hand negative that consent.] All parties acted as if the contract was between the appellant and Robinson and Bowers. Who would bear the loss if the appellant did not work? Not the respondents, but Robinson and Bowers. It is immaterial who, in fact, hires the servant; the employer is the master for whose service he is retained: *Rea v. Hoseason* (14 East, 605). Further, the arbitration clauses apply, and the respondents having refused to refer the dispute to arbitration, the appellant committed no offence by leaving. A mere absenting is not sufficient to constitute an offence within the Act, but there must be an absenting without lawful excuse, and with a guilty intention: *Rider v. Wood* (2 El. & El. 338), *Ashmore v. Horton* (2 El. & El. 360). The leaving under a mistaken notion of a right to leave is no offence. Here the appellant believed that he had a reasonable excuse for leaving the respondents' service.

The judgment of the Court was now delivered by

BRAMWELL, B. We are of opinion this conviction should be affirmed.

The first question is, did the relation of master and servant exist between the respondents and appellant? The facts are that the respondents are master potters, that they [36] hired the appellant and several other men for a considerable period, by a written agreement, at the wages of four shillings a day. On the same day that this agreement of hiring was made, the respondents engaged with two other men in writing for their services, and undertook that they would pay them one shilling for every dozen score put into the oven. In truth this meant that a sum, arrived at by taking one shilling for every dozen score of the total quantity put into the oven, was to be given to these latter men, but that out of the sum so given to them they were to pay the other men their daily wages. The appellant and the other men who signed the first mentioned agreement were no parties to this, but in fact they were paid their wages by the hands of the two men named in the second agreement. It was said this established the relation of master and servant between the men in the second and those in the first agreement, and destroyed it between the respondents and the appellant. But this is not so. It is to suppose that the appellant and the respondents entered into an agreement for no purpose but at once to cast it aside. The matter is very intelligible. The appellant desires to have, and the respondents desire to pay, fixed daily wages for the appellant's labour. But the respondents desire to have that benefit which is got from careful supervision and the partial application of the principle of piece work. They therefore hire the appellant at daily wages, and they agree with the two men in the second agreement that the appellant shall work under them as under a foreman, and that they the foremen shall be paid thus:—An account shall be taken, at one shilling for every dozen score, of all articles put in the oven; that so much of that sum as exceeds the wages of the men employed, shall be paid to them, the foremen, to keep for their own benefit; and that for the convenience of all parties the residue of that sum shall be given to them, for them to be the hands who pay the men. [37] It is clear that if the foremen had not paid the men, either because their earnings would not allow them, or for any other reason, the defendants would be liable. It was asked whose would the loss be if one of the workmen did not work. But the question is not intelligible. Nobody's but his own. If he did not work he would not be paid. If the question means if he worked idly or ill, why the loss would be the foremen's; but so it would be if the respondents had agreed in terms with the foremen (as we say they have in substance with this difference) that they themselves would pay the men and deduct their wages from the sum arrived at by taking one shilling for every dozen score. The very object of the arrangement is to give the foremen an interest in getting the greatest possible quantity of work out of the appellant and his fellows.

The other objection to the conviction arose thus:—In the agreement of hiring there is a clause of arbitration. The appellant made a claim on the respondents which the respondents refused to accede to, and refused to refer to arbitration. The appellant then deserted the service of the respondents. Now it was urged that if he thought he had a right to do so because his master would not refer this dispute to arbitration, his doing so would not be a wilful desertion of the service,

so as to subject him to a penalty. Probably that is so. But there is really no ground, on the case stated, for saying he left the service for such a reason. There is nothing to indicate it on the case; and though we have offered to remit it to the justices, the offer has been declined by the appellant. The point is not open to the appellant, and it must be taken that he left the service as a means of compelling his master either to comply with his requisition or to refer the matter, or for some other cause, knowing he was thereby breaking his agreement. That being so, the appeal must be dismissed.

Appeal dismissed.

[38] THE HULL FLAX AND COTTON MILL COMPANY v. WELLESLEY. July 6, 1860.—By the deed of settlement of a Joint Stock Company, it was provided that the capital of the Company should be 100,000l. in 1000 shares of 100l. each, and that it should be competent for any general meeting of the Company to create additional shares of 100l. each. The Company, at a general meeting, created 1500 new half shares of 50l. each, some of which the defendant purchased, executed the deed of settlement and received the dividends declared on the shares. It was afterwards resolved, at a special general meeting, that the Company be wound up under the Joint Stock Companies Acts, 1856, 1857, and the defendant was sued for calls made by the directors and the liquidators of the Company.—Held, that the defendant was estopped from denying that the 50l. shares were valid shares.—A Joint Stock Company, formed in 1837, and which had obtained an Act enabling the Company to sue and be sued in the name of one of the members as a nominal plaintiff, was afterwards registered and incorporated, pursuant to the Joint Stock Companies Acts, 1856, 1857.—Held, that the incorporated Company could sue for calls made by the directors before the incorporation of the Company.—After an order for the voluntary winding-up of a Joint Stock Company, the liquidators appointed under the Joint Stock Companies Acts, 1856, 1857, may make calls without giving the notices prescribed by the provisions of the deed of settlement or Acts, for calls made by the directors.

[S. C. 30 L. J. Ex. 5. Distinguished, *Bank of Hindustan v. Alison*, 1870, L. R. 6 C. P. 70: affirmed *ibid.* 222.]

Declaration. The Hull Flax and Cotton Mill Company, being a company duly registered according to the Joint Stock Companies Acts, 1856, 1857, by &c., their attorney, sue for money payable by the defendant, for calls made by the direction of the said Company according to the provisions of the deed of settlement of the said Company, upon shares in the Company, being part of the capital stock of the said Company, whereof the defendant was the proprietor and holder; the defendant on becoming a shareholder in the said Company, having executed the said deed of settlement of the said Company, and having thereby, before the said Company was registered, covenanted with certain trustees on behalf of the said Company, to pay such calls when made upon him, and all conditions precedent to the validity of the said calls and to the liability of the defendant as a shareholder in the said Company, to pay the amount of the said calls, having been duly performed.—And for calls made by the liquidators of the said Company upon the defendant as a shareholder and contributory of the said Company, the said Company having been duly registered under the Joint Stock Companies Acts, 1856, 1857, and having in general meetings passed and confirmed a special [39] resolution requiring the Company to be wound up voluntarily according to the said Acts, and having appointed liquidators; and all conditions precedent as to the validity of the said calls and to the liability of the defendant, as a shareholder and contributory, to pay the amount of the said calls, having been performed according to the provisions of the said Acts of Parliament, &c.

Pleas, to the first count. First: Never indebted. Secondly, that the defendant was not a holder or proprietor of the shares. Thirdly, that the calls were not made by the directors, in accordance with the provisions of the deed of settlement. Fourthly, that the calls were made before the Company was registered according to

the Joint Stock Companies Acts, 1856, 1857, and whilst the Company was an unincorporated Company.

To the second count. Fifthly, that the defendant was not a shareholder or contributory of the Company. Sixthly, that the Company was not duly registered under the Joint Stock Companies Acts, 1856, 1857. Seventhly, that special resolutions, requiring the Company to be wound up voluntarily, were not passed, and confirmed in accordance with the provisions of the Acts. Eighthly, that liquidators were not duly appointed. Ninthly, that the calls were not made by the liquidators upon the defendant, according to the provisions of the Acts.

The defendant also demurred to the first count. The plaintiffs took issue on all the pleas except the fourth, and demurred to that plea. The defendant joined in demurrer.

The cause came on to be tried before Pollock, C. B., when a verdict was taken for the plaintiffs, subject to a special case, in substance as follows:—

The plaintiffs were a Company, originally constituted under a deed of settlement dated the 5th of April, 1837.

By this indenture, which recited that the parties thereto [40] had agreed to form a Company for the purpose of purchasing, importing, &c., flax and cotton, and had agreed to raise amongst themselves a capital of 100,000*l.*, to establish and carry on the business, each of the parties covenanted with P. and H. in manner expressed in clauses numbered from 1 to 107.

"4. That the capital of the Company shall be 100,000*l.* divided into 1000 shares of 100*l.* sterling, &c., and each of the shares shall be distinguished by a number, beginning with number 1."

"14. That every proprietor of shares in the Company shall pay so much of the amount by him respectively subscribed for as hath not already been paid by him, by such instalments and at such times as the Board of directors shall call for the same, &c. And notice in writing of such call shall be given to every proprietor at least thirty days previously to the day on which the same is to be paid," &c.

"20. That no proprietor, &c., shall be allowed to transfer any share or shares without the approbation of the Board of directors," &c.

21. Directors to regulate the form of transfer.

"22. That every transfer shall carry with it the profits and interest &c., in respect of the shares transferred," &c.

"30. That every person approved as a proprietor or transferee of shares shall execute these presents or some deed of accession," &c.

"31. That a purchaser of shares shall not, as to all profits, privileges, &c., be considered the proprietor until he shall have executed or otherwise acceded to these presents."

"85. That it shall be competent for any general meeting of the Company, &c. to increase the capital of the Company, and to raise such increased capital by creating an additional number of shares, of 100*l.* each, and to cause such additional shares to be sold at such prices as the Board [41] of directors can obtain for the same, &c., and to make any new laws, orders, regulations, or provisions for better managing the Company, and the business affairs and concerns thereof, and to amend, alter, repeal, or make void, any of the existing laws, regulations, and provisions thereof, and to cause all or any of the bye-laws and provisional regulations which may be so adopted and confirmed, and all or any of such new or amended laws, regulations and provisions, and all or any such resolutions for the repeal or avoidance of existing laws, regulations, or provisions, to be embodied into any supplementary deed of settlement, to be made for the conduct or government of the Company; and the same, whether embodied in such supplementary deed of settlement or not, shall be as binding and effectual, to all intents, as if the same were inserted and contained in these presents. And it shall also be competent for any such general meeting, whether annual or special, to determine upon any question or measure, matter, or thing relative to the affairs of the Company, which shall arise in the course of the conduct and management thereof, and which shall be brought before such meeting. Provided, nevertheless, that no act, order, or resolution, shall be done or passed at any general meeting which shall release or exonerate all or any of the proprietors, for the time being, from their respective liabilities to pay and satisfy the entire sum of one hundred pounds in respect of every share, or from their covenants in that behalf contained in

this deed, or to be contained in any supplementary deed of settlement, nor which shall affect or infringe upon the rateable or proportionable division of the profits, and liability to the losses of the Company between or amongst the proprietors," &c.

"98. That if ever the losses of the Company shall have absorbed not only the guarantee fund, but also one fourth part of the then paid-up capital, the directors shall, within twenty days, &c., call a special general meeting of the [42] proprietors, stating in their notices the object of the meeting, and lay a statement of the affairs of the Company before such meeting. And it shall be lawful for any one or more of the proprietors at such meeting to require the dissolution of the Company, and the same shall be accordingly dissolved forthwith, and the affairs thereof wound up in manner hereinafter mentioned, unless three-fourths of the proprietors, &c., shall be desirous of carrying on the Company, which they shall be at liberty to do upon purchasing the shares of the party or parties desirous of withdrawing from the Company, &c.: provided that nothing herein contained shall extend to release such retiring proprietors from bearing their proportion of the losses of the Company up to the day of such special general meeting.

"99. That in case such loss should not be incurred, an absolute and entire dissolution of the Company and determination of the partnership may take place on the terms, and on no other terms (that is to say), by and with the consent and approbation of three fourth parts, at least, in number and value, of the votes of the proprietors present, and voting at two successive special general meetings."

"107. The proprietors to keep and perform the covenants, articles, &c., of the deed: and the damages and costs recovered under the covenant shall be paid over to the directors for the time being, to be applied by them as part of the assets of the Company."

In 1841, the Company obtained an Act, 4 & 5 Vict. c. xev., "An Act for regulating proceedings against the Hull Flax and Cotton Mill Company."(a) At the annual general [43] meeting in May, 1840, a resolution was passed to increase the capital of the Company by the creation of 500 new shares of 100l. each, beginning with the number 1001, to be allotted to such of the proprietors of the present shares as should apply for new shares within one month, &c. The resolution was confirmed at a special general meeting in June, 1840.

On the 7th of August, 1845, at a special general meeting convened expressly for the purpose, the following resolution was passed:—

"That 1500 new half shares be created and issued at 50l. each one half share, to be appropriated to the holder of each existing share, according to the list of proprietors now exhibited. Payment to be made on calls as provided by the deed of settlement. The proprietors to declare their acceptance or refusal within one month."

This resolution was confirmed at a special general meeting held on the 9th of October, 1845.

The whole of the holders of shares were not present, either in person or by proxy, at either of the above meetings.

The capital authorized to be raised by the above resolution was raised, and the new shares accepted by the proprietors as allotted by the directors, in compliance with the resolutions.

The mode of transferring shares, from 1843 till several years after the defendant was registered as a proprietor, was as follows:—

(a) The material parts of this Act are as follows:—Whereas "difficulties have arisen and may hereafter arise in legal proceedings by or against the Company, since by law all the members for the time being must be named in such proceedings: And whereas it is expedient that the Company should be rendered capable of suing and being sued in the name of one individual as a nominal party to such legal proceedings:" Be it enacted, that "in all actions, suits and other legal proceedings other than proceedings of a criminal nature, &c., to be hereafter instituted, &c., it shall be sufficient to state and to proceed in the name of the chief manager, or one of the directors for the time being, of the said Company, as the nominal plaintiff representing the Company, &c.; and that in all actions, &c., against the Company, &c., it shall be sufficient to state the name of the chief manager, &c., as the nominal defendant representing the Company."

Section 3 provided for actions by and against shareholders.

A printed form of notice of transfer was filled up by the [44] proprietor desirous of transferring his shares with the name of the intended transferee, and the price, and signed by the transferor. The notice was brought before a board of directors, and, if approved, signed by the chairman. The proposed new proprietor, if he had not already executed the deed of settlement, was then usually required to do so, as proprietor of the shares intended to be transferred to him. The new proprietor was then entered in the register of shareholders. After the deed had once been executed, no acceptance in writing was required of any fresh shares transferred to a proprietor.

On the 22nd of February, P. Haydon gave notice to the board of his wish to transfer one share of 100l., and three half shares of 50l. each, to the defendant. The transfer was assented to by the chairman, and shortly afterwards the defendant executed the deed of settlement of the Company as the proprietor of the above four shares. He was then entered as the proprietor of these four shares in the register of the Company.

The following is a copy of the heading of the schedule to the deed which is executed by new proprietors of the Company, and the entry made therein when the defendant executed the said deed:—

Christian and Surname.	Place of Abode and Profession.	Number of Shares Subscribed for.	Certificate Nos.	Capital Subscribed.	Seals.	Witnesses.
W. H. C. Wellesley.	Hull.	Four.		£ 250.	(L.S.)	William Hartliffe.

The defendant afterwards purchased three whole shares of J. A., and was entered in the share register of the Company in respect thereof.

In November, 1850, the directors caused a memorial of the name, residence, and description of the defendant, as a person admitted to be a shareholder, to be enrolled in Chancery.

[45] Subsequently to the defendant being registered as a shareholder, dividends were declared: viz., in September, 1850; March, 1851; August, 1851; August, 1852; February, 1852; February, 1853; February, 1854, and March, 1855. These dividends were either paid to the defendant's agent, or applied in part payment of calls.

In June, 1851, the directors made a call of 5l. per share on the half shares, payable on the 21st of July, 1851. The sum of 15l., payable on the defendant's three half shares, was deducted from the dividends on his shares, and in that way paid to the Company.

On the 27th of May, 1856, the directors made a call of 5l. a share upon each of the half shares, payable on the 2nd of July then next, and notice thereof was sent by post to the defendant, but it never in fact reached him. The defendant never paid this call of 15l.

On the 6th of July, 1857, another call of 5l. a share on the half shares was made, which is still unpaid.

On the passing of the 7 & 8 Vict. c. 110, the Company was registered under the 58th section. In August, 1857, the Company was registered under the Joint Stock Companies Acts, 1856, 1857.

At the end of the month of August, it was ascertained that more than one-fourth, and in fact the whole, of the capital of the Company, had been lost; that there was no guarantee fund, and that the Company was largely indebted. And at a meeting of the directors held on the 15th of September, 1857, the following resolutions were unanimously passed and entered in the minute book of the board of directors:—

“That a special general meeting of the Company be held on Thursday, the 1st of October, for the purpose of considering the propriety of dissolving the Company, and the voluntary winding up of its affairs, under the provisions of the Joint Stock Companies Acts, 1856 and 1857; and [46] if a resolution to that effect be passed, to appoint a liquidator,” &c.

In pursuance of notices forwarded to the proprietors, the meeting was held, and the necessary number of proprietors being present, resolutions were passed:—

“That the Company be dissolved, subject to the provisions of the Joint Stock Companies Acts, 1856 and 1857, and be wound up voluntarily under the provisions of the same Acts.”

“That W. E. and J. C. be appointed liquidators under the said Acts to wind up the Company.”

These resolutions were advertised in the *London Gazette* of the 6th of October, 1857, and were confirmed at a special general meeting held on the 3rd of November, 1857. The liquidators made calls of 25l. on each of the whole shares, and two calls of 12l. 10s. and 5l. respectively on each of the half shares.

The sums called for by the liquidators were deemed by them to be necessary, and were in fact necessary, to satisfy the debts of the Company.

The question for the opinion of the Court is,—Are the plaintiffs entitled to recover from the defendant 30l., being the amount of two calls made by the directors of the Company upon the defendant, and 152l. 10s., being the amount of calls made by the liquidators? The Court to be at liberty to draw any inferences of fact.^(a)

Mellish argued for the plaintiffs, in last Easter Term [47] (April 23). By the 85th clause of the deed of settlement it was competent to a general meeting to increase the capital of the Company by the creation of new shares. In August, 1845, it was resolved, at a special general meeting, that 1500 new half shares should be created. At this time there were 1500 shares of 100l. each; and each proprietor was, by the resolution, to be entitled to a new half share. All the proprietors must, therefore, have had notice of the creation of these half shares, and none of them appear to have dissented. It may be conceded that the power given by the deed of settlement to general meetings to increase the capital is to increase it by shares of 100l. each; but the resolution may be treated as increasing the original shares by the half shares. [Bramwell, B. The 85th clause provides that new shares shall be sold.] The defendant purchased and subscribed the deed, and thereby covenanted to pay calls upon the half shares, in respect of which this claim has arisen. His subscription was not a nullity. The 30th clause provides that the deed shall be executed by new proprietors. The 31st declares, that, as to profits, rights and privileges to arise from the shares, a purchaser shall not be considered the proprietor thereof until he shall have executed, or otherwise acceded to, the deed of settlement. A person who has been admitted to subscribe the deed, has received dividends, and so long enjoyed the privileges of a shareholder in respect of these shares, cannot now say that he is not a shareholder. The Court have power to determine questions of fact. If necessary, they may find as a fact that there has been an assent by all the shareholders to the creation of these half shares: there were two meetings of the shareholders; and, though all the shareholders did not attend, the half shares were to be allotted to every existing holder of shares, one for each share. Dividends were declared, upon the footing that the half shares were validly created, and the holders of them were admitted to the privileges of [48] shareholders. Whatever may have been the terms upon which new partners were originally to be taken in, it was competent to the parties, at any time, to enter into fresh arrangements on that head. The Company, having admitted the defendant to execute the deed in respect of the half shares, and the defendant having done so, both parties are estopped. The Company cannot now deny that the defendant is a shareholder in respect of these shares; nor can the defendant set up that he is not the proprietor of those shares, and liable to pay calls upon them. The case is analogous to *The Sheffield, Ashton-under-Lyne and Manchester Railway Company v. Woodcock* (7 M. & W. 574), where it was held that a defendant, by his conduct, was estopped from denying the validity of a transfer. The 85th

(a) The defendant's points for argument on the demurrer and special case were as follows:—That the Company had no power to create half shares. As to the first count:—That no debt was ever due to the Company; that no action is maintainable by the Company for calls. That the action should have been brought in the name of the trustees mentioned in the Company's deed of settlement, upon the covenant contained in that deed. As to the second count:—That the Company was not subject to be wound up under the winding-up statutes. That no sufficient notice of the calls in the second count mentioned was given.

clause contains a proviso that no act shall be done which shall release any proprietor for the time being from liability to pay and satisfy the entire sum of 100l. in respect of every share, nor which shall affect or infringe upon the rateable or proportionable division of the profits, and liability to the losses of the Company between the proprietors. If the proprietors of half shares were to have the same rights as the proprietors of whole shares, this proviso might apply. But the meaning of the resolution creating the half shares is, that a person must hold two half shares in order to be entitled to the privileges of the holder of a share.

Secondly, as to the suggestion that the Company have no right to sue for calls made by the directors before the incorporation of the Company under the Joint Stock Companies Acts, 1856, 1857. In *Wills v. Sutherland* (4 Exch. 211) it was held that an Act empowering a Company to sue and be sued in the name of a public officer in all actions to be thereafter "instituted by or on behalf of the Company," authorized the secretary to sue on a covenant with trustees for the Company. At the time of the incorporation of this Company, the right of [49] action was vested in the manager on behalf of the Company, and the question is, what was the effect of the incorporation? It is submitted that the 19 & 20 Vict. c. 47, and the 20 & 21 Vict. c. 14, rendered it obligatory on this Company to register. [Wilde, B. However that may be, they were in fact registered, and the question is, what was the effect of registration.] By the 111th section of the 19 & 20 Vict. c. 47, previously to the registration of any existing Company, there shall be delivered to the registrar, in case of such a Company as the present, a list of shareholders, and also a copy of the act of parliament, deed of settlement, or other instrument constituting or regulating the Company. By section 112 the list of shareholders, and other particulars, are to be verified; and, by section 33 of the 20 & 21 Vict. c. 14 (which repeals the 113th section of the former Act), on compliance with these requisitions the registrar is to certify that the Company is incorporated under the Joint Stock Companies Acts, 1856, 1857; and thereupon such Company shall be incorporated; "and all the provisions of the Joint Stock Companies Acts, 1856, 1857, shall apply to such Company, in the same manner in all respects as if it had been originally incorporated under such Acts, subject to the reservation in favour of creditors contained in the principal Act," &c. By section 115 of the 19 & 20 Vict. c. 47, the date of the certificate is to be deemed the date at which the Company is incorporated. By section 116 the registration is not to prejudice any right which, previously to such registration, had accrued against any person then being a member of the Company. The effect of the incorporation is to vest in the incorporated Company everything which belonged to the old Company, and, amongst other things, their choses in action. By the 22nd section of the 19 & 20 Vict. c. 47, the amount of calls for the time being unpaid on any share shall be deemed a debt due from the holder of such share to the Company. [Martin, B. Whilst [50] the Company were unincorporated, it was necessary that a public officer should sue; but the essence of incorporation is that they can sue for themselves.]

Thirdly, as to the point that the liquidators had no right to make calls. The 98th clause of the deed provides for the winding up of the Company when one-fourth of the capital is lost. The 102nd section of the 19 & 20 Vict. c. 47, enacts, that "a Company may be wound up voluntarily," whenever the "event, if any, occurs upon the occurrence of which it is provided by the articles of association that the Company is to be dissolved." And, thereupon, "its corporate state and all its corporate powers shall, notwithstanding any provision to the contrary in its articles of association, continue until the affairs of the Company are wound up." By section 104; the property of the Company is to be applied in satisfaction of its liabilities; and the liquidators may call on all or any of the contributories to the extent of their liability to pay all or any sums they may deem necessary to satisfy the debts of the Company, &c.

Fourthly, as to the objection that the notice of the calls made by the liquidators was insufficient. There is nothing in the 19 & 20 Vict. c. 47, which requires any particular notice to be given of a call made by liquidators. The provisions relating to calls by the directors in collecting the capital have no reference to calls made by the liquidators for the purpose of paying the debts of the Company. The provisions for winding-up the Company are a substitute for proceedings by creditors, and it is reasonable that shareholders, who are protected from executions by individuals, should be made liable to pay the calls at once and without notice, as in case of a debt due to

a creditor. When calls are made by the Court of Chancery, under the 82nd section, there is simply an order that the parties in a certain list shall pay the calls at a certain time. The words giving power to the liquidators to make calls in case [51] of a voluntary winding-up contemplates the making of calls in the same way. Table B. is merely a sketch of what it is supposed the articles of association may be, and (2) does not affect the question. He also referred to the 19th section of the 19 & 20 Vict. c. 47, and the 13th section of the 20 & 21 Vict. c. 14.

Lush (with whom was Raymond) argued for the defendant (May 3). The main question with regard to the first count is, whether half shares could be legally created. It is submitted that the creation of such shares is not warranted by the deed of settlement, and that nothing has taken place which has the effect of giving validity to them. By the 4th and the 85th clauses of that deed it appears that the parties thereto agreed to admit as partners, persons who might hold that amount of capital. The forms of voting at general meetings are wholly inapplicable to persons who are the holders of half shares. A person having less than a share, does not covenant for the payment of calls. The covenant (clause 14) is by the proprietors of shares. The provisions with respect to the transfer, in consequence of death or otherwise, all relate to shares. It was never contemplated that any one holding a less interest than a share should be a partner in the concern; for there is no such share or interest as a half share in the partnership capital. This is a matter relating to the constitution of the Company which could not be altered without the assent of every individual shareholder. Even with the assent of all the shareholders, the provisions of the deed of settlement in this respect could not be varied, except by a new deed. Notwithstanding all that took place, it is still competent for any individual shareholder to say, "there are no half shares." The defendant, therefore, has no legal title to a distribution of profits, on the footing that these half shares were well created. [52] There is no estoppel, for the defendant bought these shares in the market after they were created. No doubt it is enough, for the purpose of calling a meeting, if notice is sent to the registered address of each shareholder; but the case does not shew what number attended, and it is consistent with every statement in it that one-third of the shareholders never consented to the creation of these half shares, and that the resolution was carried by a bare majority. [Bramwell, B. Have not the directors the option of regarding these shares as valid?] They cannot validate them as against third parties without their consent. The shares were invalid at their original creation in 1845; the defendant purchased in 1850, so that he cannot be affected by what previously took place. [Wilde, B. How can a person who has purchased the shares say that they are invalid?] The defendant is not the holder of the shares, for in law they do not exist. The Company would have had no power to increase the capital by creating additional 100l. shares except for provision in the 85th clause. [Pollock, C. B. Ought not the defendant to have repudiated the shares when he found that the Company had no power to create them?] He was not bound to do so, for the shares are mere nullities. As to the third point, the liquidators have no power to wind up the Company in the manner they have done. The 98th and 99th clauses provide for the winding-up of the Company; and by the 33rd section of the 20 & 21 Vict. c. 14, those provisions are to be deemed the regulations of the Company, in the same manner as if they were contained in a registered memorandum of association and articles of association. Therefore the winding-up must be under the deed and not under the Act, and the clauses in the deed do not authorize this proceeding. On this point he also referred to the 19 & 20 Vict. c. 47, ss. 9, 19, 22, and clause 14 of the deed of settlement. He abandoned the second point.

[53] Mellish, in reply. The defendant having executed the deed and kept the shares, is estopped from saying that he is not a shareholder. [Martin, B. Suppose the trustees had sued him on his covenant to pay the calls, what could he have pleaded?] Only non est factum. [Martin, B. Both parties having acted upon the faith of these shares being valid, they are equally precluded from disputing that fact. Bramwell, B. Suppose a partnership deed provided that no contract made by the partners should be valid unless in writing, and one of the partners made a parol contract which was acted upon, would it not be binding?] All parties would be estopped from disputing its validity. The defendant is a shareholder within the definition of the 19th section of the 19 & 20 Vict. c. 47. He also referred to the 61st section of that Act.

Cur. adv. vult.

MARTIN, B., now said—This was an action brought by the official liquidators in the name of the Company for the purpose of compelling the payment of certain calls; and the objection was that, as by the constitution of the Company, which was originally a Joint Stock Company, formed under a deed, the only power to create new shares was to create shares of 100l., although at the general meeting of the Company, duly convened, new shares of 50l. were created, such shares were void: that although the defendant had executed a deed whereby he bound himself to take these shares and pay the calls made upon them, yet, the shares not being created in conformity with the power in the deed, the defendant was not bound to pay the calls made by the Company, and was also under no obligation to pay the calls made by the official liquidators for the purpose of winding-up the affairs of this Company.

The question was ably argued on both sides, but we are [54] of opinion that the argument on behalf of the plaintiffs must prevail. Whether we consider the case with reference to the calls made by the official liquidators in pursuance of the Act for winding-up such bodies as this, or to the calls made by the Company under the powers in their deed, the defendant, who executed a deed, whereby he expressly bound himself to pay calls on these shares, is estopped from setting up this answer, and is bound by his own contract to admit that the shares are good and valid, more especially as for a number of years he had derived a benefit from them. Our judgment is therefore for the plaintiffs.

The demurrer involved the same question as the special case. It was said there was a difference between one class of calls and another, and possibly it may be so; but, nevertheless, as our judgment is for the plaintiffs upon the entire case, it is useless to go into that question.

Judgment for the plaintiffs.

EMBLEM v. MYERS. June 22, 1860.—In an action for wilful negligence, the jury may take into consideration the motives of the defendant, and if the negligence is accompanied with a contempt of the plaintiff's rights and convenience, the jury may give exemplary damages.

[S. C. 30 L. J. Ex. 71; 8 W. R. 665; 2 L. T. 774. Adopted, *Bell v. Midland Railway*, 1861, 10 C. B. (N. S.) 287. Applied, *Thompson v. Hill*, 1870, L. R. 5 C. P. 567.]

The declaration stated that the plaintiff, before and at the time of the committing of the grievances, &c., was possessed of certain land, and a certain stable and loft, in the city of London, and then occupied the same, and used it for the purposes of his trade, to wit, of a coal and coke dealer; and the defendant, to wit, on &c., and on divers other days &c., before the commencement of this suit, wrongfully and injuriously pulled down a certain other building in the city aforesaid, next adjoining the said land, stable, and loft of the plaintiff, in so negligent and improper a manner, and with such a want of proper and due care and skill in that [55] behalf, that by reason thereof a piece of timber fell upon the said stable and loft of the plaintiff, and upon a truck and cart of the plaintiff, then standing upon the said land, and used by the plaintiff in his said trade, whereby the said stable and loft were greatly injured, and the gates of the said stable and loft were broken and destroyed, and the roof thereof stripped therefrom, and divers goods and harness of the plaintiff therein, exposed, damaged, and destroyed, and the said truck and cart of the plaintiff were broken and spoiled, and rendered unfit for use in his said trade, and by reason of the aforesaid negligence, carelessness, and unskilfulness of the defendant, a part of the said building so pulled down also fell upon a certain horse of the plaintiff, then upon the said land, and used by the plaintiff in his said trade, whereby the said horse was severely injured, and has been, and now is, rendered unfit for work; and by reason of the premises the plaintiff hath from thence hitherto lost and been deprived of the use of his said stable and loft, and of his said cart and truck, and of his said horse, goods, and harness, and has been unable to carry on his said trade, and has lost divers profits therein, &c.

Plea. Not guilty. (By statute 18 & 19 Vict. c. 122, ss. 38, 69, 71, 72, 74, 108.)

At the trial, before Wilde, B., at the London Sittings in last Trinity Term, it appeared that the plaintiff was the owner of a small piece of land, in Gravel Lane, Houndsditch, on which he built a stable and loft, for the purpose of his trade as a

coal and coke dealer. The defendant was the owner of an adjoining house, which, being in a dilapidated state, he was required by the police to pull down. The defendant had applied to the plaintiff to purchase his premises, but the plaintiff refused to sell them. The labourers employed by the defendant pulled down his house in such a reckless manner that a large piece of timber [56] fell on the plaintiff's stable, and knocked in the roof, which fell upon the horse and cart of the plaintiff. At that time the plaintiff's wife was in the stable. The plaintiff remonstrated with the defendant, but he said that the plaintiff had served him with a lawyer's letter and a writ, and that he would go on. The defendant told the labourers they might "work anyhow," and they threw down upon the stable great quantities of bricks, by which more injury was caused to the stable than by the pulling down of the house; and it was suggested that this was done with a view to cause the plaintiff to give up the stable.

The learned Judge told the jury that they should take into consideration all the circumstances, both the conduct of the defendant and the expressions he used, and that if they were of opinion that the destruction of the stable was caused by the negligence of the defendant in pulling down the houses, they should give such damages as they thought a reasonable compensation for the injury the plaintiff had sustained; but if they were of opinion that what was done by the defendant was done wilfully, with a high hand, for the purpose of trampling on the plaintiff and driving him out of possession of the stable, they might find exemplary damages. The jury having found a verdict for the plaintiff, with 75l. damages,

Collier, in the same term, obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury in telling them that in awarding damages they should consider the motives of the defendant, and give a different measure of damages if the injuries were committed maliciously, from that which would be applicable if they were committed negligently; and that the damages were excessive: against which

Robinson and Sharpe now shewed cause. There was no misdirection. First, it is said that the learned Judge ought [57] not to have told the jury to take into consideration the motive of the defendant, since the declaration does not charge him with a trespass, but with negligence only. But if the objection had been taken at the time of the summing up, the Judge would have amended the declaration. The objection, not having been then taken, is not now available: *Doe d. Strickland v. Strickland* (8 C. B. 724). Assuming, however, that the objection is open, the evidence justified the jury in giving exemplary damages. In Sedgwick on Damages, p. 460, 2nd ed., reference is made to an action on the case for gross negligence, in which Church, J., in delivering the opinion of the Supreme Court of the United States (*Tracy v. Swartwout*, 10 Peters, 81), said: "There is no principle better established, and in practice more universal, than that vindictive damages or smart money may be and is awarded by the verdict of juries, and whether the form of action be trespass or case." They also argued that the damages were not excessive.

Collier and H. James, in support of the rule. As this declaration is framed, it was a misdirection to tell the jury to give one measure of damage if the injury was caused by negligence, and another if it was wilful. No doubt, in actions of trespass, evidence of malicious motives is admissible: *Mayne on Damages*, p. 13, *Sears v. Lyons* (2 Stark. N. P. 317). So also in actions for defamation: *Pearson v. Lemaitre* (5 Man. & G. 700). But there is no instance of it in an action like this. [Pollock, C. B. It is very improbable that the question of motive should arise in an action for diligence; but, if it does, the Judge is warranted in telling the jury that if the defendant did not intend any wrong, they should limit their verdict to the damage really sustained; but if the injury was committed [58] in an insolent way, they might take into consideration the motive and give exemplary damages.] The plaintiff merely complains of negligent conduct on the part of the defendant in pulling down his house, whereby the plaintiff's stable was injured. In actions for negligent driving, the motive is never taken into consideration. [Wilde, B. Suppose a servant, while driving, was in the act of pulling up to prevent running against some person, and his master said, "Never mind; drive on," might not the jury take that into consideration?] Not in an action for negligent driving, but only in an action of trespass for wilful driving. They also argued that the damages were excessive.

POLLOCK, C. B. We are all of opinion that the rule ought to be discharged. I consider that the direction of the learned Judge was substantially this:—"In

measuring these damages, you may take into consideration expressions used by the defendant shewing a contempt of the plaintiff's rights and convenience." It is universally felt, by all persons who have had occasion to consider the question of compensation, that there is a difference between an injury which is the mere result of such negligence as amounts to little more than accident, and an injury, wilful or negligent, which is accompanied with expressions of insolence. I do not say that in actions of negligence there should be vindictive damages, such as are sometimes given in actions of trespass, but the measure of damage should be different according to the nature of the injury and the circumstances with which it is accompanied. It appears to me that this declaration may be read as charging a wilful wrong. It is true that the complaint is that the defendant acted negligently and with a want of due care; but it is also stated that he wrongfully and injuriously pulled down the house, and consequently the injury was one which would admit of damages [59] to an amount beyond that which the learned Judge, by his direction, invited the jury to give. The Courts have always recognised the distinction between damages given with a liberal and a sparing hand; and, since the language of this declaration is such that it may be read as charging a wilful wrong, and as it appears that the wrong was accompanied with expressions of contempt, I think that the direction of the learned Judge was correct, that the damages are not excessive, and, consequently, the rule must be discharged.

BRAMWELL, B. I am also of opinion that the direction of the learned Judge was perfectly correct. As soon as it is admitted that the plaintiff may recover more than the actual loss, and that collateral facts may be inquired into, that principle applies, whether the injury was caused by the negligent or wilful act of the defendant. Suppose a person caused a nuisance in front of another man's house, damages might be given for the insult as well as the actual injury. It is said that the act of the defendant was wilful, and therefore the plaintiff cannot recover on this declaration; but the act was negligent as well as wilful. In my opinion the plaintiff is entitled to recover the whole amount which he has chosen to claim. If a plaintiff, in his particulars, claimed 500l. because the defendant walked over his lawn, the jury might award that amount if they thought it was done for the purpose of annoyance and insult.

CHANNELL, B. At first I thought that the declaration might be treated as charging an act of trespass as well as negligence; but, on looking more closely into it, I think it must be read as charging the defendant with wilful negligence. Then it remains to be seen whether the summing up of the learned Judge was correct. In substance it was this: "You may take into consideration all [60] the circumstances, and see whether there is anything to satisfy you that the defendant behaved in an improper and unjustifiable manner; and if so, you need not give damages strictly, as in the case of mere negligence, but you may give them with a liberal hand." If in actions of trespass the plaintiff may recover damages beyond the amount of the actual injury, I see no reason why the same rule should not extend to wilful negligence. As to the statement that the damages are given for something wilful, not negligent, the objection should have been taken at the trial that the evidence was not receivable upon such a declaration. For these reasons I think the rule ought to be discharged.

WILDE, B. I am of the same opinion. I am glad the Court have come to the conclusion that upon this declaration it was competent for the jury to give exemplary damages, because it appeared to me at Nisi Prius that the case was a harsh one, and that the defendant acted with a high hand, intending to turn the plaintiff out of possession. It is said that, under this declaration, evidence as to wilfully destroying the plaintiff's shed ought not to have been admitted; but the defendant's counsel permitted it to be given without the slightest objection. Then, assuming that was one of the matters to be inquired into, there is no foundation for the objection that the damages are excessive. It is impossible to say that when a wrong is committed in the mode in which it was here committed, the circumstances attending its commission are not to be taken into consideration by the jury, with the view of properly estimating the damage. I did not tell them to find distinct damages in consequence of the defendant's conduct, but to take into consideration all the circumstances, both the conduct of the defendant and the expressions he used.

Rule discharged.

[61] *YATES v. THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF BLACKBURN.* July 6, 1860.—The plaintiff, whose lands were injuriously affected by certain works of the defendants, who were acting under a statute with which the Lands Clauses Consolidation Act, 1845, was incorporated, on the 16th of December, 1858, gave notice under the 68th section of that Act that he claimed compensation in respect of such injury, and that unless the defendant paid the amount claimed within twenty-one days, he desired to have the amount of compensation settled by arbitration under that Act. Twenty-one days after this notice, the plaintiff, by writing under his hand, nominated a person as his arbitrator, and on the 17th of January, 1859, gave notice to the defendants that he had done so, and required the defendants to appoint an arbitrator on their part. On the 25th of January the defendants tendered to the plaintiff 30l. for the alleged damage and costs, which the plaintiff refused. The defendants then nominated an arbitrator on their part, and the sum of 23l. was ultimately awarded to the plaintiff as the amount of compensation to which he was entitled. Held, that the plaintiff was not entitled to the costs of the arbitration by the 34th section of the 8 & 9 Vict. c. 18, the tender being in time, inasmuch as the plaintiff had not pursued the proper steps pointed out in the 25th section, and had not delivered his appointment to the arbitrator when the tender was made.

[S. C. 29 L. J. Ex. 447.]

Declaration. That, before and at the time of the making of the sewer hereinafter mentioned, the plaintiff was seised &c. of a plot of land at Bank Top, in the borough of Blackburn, through which the defendants, under the powers granted to them by the Blackburn Improvement Act, 1854, made a main sewer, and by the making of which the said land was injuriously affected; and thereby the plaintiff, under and by virtue of the Blackburn Improvement Act, 1854, and the Lands Clauses Consolidation Act, 1845, became entitled to claim compensation from the defendants in respect of the injury to his land; and, being so entitled, on the 16th of December, 1858, gave a notice in writing to the defendants, stating in such notice the nature of his interest in his land in respect of which he claimed compensation, and the nature of the injury to the land, and that he claimed the sum of 300l. as compensation for the injury, and that unless the defendants, within twenty-one days after the receipt of that notice, paid the said amount, or entered into a written agreement to pay the same, the plaintiff desired to have the amount of such compensation settled by arbitration in the manner prescribed by the Lands Clauses Consolidation Act, 1845: that the [62] defendants did not, within twenty-one days after they were served with the said notice, or before they were served with the notice next mentioned, pay the compensation so claimed, or enter into any written agreement for that purpose, or make any offer to pay the plaintiff any sum whatever in respect of his claim to compensation; and thereupon the plaintiff, after the expiration of twenty-one days, to wit on the 7th of January, 1859, by writing under his hand, nominated and appointed T. Slatter to be the plaintiff's arbitrator in respect of the said claim to compensation, and afterwards, on the 17th of January, 1859, served the defendants with another notice in writing that he had nominated and appointed T. Slatter to be his arbitrator in respect of his claim to compensation, and that he required the defendants to appoint an arbitrator, to whom, together with the said T. Slatter, the question as to such compensation should be referred: that afterwards, on the 7th of February, 1859, the defendants, by writing &c. under their common seal, appointed P. Park to be the arbitrator of the defendants in respect of the said claim to compensation: that afterwards, and before the said arbitrators entered upon the matters referred to them, they, by writing under their hands, appointed A. Bannerman to be the umpire to decide in any matters in which they should differ or which should be referred to him under the said Acts: that all things were done and happened, and all times elapsed, which were necessary, according to the provisions of the said Acts, to entitle the umpire to make a valid award, &c.; and thereupon the umpire, on the 25th of April, 1859, delivered to the defendants his award &c., and thereby awarded that 23l. should be paid by the defendants to the plaintiff in respect of his claim to compensation: that, the defendants not having made any offer to pay the plaintiff any sum whatever in respect of his said claim according to the [63] terms of the said Acts, the plaintiff afterwards required the

umpire to determine the costs to be paid to him by the defendants under and by virtue of the Lands Clauses Consolidation Act, 1845: that the umpire afterwards, by writing &c., duly settled the costs of the plaintiff of the said arbitration, and thereby ascertained and settled the same to be 351l.; of all which the defendants afterwards had notice, and were requested by the plaintiff to pay him the said two sums of 23l. and 351l.: Yet the defendants have not paid the same &c.

Pleas. As to so much of the declaration as relates to the sum of 351l., being the said costs &c.: That before the defendants appointed P. Park to be the arbitrator of the defendants, to wit on the 25th of January, 1859, the defendants were ready and willing to pay to the plaintiff, and then duly offered to the plaintiff to pay him, 30l. in respect of his claim to compensation, and the plaintiff then admitted the offer but refused to receive the same: that the defendants were at all necessary times in that behalf ready and willing to pay the plaintiff 30l., as he always well knew; and thereupon afterwards, to wit on the 3rd of February, 1859, the defendants, by writing under their common seal, appointed P. Park to be their arbitrator. (The plea then set out the appointment by the defendants of P. Park as their arbitrator, the appointment of the umpire and his award, which concluded as follows):—"I do award, settle, order and determine that the sum of 23l. shall be paid by the mayor, &c. to W. Yates as the amount of compensation to be paid by the mayor, &c. to W. Yates for and in respect of the damage sustained, or hereafter to be sustained, by W. Yates by reason of the mayor, aldermen, &c., and their surveyor, workmen and contractors, entering upon his land and pulling down, removing and carrying away buildings &c., and by reason of [64] the execution of such sewage works &c., regard being had to the damage already sustained and to the damage to be sustained by W. Yates in consequence of such user, and also by reason of any other act, matter or thing referred to me: the said sum of 23l. being, in my judgment, the fair and just sum which ought to be paid by the said mayor, &c. to W. Yates for such compensation as aforesaid. As witness my hand and seal this 25th of April, 1859.—A. Bannerman (L.S.)." That the said sum of 30l. so offered by the defendants to the plaintiff was more than sufficient to satisfy the amount of compensation so found to be due and payable by the defendants to the plaintiff by the said A. Bannerman, and all costs incurred by the plaintiff at the time of the said offer. And, as to so much of the declaration as relates to the said sum of 23l. awarded by A. Bannerman to be paid by the defendants to the plaintiff as the amount of compensation to be paid by the defendants to the plaintiff in respect of his said claim to compensation, &c.; that at the commencement of this suit the plaintiff was and still is indebted to the defendants in an amount exceeding his said claim, for half the costs of the said A. Bannerman, paid by the defendants for the plaintiff at his request, which half of the said costs was and is the proportion of the said costs payable by the plaintiff, by reason of the sum awarded to the plaintiff by the said A. Bannerman being less than the sum so offered by the defendants to the plaintiffs as aforesaid, and out of and against which money so due to the defendants they are willing to set off and allow to the said plaintiff his said claim.

Replication. That the said offer to the plaintiff to pay him 30l. was made after the plaintiff had appointed an arbitrator and given notice thereof to the defendants, as in the declaration mentioned, and had by reason thereof incurred costs of and incident to the said arbitration, which are [65] included in the said sum of 351l.; and that the offer to pay the plaintiff the said sum of 30l. was contained in a letter written by the town clerk of the said borough of Blackburn, addressed to J. H. Kay, the attorney of the plaintiff, as follows:—

"Town Clerk's Office, Blackburn,
"25th January, 1859.

"Dear Sir,—

"The Mayor, &c., of Blackburn and William Yates.

"I am directed to tender to your client the sum of 30l. on behalf of the mayor, aldermen and burgesses of this borough, for alleged damage to his property and costs, occasioned by the sewerage works near Pink Street. Must I make this tender personally to Mr. Yates or will you, as his attorney, admit it on his behalf? If this sum be not accepted I will send you the name of the arbitrator on behalf of the mayor, aldermen and burgesses.

"THOS. AINSWORTH, Town Clerk.

"John Hargreaves Kay, Esq."

That the plaintiff refused to accept the offer contained in the said letter and waived any tender of the said sum of 30l.; and that the offer contained in the said letter was the only offer made by the defendants to pay him the said sum of 30l.

Rejoinder. That in answer to the letter of the Town Clerk, the attorney of the plaintiff, with his authority, wrote as follows:—

“Blackburn.

“*Yates and the Mayor, &c., of Blackburn.*

“Dear Sir,—My client is strongly impressed with the conviction that by proceeding he will obtain much more than the sum you offer, besides all his costs, &c. Without prejudice, therefore, I beg to say that he will accept of 45l., in full of damages and costs. If this is not accepted [66] by the end of the week the arbitration had better proceed, and in which case I will admit your tender of the 30l.—Yours truly,

“J. H. KAY.

“Thomas Ainsworth, Esq.,

“Town Clerk, Blackburn.”

Which letter was written and sent to the defendants with the plaintiff's authority, and was received by them before the appointment by the said P. Park, and which letter is the refusal by the plaintiff to accept the 30l. and the waiver by the plaintiff of any other tender.

Demurrer, and joinder therein.

Mellish agreed in support of the demurrer.(a) By the 34th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), “All the costs of any arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.” The question is, within what time must the offer be made. It is submitted that it must be made before any costs have been incurred about the matter of the arbitration. If that construction is not to prevail, why should not the offer be made at any time before the award is actually made? Claims for compensation for lands injuriously affected by the execution of works are provided for by the 68th section of 8 & 9 Vict. c. 18, which enacts that if the party desire to have his compensation settled by arbitration, he may give notice in writing of his desire, and unless the promoters be willing to pay the amount claimed, and shall enter into a written [67] agreement for that purpose within twenty-one days, the same shall be settled by arbitration; therefore until the expiration of the twenty-one days the case is not one for arbitration. If the promoters desire to avoid having to pay the costs under the 34th section, they must make the offer within these twenty-one days. It is too late after the claimant has nominated his own arbitrator under the provisions of the 25th section. [Pollock, C. B. It is clear that the offer could not be made effectually after the arbitration had commenced.] The costs of applying to and nominating a person to be arbitrator are costs of the arbitration, or incident to it. Secondly, the offer should have been of a sum for compensation only, not of an entire sum for compensation including the costs.

Lush (with whom was Keane), for the defendants. The tender was in time. The appointment of an arbitrator by the plaintiff did not preclude the Company from making a tender, although the plaintiff incurred costs which would be taxed as part of the costs of the arbitrator. The case is analogous to that of a tender of a debt, without costs, after an application by the creditor's attorney, but before a writ has issued. Unless some time after the expiration of the twenty-one days is allowed to the Company to make a tender, the party claiming compensation may deprive them of all opportunity of tendering. Immediately the twenty-one days have elapsed the claimant may appoint an arbitrator. The Company cannot have the compensation settled by arbitration unless the claimant wishes it; and yet, in the very notice in which he elects that tribunal, he may appoint an arbitrator. Where the compensation is to be settled by a jury, the statute prescribes the day when the tender may be

(a) In Easter Term, April 30. Before Pollock, C. B., Martin, B., Bramwell, B., and Wilde, B.

made. By section 38, the Company must give the claimant ten days' notice of their intention, to summon a [68] jury, and the notice must state what sum of money the Company are willing to give him for the damage sustained. But in the case of arbitration there is no such provision. [Wilde, B. It is clear from the 25th section that some time must elapse after the claimant has expressed his desire to have the compensation settled by arbitration.] The Company are entitled to tender compensation at any time before the submission to arbitration is complete. Then it is said that the plaintiff has incurred costs in appointing an arbitrator. In like manner costs are incurred where a party instructs his attorney to demand payment of a debt, but he cannot recover them if the debt is paid before a writ issues. Again, if each party appoints an arbitrator, and the arbitrators appoint an umpire, and no award is made for three months, by section 23 the compensation must be settled by a jury, in which case the Company must give the ten days' notice, stating how much they are willing to give, as required by the 38th section. In that case the claimant could not recover the costs of the arbitration. So, here, the tender is not bad because some costs have been incurred. He referred to *Regina v. Byrom* (12 Q. B. 321).

Mellish, in reply. It is clear that a tender cannot be made at any time before the award; therefore there must be some limit, and it is submitted that the tender must be made before the claimant has appointed an arbitrator. Until that time there is a mere claim on the one side and a refusal on the other; but the appointment of an arbitrator is analogous to the issuing a writ.

Cur. adv. vult.

The judgment of the Court was now delivered by

[69] MARTIN, B. This is a question arising upon a demurrer, and the facts appearing upon the record are these:—On the 16th of December, 1858, the plaintiff gave a notice in writing to the defendants stating that he claimed compensation to the extent of 300l., by reason of certain lands of his being injuriously affected by a sewer made by the defendants; and that unless the defendants, within twenty-one days, paid that amount or entered into a written agreement to pay the same, the plaintiff demanded to have the amount of compensation settled by arbitration, in the manner prescribed by the Lands Clauses Consolidation Act, 1845. On the 7th of January 1859, being twenty-one days after the giving of the above notice, the plaintiff, by writing under his hand, nominated a person to be his arbitrator in respect of his claim; and on the 17th of January served a notice in writing upon the defendants stating that he had done so, and required the defendants to appoint an arbitrator on their part. On the 25th of January the defendants caused a letter to be written to the plaintiff stating that they were ready to pay 30l. to the plaintiff for his alleged damage and costs, and if this sum was not accepted they would send the name of their arbitrator. Upon the 26th of January, the plaintiff caused a letter to be written to the agent of the defendants stating that he refused to accept the 30l., but that he would accept 45l. in full of damages and costs; and that if that offer was not accepted the arbitrator had better proceed, in which case the plaintiff would admit a tender of 30l. On the 3rd of February the defendants appointed an arbitrator. The two arbitrators appointed a Mr. Bannerman to be the umpire. It devolved upon him to make the award, and he did so on the 25th of April, and awarded 23l. to be paid by the defendants to the plaintiff, as full compensation for every thing as to which he had power to award compensation. The umpire was afterwards requested to settle the costs of [70] the plaintiff and the arbitration, and he did so, by writing under his hand, at 351l. The sum of 30l. was more than sufficient to pay the sum of 23l. awarded to be paid by the umpire and all costs incurred by the plaintiff anterior to the 25th of January, when the sum of 30l. was to be taken as tendered; and the question which has been argued before us is, whether, by virtue of the Lands Clauses Consolidation Act, 1845, the plaintiff is entitled to recover in the action the costs, amounting to 351l.

The question depends upon the construction of the 68th, 25th and 34th sections of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). The argument on the part of the plaintiff is, that if the party against whom compensation is claimed do not, within twenty-one days after notice, be willing to pay the amount claimed and enter into an agreement to pay it, it is competent for the claimant upon the twenty-second day to appoint an arbitrator; and whatever the event of the arbitration or umpirage may be, if the party to pay the compensation do not, before the appoint-

ment of the claimant's arbitrator, make the tender, he must of necessity, pay to the claimant the costs of the arbitration. The 68th section enacts, that unless the promoters (the character filed by the defendants) are willing to pay the amount of compensation claimed, and enter into a written agreement for that purpose within twenty-one days after the receipt of the notice making the claim, the amount of compensation shall be settled by arbitration. The notice was given upon the 16th of December, and the twenty-one days expired upon the 7th of January. The defendants had not before then agreed to pay the amount claimed. The compensation therefore was to be settled by arbitration. The 25th section provides for it, and that section seems to us to enact, first, that an endeavour should be made by the parties to concur in choosing a single arbitrator, and in the event of [71] this failing, that a request should be made by the one upon the other that the latter should nominate an arbitrator; that then each should make appointments in writing and deliver them to their respective arbitrators, which are to be deemed the submission, and irrevocable. In the present case the plaintiff made no attempt to procure the appointment of a single arbitrator. On the contrary, on the expiration of the twenty-one days he at once appointed an arbitrator in the sense of signing a paper nominating one, but it does not appear that he delivered it to the arbitrator. He afterwards gave notice to the defendants of his having made the appointment, and called upon them to appoint one, and after this the tender was made. The contention on the part of the plaintiff was that the tender was too late, because he had then incurred costs incident to the arbitration; but without laying down a rule as to the time within which the tender must be made, to relieve the party making it from costs by virtue of the 34th section, we think that in the present case the tender was in time, inasmuch as the plaintiff did not pursue the proper steps pointed out in the 25th section, and had not, when the tender was made, delivered his appointment to the arbitrator—up to which time everything previously done was revocable by him.

We cannot forbear expressing our concern and regret that it appears in this case that, whilst the compensation awarded was 23l. only, the costs of the arbitrators, and umpire, and of one party to the arbitration, amount to the enormous sum of 351l.

Judgment for the defendants.

[72] MASON v. THE BIRKENHEAD IMPROVEMENT COMMISSIONERS. June 21, 1860. —The 3 & 4 Wm. 4, c. lxviii., for paving, lighting, &c., the town of Birkenhead, by sect. 201 enacts that no plaintiff shall recover in any action, &c., to be commenced against the Commissioners for anything done or to be done in pursuance or under the authority of the Act, unless notice in writing shall have been given to the defendants. The Commissioners were sued for an injury occasioned by the negligence of some paviours, their servants. Held, that they were entitled to notice of action, and that a notice detailing the facts, but not stating an intention to bring an action, was insufficient.

[S. C. 29 L. J. Ex. 407; 2 L. T. 632.]

Declaration. That the defendants wrongfully, negligently, and unlawfully put and placed, and caused to be put and placed, large quantities of stones, &c., upon a certain public highway, and kept and continued the same thereon during the day and night without any light or other signal, by means whereof the plaintiff passing along the highway fell over the same, &c.

Plea. First: Not guilty. Secondly, that the supposed grievances were committed after the passing of an Act (3 & 4 Wm. 4, c. lxviii.(a)) for paving, lighting,

(a) Section 201 enacts, "That no plaintiff shall recover in any action or suit to be commenced against the Commissioners or any of them or any other person, for anything done or to be done in pursuance or under the authority of this Act, unless notice in writing, signed by the attorney for the plaintiff, and specifying the cause of such action, shall have been given to the defendants thirty days before such action shall be commenced; nor shall the plaintiff recover in any such action if tender of sufficient amends shall have been made to him or his attorney, by or on behalf of the defendant, before such action brought," &c.

&c., the town of Birkenhead; and that the matters complained of were done by the defendants as Commissioners under the said Act, and in pursuance of and under the authority of the Act; and that no notice in writing, signed by the attorney for the plaintiff and specifying the cause of action, was given to the defendants, or either of them, thirty days before the commencement of the suit, pursuant to the said statute.

Upon these pleas issues were joined.

At the trial, before the Recorder of London, at the Chester Spring Assizes, the plaintiff proved that on the [73] 17th of January, 1859, he fell over some flagstones lying on a footway in the town of Birkenhead which had been put there by some paviours employed by the defendants in repairing the gutter and kerb of the footway. On the 30th of May, 1859, the plaintiff's attorney wrote to the defendants as follows:

"18 Price Street, Birkenhead.

"Gentlemen,—I am instructed by Mr. John Mason to apply to you for compensation for the serious injuries he has sustained through the carelessness and negligence of yourselves and your servants in leaving large quantities of materials on the public highway without any protection, and to inform you that unless some reasonable compensation is made an action will be brought against you.—Yours, &c.

"To the Commissioners of Birkenhead.

"S. O. HUSBAND."

On the 31st of July the plaintiff wrote to the defendants a full and detailed statement of the accident and its supposed cause, but the letter did not state his intention to bring an action. The jury found a verdict for the plaintiff, leave being reserved to the defendants to move to enter a verdict for them if the Court should be of opinion that there was no sufficient notice of action.

Welsby, in Easter Term, having obtained a rule nisi accordingly,

Beavan (with whom was H. Lloyd) shewed cause.^(a) The 201st section of the 3 & 4 Wm. 4, c. lxxviii., provides that no person shall recover in any action unless "notice in writing, &c., specifying the cause of such action shall have been given," &c. Under these words it is enough to give [74] notice of the facts out of which the cause of action arises. The letter of the plaintiff of the 31st of July is therefore a sufficient notice. [Welsby. The notice must be "signed by the attorney for the plaintiff."^(a)²] A person may act as his own attorney. The 24 Geo. 2, c. 44, s. 1, requires the notice of action against a justice of the peace to be served by the attorney or agent for the party who intends to sue; but in *Morgan v. Leach* (10 M. & W. 558) it was held that service by the clerk of the attorney was sufficient. *Norris v. Smith* (10 A. & E. 188), which may be relied on as shewing that distinct notice must be given of the intention to bring an action, depends on the peculiar words of the statute which was under consideration in that case. The plea is bad. The 5 & 6 Vict. c. 97, s. 4, which provides for the uniformity of notices of action, enacts that "in all cases where notice of action is required, such notice shall be given one calendar month at least before any action shall be commenced." Therefore the plea should have averred that the plaintiff did not "one calendar month" before action give the notice. [Bramwell, B. Is it necessary to give notice in an action for negligence?]

Welsby, in support of the rule. *Norris v. Smith* (10 A. & E. 188) is a distinct authority that the notice must state positively that an action will be brought, and that a conditional notice is insufficient. The letter of the plaintiff's attorney neither states that an action will be brought, nor does it specify the cause of action with time and place, as it should have done: *Martins v. Upcher* (3 Q. B. 662). The Commissioners in causing the streets to be channelled and paved were acting in pursuance of the Act, and therefore, though the injury [75] was occasioned by the negligence of their servants, they were entitled to notice of action.

Cur. adv. vult.

BRAMWELL, B. now said:—There is one objection which is fatal to the maintenance of this action,—the notice of action being clearly insufficient. We had some doubt however whether notice of action was necessary, the action being for negligence.

(a)¹ In Trinity Term, May 31. Before Bramwell, B., and Chaunnell, B.

(a)² See *Bennett v. Broughton*, cited 10 M. & W. 559.

It may be that notice of action is not necessary, where the negligence is the personal negligence of the individual; but when the negligence is the negligence of a servant of the Commissioners acting in the execution of the Act, we think they are entitled to notice.

CHANNELL, B., concurred.

Rule absolute.(a)

REED v. LAMB. June 19, 20, 1860.—The register of voters at a parliamentary election, made in pursuance of the 48th and 49th sections of the 6 & 7 Vict. c. 18, is a document of such a public nature as to be admissible in evidence upon its mere production by the returning officer, and therefore an examined or certified copy of it is also admissible.—In an action for penalties, under the Corrupt Practices at Elections Act, 1854 (17 & 18 Vict. c. 102), the plaintiff gave in evidence a copy of the writ and return from the office of the clerk of the Crown, certified by a clerk in the office to be a true copy of the original writ and examined therewith. The defendant's counsel having allowed it to be given in evidence as a certified copy: Held, that, assuming it was not, there was no ground for granting a new trial.—Semble that, in such an action, parol evidence of an election having taken place is not sufficient without proof of the writ, return and register.

[S. C. 29 L. J. Ex. 452.]

Declaration. That after the passing of the Corrupt Practices Prevention Act, 1854, to wit, on the 20th day of August, 1859, there was holden an election in and for the borough of Berwick-upon-Tweed, for the return of a member to serve in parliament for the said borough, and one D. C. Marjoribanks was a candidate at the said elec-[76]-tion within the meaning of the Act; that after the passing of the Act and before this suit, the said election being so holden and the said D. C. Marjoribanks being such candidate, the defendant was guilty of bribery at the said election, &c., by giving money to one M. Middlemas, then being a voter for the said borough for and at the said election &c., in order to induce the said M. Middlemas to vote for the said D. C. Marjoribanks at the said election, contrary to the said statute, whereby the defendant then forfeited and became liable to pay for his said offence 100l., for which sum the plaintiff in this Court sues according to the said statute; and the plaintiff saith that all things have happened and all periods of time have elapsed necessary to enable the plaintiff to sue for and recover the said sum of 100l., &c.

There were ten other similar counts for giving or offering bribes to other voters, or giving drink by way of refreshment to voters on account of their being about to poll at the election.

Plea: Not guilty (by statute 21 Jac. 1, c. 4, s. 4).

At the trial, before Hill, J., at the last Spring Assizes for the county of Northumberland, in order to prove the holding of the election, Mr. Bacon, managing clerk of the plaintiff's attorney, said:—"I have a certified examined copy of the writ and return for the election on the 20th of August, 1859, from the office of the clerk of the Crown in Chancery." It was put in and taken as read.

Copies of the poll books were then produced, stamped with the seal of the Crown-office in Chancery. Bacon said, "I looked at the copies while a Mr. Leman, who appeared to be acting as a clerk in the office of the clerk of the Crown in Chancery, read over the originals. The copies were delivered out by the clerk. I bespoke them and saw the stamps affixed in the office." On cross-examination, Mr. Bacon said he looked at the originals, and in some instances [77] saw that the copies corresponded with them; but he could not say from such observations that every word corresponded. It was objected that the copies were not office copies, nor proved to be copies, nor proved to be examined; and therefore not admissible under the 6 Vict. c. 18, s. 94. The learned Judge received them, subject to the objection.

The town clerk was then called and produced a list or register of votes at the last election. It was signed by him as town clerk. On cross-examination he said that the sheriff was the returning officer; that he had delivered a signed copy of that list

(a) See 2 Chitty's Statutes, by Welsby and Beavan, p. 710.

to the under-sheriff, and that such copy was then in the custody of the sheriff. The defendant's counsel objected that the copy delivered to the sheriff as returning officer, under the 6 Vict. c. 18, ss. 48, 49, was the original register of voters and should have been produced. The document produced by the town clerk was admitted, subject to the objection.

The register of freemen and householders, containing the name of Middlemas, the voter named in the first count, signed by the revising barrister, was produced, and the signature of the revising barrister was proved. It was objected that this register was only a step towards the formation of the original register of voters, but the learned Judge would not exclude it.

Middlemas then proved that the nomination was on the 19th of August, and that on the following day the defendant gave him three sovereigns to vote for Marjoribanks, and that he went to the polling-booth and voted. At the conclusion of the case the copy of the writ and return was read. The copy of the writ was stamped with the seal of the Crown office in Chancery, and at the foot was a certificate, as follows:—
 "This is a true copy of the original (writ) remaining in the custody of the clerk of the [78] Crown. Examined therewith this 20th day of February, 1860.—G. V. Leman. Henry Walker."

The writ was as follows:—

"Victoria, &c. To the sheriff of the borough of Berwick-upon-Tweed: Whereas, &c., we have ordered a certain parliament to be holden, &c. We command, &c., you that within the borough aforesaid one fit and discreet burgess, within six days after the receipt of these presents (first giving three clear days' notice at the least of the day of such election, exclusive of the day of proclamation and of the day of election), freely, &c., you cause to be elected, and the names of such burgess, &c., you cause to be inserted in certain indentures to be thereupon made between you and them who shall be present at the election, &c.: And this election so made distinctly, openly under your seal, &c., you certify to us in our Chancery by forthwith remitting to us one part of the aforesaid indentures annexed to these presents, together with this writ. Witness ourself, &c.

"ROMILLY. ABBOTT.

"To the sheriff of the borough of Berwick-upon-Tweed, or his deputy. A writ for a new election of a burgess for the said borough.

"ROMILLY. ABBOTT.

"Received on the day of at A.M.

"JOS. HEMING, Sheriff."

The execution of this writ appears in the schedule hereunto annexed.

"The Answer of Jos. Heming, Sheriff."

The copy indenture was stamped and certified in the same manner as the writ. It stated that proclamation had been made and notice of the day of election given by the sheriff, and that by virtue of the writ thereunto annexed, the electors present on the day of the date thereof had elected D. C. Marjoribanks.

At the conclusion of the plaintiff's case, and after his [79] counsel had left the Court, the defendant's counsel objected, that the copies of the writ and return were not duly certified copies. He also objected, as against the defendant, that there was no evidence to shew that an election had been duly held; that it was not proved when the writ was received by the sheriff, nor when nor whether any proclamation was made; that it was not proved that there were three clear days' notice of the election as required by law; that there was no evidence that the returning officer had taken the oath required by law, nor that the Durham or Freeman's Act had been read; and, therefore, that the plaintiff must be nonsuited.

The learned Judge overruled these objections, and told the jury that in his opinion there was evidence that an election had been held and that Mr. Marjoribanks had been returned, reserving leave to the defendant to move to enter a verdict or nonsuit, if the Court should be of opinion that there was no evidence to go to the jury. The jury found a verdict for the plaintiff.

Edward James, in Easter Term, obtained a rule nisi to enter a verdict for the defendant or for a new trial, on the ground of the improper reception of evidence as

to the writ and return, the register of voters, the time of the receipt of the writ by the sheriff, the time of holding the election, the notice of election, and the poll-book.

S. Temple and Udall now shewed cause. As to the writ and return. First, the objection is not open to the defendant. Mr. Bacon was asked whether he produced a certified examined copy of the writ and return, which he said he had. There was no cross-examination on this point, but the writ and return were put in, taken as read, and afterwards actually read. The objections to the reception of the document might have been removed if taken in proper time. It is like the case of an objection to a document on the ground [80] of the insufficiency of the stamp, which must always be taken before the document is read. Secondly, the copies put in were properly certified copies. They purport to be office copies, and at the end of each is the certificate "this is a true copy of the original." It must be taken that the person who signed the copy had the custody of the originals, and therefore the document was admissible under the 14 & 15 Vict. c. 99, s. 14. [Wilde, B., referred to *Baker v. Cave* (1 H. & N. 674).]

Thirdly, as to the poll-books, copies were produced from the office of the clerk of the Crown in Chancery, which were sufficiently proved to have been examined copies. But, as office copies, they were admissible in evidence. By the 6 & 7 Vict. c. 18, s. 94, office copies of the poll-books, issued by the clerk of the Crown or his deputy, are made evidence. It was proved that Leman, who gave out these copies, was a clerk in the office, "he was acting as such." When a person is appointed to a public office he must necessarily employ clerks. There was therefore evidence for the jury that Leman was the proper officer to issue the copies of the poll-books which were in his custody. [Wilde, B. Rightly or wrongly, the poll-books were in the custody of the clerk in the office. May it not be said that a document is entrusted to the clerk, if he has the possession of it?] Assuming that the copies were not made admissible by the 6 & 7 Vict. c. 18, s. 94, the provisions of that clause are cumulative and do not exclude other proof. Office copies of documents of public importance are admissible in evidence, if the officer be bound either at common law or by statute to furnish copies: Taylor on Evidence, p. 1235, 3rd ed.; citing Buller's *Nisi Prius*, p. 229. In *Appleton v. Lord Braybrooke* (6 M. & Sel. 34), Bayley, J., distinguishes that case, where it was held that a colonial judgment could not be proved by an office copy, from one "where there is a known [81] officer whose duty it is to deliver out copies," as in the instance of the chirograph of a fine. Poll-books are documents of a public character, office copies of which are made evidence, and these copies delivered out by a clerk in the office of the clerk of the Crown in Chancery, and sealed with the seal of the office, are therefore, at common law admissible in evidence as office copies. In *Mead v. Robinson* (Willes, 422) a copy of the poll taken at a borough election was held to be admissible. So, in *Rex v. Hughes* (cited Willes, 424), the copy of a poll on the election of a mayor.

Fourthly, as to the register of voters produced by the town clerk. The document produced was a copy printed in accordance with the directions of the 6 & 7 Vict. c. 18, s. 49. The town clerk proved that it was a duplicate of the register in the possession of the returning officer. There was therefore evidence that this was an examined copy of the register. The register of voters in the custody of the returning officer is a public document of such a nature that it may be proved by the production of a copy.

Fifthly, as to the list signed by the revising barrister. This was the list handed to the town clerk in pursuance of the 6 & 7 Vict. c. 18, s. 48. In *Regina v. Clarke* (1 F. & F. 654), a similar list was admitted in evidence by Byles, J., for the purpose of proving that a particular person was a voter. [Channell, B. It appears to me that the plaintiff does not want this list, because there is sufficient evidence without it.]

Sixthly, the time of the receipt of the writ is sufficiently proved by the return. The return under seal (which was an act done by a public officer in the execution of his duty, and must therefore be presumed to have been done rightly,) states the proclamation and the notice of holding the election. If that document is evidence, there was abundant [82] proof that the election was rightly held. The return is the document which constituted the title of the member to his seat. [Channell, B., referred to *The Irish Society v. The Bishop of Derry* (12 Cl. & F. 641).]

Lastly, assuming that evidence material for the purpose of inducing the jury to

come to a conclusion upon specific facts has been erroneously admitted, no new trial will be granted if it can be shewn that these facts need not have been proved. [Bramwell, B. Suppose, in an action against the acceptor of a bill, the plaintiff attempted to prove the presentation, but did so by improper evidence, would that be wholly immaterial?] It is submitted that it would have been sufficient to prove an election *de facto*, without proving the regularity of it. The 17 & 18 Vict. c. 102, after reciting that "the laws now in force for preventing corrupt practices in the election of members to serve in parliament have been found insufficient, and that it is expedient to consolidate and amend such laws and to make further provision for securing the freedom of such elections," by section 2 enacts that the following persons shall be deemed guilty of bribery and shall be punishable accordingly:—1. "Every person who shall &c. give, lend &c. any money or valuable consideration to or for any voter &c., in order to induce any voter to vote or refrain from voting &c. at any election." Under these words the offence may be complete though no election ever took place. "Any election" means "any election which may thereafter take place." The offence was complete by the corrupt act of purchasing or endeavouring to purchase the vote; therefore, even if the whole of the documentary evidence used at the trial were rejected, the offence would have been proved. [Wilde, B., referred to *Doe d. Welsh v. Langfield* (16 M. & W. 497).] Middlemas proved that there was an election *de facto*. [Channell, B. The election is held by a person filling the office of re-[83]-turning officer: the question is whether his authority must not be shewn.] No doubt it was necessary to prove that Middlemas was a voter, but the fact that the defendant offered a bribe to Middlemas as a voter is evidence, as against the defendant, that he was a voter. There was no contest on that point, and no cross-examination with reference to it at the trial. The Court in its discretion will not grant a new trial on a point on which there was abundant evidence uncontradicted on the former trial.

Edward James and Kemplay, in support of the rule. First, the parol evidence without the documents was not sufficient to support the verdict. That which constitutes the offence in respect of which the plaintiff has brought his action for a penalty, is bribery at a particular election. The declaration states that, on the 20th of August, 1859, there was holden an election for the borough of Berwick upon Tweed, and that the defendant bribed Middlemas to "vote at the said election." In any case the plaintiff must prove that Middlemas was a voter. [Wilde, B. In the interpretation clause (sect. 38) of the 17 & 18 Vict. c. 102, it is said, "the word 'voter' shall mean any person who has or claims a right to vote in the election of a member or members to serve in parliament." That does not refer to a person who is not a voter, and never pretended to be so. The words "claims a right to vote" apply to a case where a voter, who has been excluded by the revising barrister, has a right to claim to be a voter and tender his vote. In committee on a scrutiny, voters whose names have been expunged by the revising barrister might be retained: 6 Vict. c. 18, s. 98. Independently of the documentary evidence, there was merely *prima facie* evidence that Middlemas was a voter. The admission of the documentary evidence may have disabled the defendant's counsel [84] from commenting successfully on the *prima facie* evidence. [Wilde, B. Would not the learned Judge have been bound to tell the jury that, if a bribe was offered to a person claiming to be a voter, the offence was complete?] It is submitted not, unless the claim was a real one. If the register had not been before the jury, it might have been contended with effect that the person bribed did not in reality claim to have a vote. [Channell, B. The documentary evidence may be material to prove the averment in the declaration that the election was for a member for the borough of Berwick upon Tweed.] All that the jury would have been justified in inferring from the parol evidence was that something which was called an election was going on. There was nothing to shew that it was a proper assembly held in obedience to the writ. If there was no writ the supposed election was null and void, and no right of action for the penalty could have accrued.

Secondly, the documentary evidence was not admissible. With respect to the writ and return, the 14 & 15 Vict. c. 99, s. 14, only provides for the admissibility of an examined or certified copy of any book or document of a public nature. There is no statute which renders a copy of a writ admissible. If there was no writ there could be no election. The document produced and said to be a certified copy turned out not to be so. It was allowed to be taken as read, under the mistaken notion that it was a certified copy.

Thirdly, the copy of the register of voters was inadmissible. By the 48th section of the 6 & 7 Vict. c. 18, the revising barrister must deliver to the town clerk the list of voters, and the town clerk must cause the list to be copied and printed in a book, which he must sign and deliver to the returning officer. By the 49th section the printed book so signed is made the register of voters. This register is not a document of such a public nature as to be admissible in evidence on its mere production by the returning [85] officer; but it would be necessary to prove the signature of the town clerk, for without his signature it would not be the register. [Channell, B. The right to have a copy is not limited to the inhabitants of the particular borough, but any of the public may obtain one on payment. Pollock, C. B. The transfer books of the Bank of England relate only to the holders of stock, and yet they are public documents. A number of other books and documents of a like nature are mentioned in Taylor on Evidence, sect. 1438, p. 1281, 3rd ed., such as parish registers, the books of the East India Company, the rolls of courts baron, assessments of land tax, &c.(a)] The 6 & 7 Vict. c. 18, does not require the register to be kept in any particular place, only in the custody of the returning officer. Corporation books are admissible if they come from the proper custody; *Rea v. Mothersell* (1 Str. 93), Phillips on Evidence, vol. 2, p. 229, 10th ed.; but there is no authority that a copy of them may be given in evidence. So with terriers or surveys of glebe lands, which are required by the ecclesiastical canons to be returned into the registry of the bishop: Phillips on Evidence, vol. 2, p. 235, 10th ed. Printed copies of the statements of the annual accounts of a turnpike trust, produced from the office of the clerk of the peace (to which the originals, signed by the chairman at the annual general meeting, had been returned pursuant to the 3 Geo. 4, c. 126, s. 78), are not admissible in evidence, in an action against the trustees, without proof that the originals were lost or destroyed: *Pardoe v. Price* (13 M. & W. 267). Besides, the copy produced was not proved to be an examined or certified copy.

Fourthly, there was no evidence of notice of the election. [Pollock, C. B. The House of Commons cannot assemble [86] without a previous proclamation; but, in a proceeding in which it became necessary to prove that the House was sitting, would it be necessary to prove that they were called together by proclamation? The maxim "omnia rite acta presumuntur" applies.] Unless notice be given according to the provisions of the 33 Geo. 3, c. 64, and 3 & 4 Vict. c. 81, the election would be wholly void. [Pollock, C. B. As an election, but not for other purposes. Though a trial is set aside and a venire de novo granted, that does not prevent an indictment for perjury committed at the trial.] They abandoned the objection as to the admissibility of the poll book.

POLLOCK, C. B. We are all of opinion that the rule ought to be discharged. I am not aware that it is necessary to say anything with respect to the question whether parol evidence would be sufficient without the documents; but I cannot abstain from making this remark, that it appears to me idle to contend that there was no proof that the person bribed was a voter, or that there was an election for a member of parliament. Human life is too short to admit of its being occupied in needless repetitions. In an action by the assignees of a bankrupt, a witness is called and merely asked "are the plaintiffs the assignees?" The answer is, "yes." Then, is there to be a motion for a new trial because the witness was not asked whether the plaintiffs were the assignees of the particular bankrupt, naming him at the time? We ought not for a moment to entertain such an objection. The pleadings were opened and the jury were told what issues they had to try; and no doubt the learned counsel said that this was a proceeding by the plaintiff against the defendant, on the ground that on the 20th of August, 1859, there was an election, in and for the borough of Berwick upon Tweed, for the return of a member to serve in parliament for that borough. No doubt, also, it was [87] stated that the purpose was to inquire whether the defendant, who was charged with bribery at that election, was guilty of the offence. The parol evidence was this:—A witness named Matthew Middlemas said, "I am a householder and voter at Berwick. I remember the election at Berwick in August." Now it is objected that it does not appear that there was an election at Berwick when two persons were candidates, or that there was an election for a member of parliament. I regret that the time of the Court should have been occupied in discussing such an

(a) See also *Motteram v. The Eastern Counties Railway Company*, 7 C. B. N. S. 558.

objection. Moreover, since we are all of opinion that the documents were properly received, that objection altogether fails.

Then as to the admissibility of the documents. I am of opinion that the writ and return, professing to be examined copies, and certainly presented as such, were properly received. It is objected that they were not certified. Perhaps they were not strictly according to the act of parliament, but they were examined copies, and a witness was ready to prove that they were correct. Besides they were allowed to be taken as read, and were therefore in evidence: and although the Court would have given effect to a valid objection, they cannot entertain an objection taken too late and which has no foundation. If it turns out that an objection being taken could have been cured, the Court ought not now to allow it. It appears to me that the writ and return were properly in evidence, and that there is no objection on that ground. As to the register I entertain no doubt, that a document which the statute requires to be furnished to the sheriff, and kept by him, is a document of such a public nature that the mere production of it by the sheriff or under-sheriff would be sufficient without further evidence; and therefore an examined copy is admissible. A copy of the register which the town clerk is bound to have printed and to sign is a sufficient examined copy, if it [88] answers the provisions under which such a copy may be given in evidence. I think that all the objections fail, and the rule must be discharged.

CHANNELL, B. I also think that the rule ought to be discharged. It seems to me unnecessary to give any opinion upon the question whether parol evidence, apart from the documents, would have supported the plaintiff's case, because if the parol evidence can be connected with the documents there was clearly a case for the jury. Whether it can or cannot depends upon whether or no the documents were admissible. The objection to the poll-book was very properly given up, because it was admitted that an office copy of that poll-book would be evidence, and though there was no proof that the copy produced was an examined copy, it appeared that it was an office copy, and that is sufficient. There were three other documents, to the admissibility of which objection was made. First, it was said that there was no evidence of the writ having issued, and that the election took place under the writ. That is an important objection, because I am not prepared to say, that if there was no evidence that a writ issued, a mere election *de facto* would have supported this proceeding. I do not say it would not, but I guard myself against expressing an opinion that parol evidence of an election, unconnected with any writ, would have been sufficient. Then was there evidence, properly receivable, of a writ? A document was put in and a witness was asked if that was "an examined certified copy." The question involved two considerations, its being examined and certified. It was stated to be a certified copy, and the defendant's counsel was under that impression, and therefore allowed it to be taken as read. *Prima facie* the defendant was bound by the admission that the document should be taken as [89] read; but at a later stage of the cause it came to the knowledge of his counsel that it was not a certified copy. It was therefore open to him to apply to the Judge to strike it out of his note; but if that application had been made, there is no doubt the plaintiff would have proved that it was an examined copy, and it would have been equally evidence whether an examined or a certified copy; consequently that objection also fails. The same observations apply to the return. Then an objection was made to the receipt of the copy of the register. As to that, it seems to me that the judgment of the Court may proceed on a very short ground. I am prepared to hold, with the Lord Chief Baron, that the printed copy signed by the town clerk was admissible, but I do not put my judgment on that ground. The only objection was that by the 49th section of the 6 & 7 Vict. c. 18, the printed book signed by the town clerk is made "the register;" and that nothing short of the production of that document would suffice. No objection was taken that the printed copy was not examined or authenticated. Therefore, if it was not necessary to produce the register, it must be taken that the document produced was either examined or certified, and then the question is whether it is a public document, the mere production of which from the proper custody would be evidence *per se*. It was said that it was necessary to prove the signature of the town clerk to the copy in the custody of the returning officer. I think that is not so, for the town clerk was acting in the discharge of a public duty. The 48th and 49th sections, taken together, require him to perform certain duties. First, he is to cause the lists of voters, delivered to him by the revising

barrister, to be copied and printed in a book, which he is to sign and deliver to the returning officer, which book is made the register, and he is to keep printed copies of that register [90] and deliver them to the public on payment of a certain charge. It appears to me that the printed book is a public document, the production of which would be evidence per se, if produced from the proper custody, and consequently an examined or certified copy of it might be given in evidence. I do not however enter into the question whether the copy produced was examined or certified, because the only objection taken, according to the Judge's note, was that the register itself must be produced. I come to this conclusion without any reluctance, because I cannot entertain a particle of doubt that the copy produced was a true copy. There was one other objection, viz., that due notice of the election was not proved, but that is immaterial; for when the writ was in evidence, and the register proved, it is no answer to say that the plaintiff has not proved a notice.

WILDE, B. I am of the same opinion. The main point for our judgment is as to the admissibility in evidence of these three documents, the writ, the return, and the register. As regards the writ and return, they were produced by the plaintiff's counsel as certified copies, and it is plain that he thought they were. The counsel for the defendant did not ask to look at them, but allowed them to be put in and taken as read. He subsequently found out that they were not certified copies, and then made the objection. At that time the plaintiff's counsel was not in Court, but no doubt, if he had been, he would have removed the objection, for he had a witness who could have proved that they were examined copies. Under these circumstances we are to determine whether or no these documents were admissible as certified copies. For my own part, I think that the rule with reference to the course at Nisi Prius ought to be strictly acted on. If counsel have allowed, [91] without objection, a paper to be put in as proved, they should be bound by it, unless there are strong circumstances, to shew that the verdict ought not to stand. If, indeed, the circumstances disclose bad faith, or that the document itself was not admissible in evidence, there might be reason for the Court rejecting it and granting a new trial. But in this case there is neither of those elements: the whole matter was in perfectly good faith, and the documents were admissible. Under these circumstances, if we came to the conclusion that these documents were not certified copies, we should cause great injustice. The writ was certainly a certified copy: it was not only in the ordinary form, but it was a document coming from the office where the original was kept, and containing a memorandum signed by a clerk to the effect that it was a certified copy. I think that the point does not arise, the objection not having been taken at the time. The same remarks apply to the return. Then it only remains to consider the register. No objection was raised as to whether the document produced was or was not a certified copy; the only question was whether the original was of such a character that it would be evidence if produced from the proper custody. It was laid down by Lord Holt in *Lynche v. Clerke* (2 Salk. 154), and adopted in a note in Douglas's Reports (vol. 2, p. 594), "that wherever an original is of a public nature and would be evidence if produced, an immediate sworn copy thereof will be evidence." The question therefore is, whether this document is of a public nature, such as to be evidence per se if produced from the proper custody. It has been argued that it is not, and that it would be necessary to prove the signature of the town clerk. But no authority was cited for that, and it seems to me that it is a document of such a public nature that it would prove itself if brought from the proper custody. It [92] is a document in which the public are concerned: it is kept in pursuance of an act of parliament, and confided to the custody of a particular officer for a public purpose, and moreover the Act provides that any person may have a copy of it. Public convenience requires that a copy should be admissible in evidence. For these reasons I think that the three documents were admissible in evidence. A further point was raised, viz., that there was no evidence of notice. The truth is that the return made by the sheriff was evidence of notice. I do not dwell upon that, because I am of opinion that in order to constitute this offence under the statute, it was not necessary to prove all the minute formalities necessary before an election can take place. As to the last point, viz., whether parol evidence without the documentary would be sufficient to sustain the verdict, it is unnecessary to give an opinion. It was argued that if these documents are not admissible, still the Court will not grant a new trial,

because there was abundant evidence without them, and they could have had no effect on the minds of the jury. As we all think they were admissible, it is not necessary to say any more on that point. I agree with the Lord Chief Baron, that we ought to act upon what may be fairly presumed to be the meaning of the language of the witness, and not to take every sentence by itself without reference to the subject-matter. For these reasons I think that the rule ought to be discharged.

Rule discharged.

[93] BURTON, Judgment Creditor v. SARAH ROBERTS, Executrix of Thomas Roberts, Judgment Debtor, PARKER, Garnishee. June 26, 1860.—Where judgment is recovered against an executor, a debt due from a third person to the testator's estate may be attached under the garnishment clauses of the Common Law Procedure Act, 1854, and it is no answer that a decree has been made in a suit in Chancery for the administration of the testator's estate.

[S. C. 29 L. J. Ex. 484.]

In this case Burton, the plaintiff, had recovered judgment against Sarah Roberts, as executrix of Thomas Roberts, for the sum of 48l. 14s., debt, and 16l. 18s. 8d. costs. Upon an affidavit that Parker was indebted to the estate of Thomas Roberts, Bramwell, B., made the usual order "that all debts owing or accruing from the garnishee to the judgment debtor be attached to answer the judgment recovered against the judgment debtor by the judgment creditor," &c., and that the garnishee, on a day named, shew cause why he should not pay the judgment creditor the debt due from him to the said judgment debtor. On the 3rd May a decree was made in a suit in Chancery for the administration of the testator's estate, of which the judgment creditor had notice. The parties attended at Chambers before Channell, B., who referred the matter to the Court.

Robinson, in last Trinity Term (June 8), moved for a rule calling on the garnishee to shew cause why he should not pay the judgment creditor the debt due from the garnishee to the judgment debtor, or so much thereof as is sufficient to satisfy the judgment debt.

Holl shewed cause in the first instance. First, an executor, against whom a judgment has been recovered in that character, is not a "judgment debtor" within the meaning of the 61st section of the Common Law Procedure Act, 1854. The judgment is, that the plaintiff do recover the debt and costs to be levied de bonis testatoris if the defendant have [94] so much, but if not, then the costs de bonis propriis. But if it be held that an executor is a judgment debtor within that enactment, this consequence will follow, that a debt due to him in his own right might be attached for the testator's debt. [Martin, B. In Roll. Abridg. tit. Customs of London (K.), 2, it is said that a debt due to an administrator may be attached.] In *Baynard v. Nicolls* (5 E. & B. 59), it was held that an executor of a judgment creditor is not entitled to attach a debt due to the judgment debtor before he has made himself a party to the judgment. Lord Campbell there said, "I would by no means give a forced construction to enactments against garnishees: that would often lead to molestation of third parties without much benefit to any one." [Bramwell, B. According to the old form, in an action by and against executors, the declaration should be in the detinet only, though sometimes an executor might be sued in the debet and detinet, as in *Hargrave's case* (5 Rep. 65).] Secondly, if this rule be made absolute it would disturb the due administration of the testator's assets. After a decree in an administration suit, a Court of equity will restrain the creditors from proceeding at law; and if a creditor, after notice of the decree, obtains judgment against the executor, and takes in execution the testator's assets, he will be compelled to restore them: *Clarke v. The Earl of Ormonde* (Jacob, 722). Here the judgment creditor is proceeding after notice of the decree, and this attachment is only another mode of enforcing execution. [Bramwell, B. Suppose a creditor issued a fi. fa., and afterwards there was a decree in an administration suit, would he be restrained from proceeding with his execution?] *Kent v. Pickering* (5 Sim. 569) decided that after a

decree for the administration of the assets of a testator, the Court will interfere so far as to give [95] effect to its own decree, and therefore they will restrain the creditor from proceeding at law against the assets; but they will not interpose to protect the executors from any liability to which they may have subjected themselves personally.

Robinson was not called upon to support the rule.

Cur. adv. vult.

BRAMWELL, B., now said—In this case we think the rule should be absolute, unless the garnishee desires that a writ should issue against him; if so, the rule should be absolute that the writ issue. I should further state that the Court is of opinion, that where judgment is recovered against an executor, a debt due to the testator's estate from a third person may be attached under the garnishee clauses of the Common Law Procedure Act, 1854.

Holl having stated that he did not wish a writ to issue,

Rule absolute.

BAXENDALE AND OTHERS v. THE GREAT WESTERN RAILWAY COMPANY. (a) June 11, 1860.—In an action against a carrier, the declaration contained one count alleging the loss and damage of a variety of goods which the defendants undertook to carry for the plaintiff to numerous places at different times. The plaintiff having delivered particulars of his claim, and the defendants having pleaded payment into Court of a sum in satisfaction thereof, the Court ordered the defendants to deliver an account of the particular items of the plaintiff's demand in respect of which the money was paid into Court.

[S. C. 30 L. J. Ex. 63. Discussed, *Thames Ironworks and Shipbuilding Company v. Royal Mail Steam Packet Company*, 1861, 10 C. B. (N. S.) 375.]

This was a rule to rescind an order of Channell, B., that the defendants deliver to the plaintiffs an account in writing of the particular items of the plaintiffs' demand, on which the sum of 55l. was paid into Court.

The declaration stated that the defendants were, at the happening of the events hereinafter mentioned, and still [96] are, common carriers of goods and chattels, to wit, from London to Torquay, Bath, Taunton, Exeter, Trowbridge, Plymouth, Bristol, Reading, Yeovil and Totnes respectively, and from Bristol to Portsmouth and Taunton respectively, and from Salisbury to Plymouth, and from Oxford to Yeovil, and from Frome to Trowbridge; and thereupon the plaintiffs caused to be delivered to the defendants, and the defendants then accepted and received of and from the plaintiffs, certain boxes, parcels, bales, hampers, and other packages, containing goods and chattels of great value, to be safely and securely carried and conveyed by the defendants from London to Torquay, Bath, Taunton, Exeter, Trowbridge, Plymouth, Bristol, Reading, Yeovil and Totnes respectively, and from Bristol to Portsmouth and Taunton respectively, and from Salisbury to Plymouth, and from Oxford to Yeovil, and from Frome to Trowbridge, and then, to wit at Torquay, Bath, &c., to be respectively safely and securely delivered for the plaintiffs for certain reasonable reward to the defendants in that behalf. Yet the defendants, not regarding their duty as such common carriers, did not nor would safely or securely carry or convey the said boxes, parcels, &c., respectively, or any of them, to Torquay, Bath, Taunton, Exeter, Trowbridge, Plymouth, Bristol, Reading, Yeovil, Totnes and Portsmouth aforesaid respectively; nor there, to wit, at Torquay, Bath, &c., respectively, safely or securely deliver the same to the plaintiffs; but, on the contrary, the defendants so carelessly and negligently behaved and conducted themselves in the premises, that by and through the negligence, carelessness and default of the defendants in the premises, the said boxes, parcels, &c., and their contents, became and were damaged, broken, spoiled and wholly lost to the plaintiffs.

The plaintiffs, in pursuance of a Judge's order, delivered [97] particulars of their

claim for damage, injury and loss, amounting to 67l. 10s. 1d. The particulars, which were in the following form, comprised twenty-six items:—

	1859.		£	s.	d.
London to Bath	March 4	Damage to Prints		14	0
Torquay.	June 25	Damage to Box Glass		18	0
&c.		&c.			
Salisbury, Plymouth	June 1	By delay to 2 Hampers Plants	5	0	0
Bristol, Portsmouth	Augt. 12	Value of Pun. Treacle lost .	7	15	6
&c.		&c.			

The defendants pleaded payment of 55l. into Court, and that such sum was enough to satisfy the claims of the plaintiffs in respect of the matters therein pleaded. Thereupon the plaintiffs obtained the order now sought to be rescinded.

The affidavit in answer to the rule stated, that the items of the particulars of demand consisted of sums actually paid by the plaintiffs to the owners of the goods in satisfaction of claims for loss or damage to such goods whilst in the possession of the defendants as carriers: that without such particulars it was impossible for the plaintiffs to know which of the twenty-six items of the plaintiffs' claim are disputed by the defendants; and without such particulars the plaintiffs would have to be prepared to prove every item on the trial, and to bring up several witnesses from different parts of the country, at a considerable expense, to prove every item.

C. Pollock shewed cause. The difficulty would not arise under the old form of declaration because it would have contained a distinct count for each item of claim, [98] and the defendants must have specified in respect of which counts they paid the money into Court. [Martin, B. I have had similar cases before me at Chambers, and I thought it reasonable that the defendants should give the particulars.] Unless the application is granted, the plaintiffs will be bound by their particulars, whilst the defendants may apply their payment to any item of claim, so as to meet the plaintiffs' proof.

Field, in support of the rule. The declaration, in fact, comprises twenty-six counts, and but for the Common Law Procedure Act, 1852, would have been bad on special demurrer. Before that Act the plaintiffs must either have brought separate actions, or had separate counts for each alleged grievance. Upon a declaration framed as this is, the defendants are entitled, as a matter of right, to particulars of the plaintiffs' claim. Since the plaintiffs have chosen to include twenty-six counts in one, the defendants have a right to pay money into Court without specifying the particular count upon which it is paid. Payment into Court is a statutory right. [Channell, B. So is a set-off, but particulars must be given. Pollock, C. B. The mere payment into Court does not lead to the settlement of the action, nor simplify the issue; for if the particulars are not given, the plaintiffs must prove every item of claim. Bramwell, B. As the matter stands, the plaintiffs must prove damage above the amount paid into Court; but if particulars are given, and the plaintiffs shew that upon any one item of damage they are entitled to a shilling more than the sum mentioned in the particulars, they would be entitled to the verdict, although the sum paid into Court exceeded the amount of damage which they proved. Martin, B. The plaintiffs only say, "Tell us upon which [99] count you pay the money into Court." If particulars are not given, the plaintiffs must be prepared to prove every item, because the defendants may apply the payments as they think fit.] The plea is in accordance with the form prescribed by the 71st section of the Common Law Procedure Act, 1852, viz., "that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to." [Martin, B. Suppose a count in trespass quare clausum fregit is joined with a count in trover, and the defendant pleads to the whole, payment into Court, may he not be compelled to specify upon which count he pays the money? Channell, B. In *Ireland v. Thompson* (4 Bing. N. C. 716), the defendant pleaded, with several other pleas, payment of 5000l. in satisfaction of the plaintiff's demand, and

the Court made absolute a rule to discharge the rule to plead several matters, unless the defendant delivered particulars of the payment.] In *Phipps v. Sothorn* (8 Dowl. P. C. 208) the Court refused to compel a defendant to deliver particulars of payment. It was argued that the case was analogous to the plea of set-off; but Parke, B., said, "There is no such analogy as that contended for. A plea of set-off is in effect a cross action, and the plaintiff has a right to know what claim the defendant has against him; but here you seek to make the defendant disclose the evidence in support of his answer to the action." There is no instance of such an application as the present.

POLLOCK, C. B. I am of opinion that the rule ought to be discharged.

MARTIN, B. I am of the same opinion.

BRAMWELL, B. I do not see that the rule should be [100] absolute. The application is of a novel character, and it may be that the effect of setting aside the order of my brother Channell might compel the plaintiffs to have twenty-six separate counts. If the declaration had merely contained the common counts for goods sold and delivered, I should have doubted the power of the Court to order particulars. It would be as reasonable to require particulars of payment before action as after it, but it is never done.

Rule discharged.

ALEXANDER v. WORMAN. July 6, 1860.—The plaintiff was surveyor to a Benefit Building Society, of which the defendant was one of the managing directors. By a Rule of the Society, it was declared that its object was to advance money to its members to enable them to buy or build houses. By another Rule, the surveyor shall examine and report upon houses and other property "previous to money being advanced thereon by the Society, and shall transact all other business of the Society, &c., for which he shall receive out of the funds thereof, a fair and reasonable remuneration." The directors took on lease a piece of land on which they covenanted to build six houses. At a meeting of the directors, at which the defendant was present, it was resolved that the plaintiff be instructed to prepare plans and specifications for the houses. At another meeting it was resolved that the plaintiff be paid a commission of $3\frac{1}{2}$ per cent. on the outlay. The plaintiff prepared the plans and specifications and superintended the building, but before it was finished the Society became insolvent. The plaintiff made several applications "to the directors of the Society" for payment of his commission but without success, and, the Society having become extinct, he brought an action against the defendant. Held, that the contract was not with the defendant personally but with the Society, and that the plaintiff's only right to remuneration was out of the Society's funds: Per Pollock, C. B., Martin, B., and Channell, B. Bramwell, B., dissentiente.

[S. C. 30 L. J. Ex. 198; 3 L. T. 477.]

Action for work done and materials provided by the plaintiff for the defendant, and for commission payable from the defendant to the plaintiff in respect thereof.

Plea. Never indebted.

At the trial, before Blackburn, J., at the Surrey Summer Assizes, 1859, it appeared that the plaintiff, who was a surveyor, sought to recover from the defendant the sum of 59l. 10s., being his commission at $3\frac{1}{2}$ per cent., for preparing plans, specifications, &c., and superintending the erection of six houses in the Midhurst Road, Bethnal Green, Middlesex. The defendant was a shareholder of a Benefit Building Society, called "The Second East London People's Co-operative Benefit Building Society." At a general meeting of the members of the Society, held on [101] the 4th of March, 1858, at which the plaintiff and defendant were present, it was resolved that the defendant and four other persons "become members of the committee:" also that the plaintiff "be the surveyor of the Society." At a committee meeting, held on the 20th April, 1858, at which the plaintiff and defendant were present, it was proposed by the defendant, and resolved, "that the plaintiff be instructed to supply Mr. Rogers" (the solicitor of the Society) "with plans and specifications for six houses in Midhurst Road." The plaintiff accordingly prepared drawings and specifications for the houses. On the 27th of April the plaintiff attended

another committee meeting, at which the defendant was not present, and reported that he had prepared the plans; when it was resolved "that the surveyor be instructed to obtain tenders from six builders for the erection of six houses in Midhurst Road." On the 4th of May the plaintiff attended another committee meeting, at which the defendant was present, when several tenders from builders were opened; and the tender of one "Green being the lowest, consideration of same was adjourned for the attendance of Mr. Beetson" (one of the directors). The plaintiff was asked what his commission would be, and he said $3\frac{1}{2}$ per cent. on the outlay, which was agreed to. On the 11th of May the plaintiff attended another committee meeting, at which the defendant was present, when the minutes of the last meeting were "read and received as correctly entered;" and it was resolved that "Green's tender for building six houses in Midhurst Road for 1550l. be accepted." At that meeting the plaintiff received instructions to tell Green to proceed with the works. On the 18th of May the plaintiff forwarded a report of the progress of the works, addressed "To the Directors of the Second East London People's Co-operative Benefit Building Society;" and he informed them that he expected the builder would want from 150l. to 200l. in about a month's time. On the 25th of May the plaintiff made another report of the progress of the works, and he informed the directors that he would give them a fortnight's notice of any monies being required. On the 15th of June the plaintiff wrote to the chairman of directors a letter stating that 200l. would be required by the builders in a fortnight. On the 30th of June the plaintiff gave to Green, the builder, the following certificate, addressed, "To the Directors of the Second East London Benefit Building Society:—I hereby certify that Mr. George Green is entitled to 300l. for works done as per contract at Midhurst Road, Bethnal Green, on your account." On the 2nd of July the plaintiff wrote to the directors informing them that the certificate would be presented. Similar certificates were afterwards given, the amount certified being in the whole 900l. The money was not paid, and the builder refused to proceed with the works. A correspondence on the subject then took place between the plaintiff and the directors. On the 23rd of August, 1858, the plaintiff wrote a letter to the directors in which he said, "You must also be aware that the nonpayment of the contract, as regards money, places me in a very awkward position, completely destroying the relative positions which ought to exist between builder and architect. With regard to myself, I should feel obliged if you would remit me 25l. on account, or your acceptance for that sum at two months would suit me." In reply, the plaintiff was informed that the committee had made an arrangement with the builder. On the 13th of September, 1858, the plaintiff again wrote to the directors a letter, which concluded as follows—"Allow me to call your attention to my request, as you must be aware [103] that I have been working now for a long time and have received no remuneration whatever. I trust you will see the justice of granting my request." By a resolution of the 16th September these houses were allotted to the defendant and five other directors. Afterwards it was proposed, at a meeting of the directors, to give up the houses to Green, the builder; and by an agreement dated the 8th November, 1858, between Green of the one part, and the defendant and Legge and Roper (two directors) of the other part, after reciting "that a certain Society enrolled as the Second East London People's Co-operative Benefit Building Society, of which the defendant, Legge and Roper are members of the committee, is indebted to Green" &c., the defendant, Legge and Roper assigned to Green the six houses in Midhurst Road in satisfaction of his debt. On the 29th November the plaintiff sent his account, headed "To the Directors of the Second East London People's Co-operative Benefit Building Society," in the following letter addressed to the directors—"Houses in Midhurst Road. Having understood from Mr. Rogers that you have transferred these houses to the builder, I beg to inclose my charges herein, and shall feel obliged by an immediate settlement. I consider I have been very unfairly treated." The Society, having no funds, became extinct, and the plaintiff then brought this action against the defendant. The ground on which the six houses were built was leased to the defendant, Legge and Roper by an indenture dated the 11th of May, 1858, and made between one Hammack of the first part, and the defendant, Legge and Roper of the second part; and it contained a covenant as follows—"And the said parties hereto of the second part do, and each of them doth, covenant &c. that they will at their own expense build on the said ground &c. six houses in a workmanlike manner" &c. By

the [104] Rules of the Society, which were duly certified and enrolled, it was thus provided:—

“Objects of the Association.

“1. That this Association be called ‘The Second East London People’s Co-operative Benefit Building Society,’ and that its object is to raise by the subscriptions of its members, and on shares of 30l. each, a fund for the purpose of enabling each member to receive out of the funds of the Society the full amount of his share or shares, to erect or purchase a dwelling house or houses, or other real or leasehold property.”

“Management.

“3. That this Society shall be managed by a committee of not more than twelve members, three or more trustees, and a secretary, &c. There shall also be a solicitor and surveyor, who shall respectively transact the business of this Society under the direction of the committee.”

“Surveyor.

“29. Shall examine all houses and other property previous to any money being advanced thereon by the Society, and make in writing a correct report thereof and of the value thereof to the committee, and shall transact all other business of the Society that may require the assistance of a surveyor, for which he shall receive out of the funds thereof a fair and reasonable remuneration; and should any dispute arise as to his charges the same shall be referred to the decision of the committee, which shall be final.”

It was submitted, on behalf of the defendant, that the work was done by the plaintiff as surveyor of the Society, and that the defendant was not personally liable. The learned Judge was of that opinion, and directed a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for 59l. 10s., all points to be open to either party, and the Court to draw inferences of fact.

[105] Parry, Serjt., in Michaelmas Term, 1859, obtained a rule nisi accordingly, on the ground that the learned Judge ought to have directed a verdict for the plaintiff upon the whole of the facts of the case which were before him.

Hawkins and Lefevre shewed cause in last Trinity Term (May 30). The defendant is not personally liable for the work done by the plaintiff. The Society was constituted under the Building Societies Act, 6 & 7 Wm. 4, c. 32, section 4 of which incorporates all the provisions of the 10 Geo. 4, c. 56, and 4 & 5 Wm. 4, c. 40, so far as the same are applicable to Benefit Building Societies. The 10 Geo. 4, c. 56, s. 11, enables every such Society to appoint such clerks “and other officers” as shall be deemed necessary to carry into execution the purposes of such Society. The 10th section provides that the rules of the Society shall contain provisions with respect to the duties of its officers. Section 8 makes the rules, when entered in a book and confirmed by justices, binding on the officers of the Society, who are to be deemed to have full notice thereof. The 21st section vests the effects of the Society in the treasurer for the time being, who is thereby authorized to bring and defend actions concerning the property, right or claim of the Society. Section 22 provides that the treasurer or trustee, or any other officer, shall not be liable to make good any deficiency in the funds of the Society. Here officers have been appointed, and rules have been framed for the management of the Society. By Rule 3, the Society is to be managed by a committee, and there must be a solicitor and a surveyor. Therefore, the surveyor is an officer of the Society. Rule 29 prescribes the duties of the surveyor. He must transact all the business of the Society which requires a surveyor, and he is to be remunerated out of their funds. There is no evidence that the defendant [106] personally pledged himself to pay for this work; but it was done on the understanding that the plaintiff was to look to the funds of the Society. [Bramwell, B. How is he to get his remuneration?] By suing the treasurer or trustees, under the 21st section of the 10 Geo. 4, c. 56. The plaintiff always treated this work as done by him for the Society, in the performance of his duty as their surveyor: and he did not make any claim on the defendant until after the Society failed. *Braithwaite v. Schofield* (9 B. & C. 401) was decided before the 10 Geo. 4, c. 56, passed, and it only established that where a number of persons are associated together for a particular object, and

work is done in pursuance of a resolution by them, the ordinary rule applies that the persons who gave the order for the work must pay for it. [Pollock, C. B. The question is whether the plaintiff was acting as the surveyor of the Society or in his individual capacity.] *Kelsall v. Tyler* (11 Exch. 513) does not affect this question. *Burton v. Tannahill* (5 E. & B. 797) is an authority that no action can be maintained against the individual members for work done for the Society. It is the duty of the plaintiff, who seeks to make the defendant responsible, to establish his liability. The plaintiff must shew either that the work was done on the credit of the defendant, or that the defendant, conjointly with the other directors, undertook to pay the plaintiff. The mere circumstance of the defendant having acted as a director of the Society, and given orders on behalf of the Society, is not sufficient to render him personally responsible. Assuming that the contract was ultra vires, it does not therefore follow that the defendant is personally liable.

Parry, Serjt., and Laxton, in support of the rule. The [107] plaintiff proved an ordinary contract, viz., that he was employed to do the work, that the defendant was one of the persons who ordered it, and that the work was done. Therefore, *prima facie*, the defendant is liable to pay for it. Then, how does he seek to discharge himself from that liability? Reliance is placed on the 29th Rule; but that does not say that the surveyor is to be paid exclusively out of the funds of the Society. The object of that provision was to enable the directors to appropriate the funds to such a purpose: and now it is conceded that there are no funds with which the surveyor can be paid. *Braithwaite v. Schofield* (9 B. & C. 401) is a conclusive authority as to the common law liability of the defendant. In *Burton v. Tannahill* (5 E. & B. 797), it did not appear that the defendant personally gave orders for the work; and, moreover, the common law liability of the members of the Society was annulled by the prohibitory clause, (sect. 1) of the 17 & 18 Vict. c. 25. Further, the plaintiff was not employed to do the business of the Society. By rule 1 the object of the Society was to raise a fund for the purpose of enabling members to purchase houses. The directors had no power to build. The employment of the plaintiff to prepare plans and specifications, and to superintend the building of houses was ultra vires, and, therefore, the directors who employed him are personally liable. In *Grimes v. Harrison* (26 Beav. 435), the Master of the Rolls points out the distinction between Land Societies and Building Societies. *Kelsall v. Tyler* (11 Exch. 513) is a distinct authority that the directors of a Building Society have no power to enter into contracts collateral to the purpose for which the Society was formed. Again, the plaintiff was not employed as surveyor, but as architect. A surveyor is defined in Johnson's Dictionary as "overseer, one placed to superintend [108] others." The duties of the surveyor are prescribed in the 29th Rule; he is to examine and report upon property, previous to money being advanced thereon, and to transact all other business of the Society of a like nature. The Rules make no mention of an architect. It lies on the defendant to get rid of his liability, and what was passing in his mind is immaterial. If the plaintiff had brought his action against the Society they would have said, "You must sue the persons who employed you, the work was not done for the Society."

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered.

BRAMWELL, B. There appears to be three questions in this case. First, did the plaintiff enter into any contract? Secondly, if he did, was it with the defendant? Thirdly, if so, what was it? Now, the plaintiff is an architect: he was ordered to do work in the way of his profession, and he did it. Presumably, therefore, he is to be paid for it, which involves the existence of some contract with some one. But it is said, "no, he trusted the Society which was interested in the work, a Building Society, or their funds." But I know no way in which a Society, not a corporation and not having an officer to be sued for it, can be got at or sued, nor how its funds can be reached, except by a contract with one or more individuals upon which the individual or individuals is or are absolutely or contingently liable. Now this Society is not a corporation and has no public officer. There is no pretence for saying that an action can be maintained under the 21st section of 10 Geo. 4, c. 56, which obviously relates to the property of the Society and not to contracts which its members may think fit to enter into. Of course it was competent for the plaintiff to agree to do his work gratis, or [109] without any legal claim to remuneration, but I see no evidence that

he did so, and yet that will be the result, and would be the result whatever might be the state of funds of the Society, if he can in no event maintain an action against an individual. It is a mistake to say the defendant is not liable because he did not intend to be: the question is what his conduct reasonably gave the plaintiff to understand; and I see nothing to prevent the plaintiff entertaining the ordinary and very reasonable belief, that if he was ordered to do work in the way of his profession, and did it, he was to be paid for it. On the contrary, the evidence is express that he was. Nor is it material that the reports and bills are addressed to the Building Society. Sending in a bill to

Rifle Corps would not shew that the creditor had performed the impossibility of trusting a non-existing legal abstraction. Then, if the plaintiff made some contract with some one or more, was the defendant the person or one of the persons he contracted with? It is obvious he was. Whatever would point to any member of the Society as being liable would point to the defendant. He was a member of the Society. He was a director, and he gave the order, and had a personal interest under his covenants as lessee of the land in the doing of the work. If any reason can be given to shew he was not a contracting party, it can be given with at least equal strength to shew no one else was. It is to my mind the demonstration that some contract was made, and made with the defendant, by which in some way, in some event, absolutely or conditionally, the plaintiff could enforce a reward for the work he had performed.

It remains to consider what that contract was. *Primâ facie* it is the ordinary one, viz., that the work done, he should be paid for it the agreed price, or on a quantum meruit; and it is for the defendant to shew that is not so here. The defendant then relies on the following matters. As I [110] have mentioned, there was a Building Society—the defendant a director—as such he gave the order—the plaintiff was appointed surveyor, and accepted the office. By 10 Geo. 4, c. 56, s. 8 (which by the 6 & 7 Wm. 4, c. 32, regulates these Societies), all officers are deemed to have notice of the Rules of the Society, and by one of the Rules the surveyor is to be paid out of the funds; then, there being no funds, the plaintiff is not to be paid. Now, I think the first answer to this is that given by my brother Parry, viz., that this Rule is a rule not affecting the surveyor, but a rule of the members authorizing such an application of the funds. However, it may be otherwise; but there is another answer. This work was not done by the plaintiff as surveyor, not done by him as an officer of the Society. The Society had no authority to build—that is clear, and has been decided. The surveyor's business is that which his name indicates, he is to survey those buildings which are to be the security of the Society, a work which is wholly different from that of an architect making drawings, plans, elevations and specifications. It could not be done by him as their officer, if they could not, as a Society, do that on which they employed him. Therefore the Rule does not apply to this work. The ordering of it was *ultra vires*; and if the plaintiff sought to enforce a claim on the Society, or funds of the Society, supposing by some contrivance he could do so, he might be met by this objection.

But it is said he must be taken to do this work on the same terms as he worked as surveyor, and if he had actual notice of the Rule that might be; but he had not. The statute only means he shall be deemed as such officer to have notice, and it seems to me as unreasonable to hold he is bound by the Rule, as it would be so to hold, if he had supplied bricks for the building. I cannot but think, therefore, that this is the common case of work ordered, by the defendant, of [111] the plaintiff in the way of his profession, and done by him; and that, therefore, he is entitled to be paid for it. In fact it is the case of *Braithwaite v. Schofield* (9 B. & C. 401), only stronger. It is true that case was before 6 & 7 Wm. 4, c. 32, but what difference does that statute make? It neither gives a right nor takes one away. The opinions expressed in *Burton v. Tannahill* (5 E. & B. 797), are to the same effect. I think the rule should be made absolute.

MARTIN, B. The judgment which I am about to deliver is that of the Lord Chief Baron, my brother Channell and myself.

The plaintiff in this case was the surveyor to a Building Society. He was an officer named in the Rules; and by one of them his compensation was to be paid out of the funds of the Society. The object of the Society was to advance money to its members, to enable them to buy or build houses. The directors, of whom the defendant was one, leased a piece of land upon which they proposed to build. At one of

the regular meetings of the Society the plaintiff was directed to prepare plans, &c., and a resolution was entered in a book of the Society to this effect. At another meeting a resolution was made and duly entered, that the compensation to the plaintiff should be 3l. per cent. on the outlay, for which per centage the action was brought. The plaintiff made the plans and superintended the building for some time, but ultimately the Society became insolvent. The plaintiff made several applications for payment, but always to the secretary; and until the Society was broken up he made no demand upon the defendant, or any other of the directors, that they should pay him out of their own funds. By a section in one of the acts of parliament regulating such Societies, the surveyor is to be deemed to have notice of the rules.

[112] The cause was tried before my brother Blackburn at Croydon, last Summer Assizes, when he directed a nonsuit, giving the plaintiff leave to move to enter a verdict. A rule was granted for the purpose, and the Lord Chief Baron, Baron Channell and myself think it ought to be discharged.

The question is much more one of fact than of law, and the reasons for our judgment are these. We think the onus of proof in this, as in every other case for work and labour, is upon the plaintiff, and that he is bound to satisfy the jury either, first, that the defendant contracted to pay, by which we mean that he understood that he himself, or that he in conjunction with the other directors, was to pay the plaintiff for his labour. Such a contract might have been proved in an infinite variety of ways; but we think it clear upon the evidence in this case that the defendant thought that he was dealing with an officer of the Society and not with a surveyor, whom he was to pay out of his own private funds either solely or in conjunction with others. By the Rule the surveyor was to be paid out of the funds of the Society, and although the building houses was not within the object of the Society as stated in the Rules, it seems to us that both the plaintiff and the defendant and his co-directors acted as if it was, and in our opinion the plaintiff failed to prove that the defendant contracted to pay him in the sense above-mentioned.

But, secondly, we quite agree that if the defendant had so conducted himself as reasonably to create in the plaintiff's mind the belief that he was to be paid by the defendant for his labour, it is quite immaterial whether the defendant himself understood that he was to pay. To create a liability of the kind, however, it is of the very essence of it to establish that the plaintiff himself understood and believed that he was to be paid by the defendant, but the evidence [113] satisfies us that he had no such belief, and that until the Society was broken up he looked to the funds of the Society for payment, and not to the defendant or his co-directors at all.

We think it a mistake to suppose that, in Societies of the kind, the surveyor or secretary or the officers do work and labour upon the same terms as professional men of their class ordinarily do. They generally have a much greater interest in them than the directors, and in the great majority of cases are the individuals who get them up, and at whose request the directors consent to accept the office and take upon themselves the liabilities and duties of their situation; and it is to us very clear that such officers discharge duties and perform services with the understanding on all hands that they are to be remunerated out of the funds, and that if the funds fail the officers must remain unpaid.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

ABBOTT v. FEARY. June 20, 1860.—The Court of Exchequer having granted a rule nisi, to enter a verdict for the defendant on a point reserved at the trial, or for a new trial on the ground of misdirection and that the verdict was against evidence, afterwards made the rule absolute to the extent of granting a new trial. No leave to appeal was given. Held, by the Court of Exchequer Chamber, that no appeal lay. Williams, J., dissentiente.

[S. C. 290 L. J. Ex. 475; 8 W. R. 617.]

This was an action on a bill of exchange drawn by J. T. Harradine upon the defendant, accepted by him, and indorsed to the plaintiff. The defendant pleaded

that he did not accept. At the trial of the cause, before Pollock, C. B., it appeared that the defence was that the bill was a [114] forgery, but evidence was given that the defendant had paid similar bills. The learned Judge directed the jury that if the bill had been signed with the name of the defendant in a manner which had been accredited by the conduct of the defendant, and the plaintiff knew of such accrediting, and accordingly gave credit to such signature, they ought to find a verdict for the plaintiff. The jury found a verdict for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him if the Court should be of opinion that there was no evidence to go to the jury that would justify their finding a verdict for the plaintiff.

On the 23rd of May, 1857, the Court of Exchequer, on the motion of the defendant, granted a rule to shew cause why the verdict should not be set aside, and a verdict entered for the defendant, on the ground that there was no evidence of authority, general or special, from the defendant to accept the bill, and no representation of any authority to the plaintiff; or why the verdict should not be set aside, and a new trial had, for misdirection, or that the verdict was against evidence. The Court of Exchequer, on the 24th of November, 1857, made the rule absolute to the extent of setting aside the verdict and ordering a new trial.

Notice of appeal against this decision was given by the defendant, according to the Common Law Procedure Act, 1854. The case on appeal further stated that the plaintiff contended, amongst other things, that the defendant was not entitled to appeal from this decision.

O'Malley (with whom was Couch), for the appellant. This was a rule to enter a verdict upon a point reserved at the trial, and the Court of Exchequer has given a judgment discharging the rule so far as it relates to the entry of a verdict for the defendant on the point reserved. The [115] appellant has a right to be heard to say that the judgment was erroneous in that respect. Under the circumstances of this case the rule nisi should be treated as consisting of two distinct rules, rather than as being a rule in the alternative. If, looking at the whole rule, the judgment of the Court below is wrong, there is a right of appeal.

Hawkins, for the respondent. The case falls, not within the 34th, but within the 35th section of the Common Law Procedure Act, 1854. No appeal lies against the rule for a new trial except by leave of the Court, which has not been obtained. [Williams, J. Is not the defendant "decided against" on the points reserved at the trial?]

WIGHTMAN, J. It appears to me that we cannot entertain this appeal. The 34th section of the Common Law Procedure Act, 1854, enacts, that "in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to shew cause be refused, or granted and then discharged, or made absolute, the party decided against may appeal." That is applicable to a case where the rule is discharged or made absolute on the point on which it was obtained. Where the parties obtain a rule in the alternative, as to enter a nonsuit or for a new trial, and the Court accepts one of the alternatives, the right to appeal under the 34th section is gone. The parties give the Court authority to adopt either alternative. The case is within the 35th section. The plaintiff could not have appealed. The defendant has the advantage of a new trial, and the rule to enter a nonsuit drops. The 34th section was not intended to apply to a case of this kind.

WILLIAMS, J. I regret that I cannot agree with the rest of the Court. I think that we ought to hear the appeal. At [116] the close of the plaintiff's case the defendant's counsel objected that there was no case, and said that the Judge ought to direct the jury to find for the defendant. It was agreed that, instead of the Judge deciding it, the question should be reserved for the Court. It must be considered what would have been the case if there had been simply an application by the defendant to enter a verdict or nonsuit. It may be argued that even under those circumstances the Court might say, "Instead of that we will direct a new trial." But I consider that the agreement of the parties put them in a position to ask for judgment on the point reserved, and that it would be departing from the footing on which they stand, to say that the matter is one for further investigation. The agreement at the trial was one which, I think, the parties had a right to have carried into effect. Then, does it make any difference that the rule to enter a verdict also asks for a new trial? I think not. It appears to me that the rule is not in the alternative; which it would be if

the meaning were that the defendant would be content with one or the other of two things. The defendant in effect asks for a decision on a point of law, which, if decided in his favour, by a convention between the parties, is to entitle him to a verdict. Then he goes on to say, "If I am wrong on that point, I am at least entitled to a new trial." Why should the defendant lose his right to insist on the first point because he is diffident as to his success upon it? I think the Court was bound to have decided it. There is no reason why the defendant should be deprived of his right, because he also asks for something else, if he is now able to sustain that right. If, in consequence of the rule being in form alternative, or the defendant's delay in proceeding with the appeal, notice of trial has been given and costs incurred by the plaintiff, it may be proper to make the defendant pay the costs of such notice of trial, or other expenses rendered [117] unnecessary. Then we come to the question upon the words of the statute. The case appears to me to be exactly within the words of the 34th section. The point was reserved, a rule was granted, which, so far as regards the point reserved, was discharged, and the defendant has been "decided against" upon the point reserved; therefore I think he has a right to appeal.

CROMPTON, J. I am disposed to agree with my brother Williams in thinking that it is not material whether the rule simply asks to enter a verdict on the point reserved, or whether it also asks for a new trial. But I think that the right given by these sections is subordinate to the inherent power of the Court to grant a new trial whenever the justice of the case requires it. In this Court we are confined to matters of law. It is important, therefore, not to interfere with the discretion of the Courts in granting new trials. In the present case the Court thought that sufficient evidence had not been brought before the jury, and they, therefore, exercised their inherent power to grant a new trial. I agree that what took place at *Nisi Prius* was in the nature of an agreement that the Court should have the power to enter a verdict for either party. But the appellant cannot be in a better position than if the verdict had been actually entered for him; and I do not see why the arrangement should interfere with the discretionary power of the Court.

WILLES, J. I am of the same opinion. The arrangement was no more absolute or final than other arrangements, which are subject to be set aside or disregarded on the ground of mistake or fraud. If the Court finds that facts exist, which if brought to the knowledge of either party would have prevented the arrangement, it is the duty of the Court not to hold itself bound by such arrangement. There [118] is a clear and sound distinction between the superior Courts and Courts of inferior jurisdiction. While inferior Courts have no power, except by statute, to grant new trials, the superior Courts possess such power where the first trial has been unsatisfactory or abortive. In *Wade v. Simeon* (13 M. & W. 647) a Judge's order was obtained by consent, that, upon payment of the debt and costs on or before the 14th of December, all further proceedings should be stayed, and in default of payment the plaintiff should be at liberty to sign judgment. The Court of Exchequer held, that notwithstanding the order it had power to interfere, and ought to interfere if it perceived that the process and jurisdiction of the Court were about to be used for purposes not consistent with justice. I cannot help thinking that if the Courts were bound to act blindly on arrangements of this kind it would be abrogating a most wholesome jurisdiction. There appears to be express authority that the Courts are not absolutely bound by such a transaction as that in the present case. I agree that the question is the same as if the rule nisi had asked only to enter the verdict. In either case I think that the Court may, in the exercise of its discretion, grant a new trial. Therefore I think that we cannot entertain the appeal.

BLACKBURN, J. I also think that an appeal does not lie. The case is the same as if the rule had been simply to enter a verdict for the defendant. The true bargain between the parties at the trial was that a verdict should be entered subject to the opinion of the Court on the evidence as it then stood: but that arrangement was subject to the inherent right of the Court to set aside the verdict for any purpose of justice. In cases of leave reserved to enter a verdict I have always understood that the verdict [119] may be set aside on any other ground, and where it appears that the rule ought to be moulded, the Court may so deal with it. If, therefore, the Court finds that the facts at the trial, or any other matters, render it proper that they should do so, they may say "there ought not to be a verdict entered for the defendant, but the case must be further inquired into." We must, however, decide this as a matter of

law on the construction of the statute, and it is to be observed that the words of the 34th and 35th sections do not apply to the case where the rule is not "discharged or made absolute" but a middle course is taken.

KEATING, J. I concur in thinking that no appeal lies, because the rule has not been "discharged or made absolute." The Court have taken a middle course. If the defendant could appeal it appears to me that great inconvenience, and even injustice, would be the result. The defendant might prosecute his appeal in this Court, and afterwards in the House of Lords, and during all the time so occupied the plaintiff would have the rule for the new trial hanging over his head.

Hawkins applied for costs.

WIGHTMAN, J. We cannot give costs. All that we can say is that we do not entertain the appeal.

[120] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

STURGIS, Provisional Assignee of Hartley, an Insolvent Debtor v. SIR WILLIAM DARELL, BART., Administrator, with the Will annexed, of John Earl of Egmont. June 19, 1860.—In May, 1831, the obligee of a bond brought an action against the obligor. After notice of trial the action abated by the death of the obligor in December 1835. The obligor left a will, which was not proved by the executor named therein. On the 18th of May, 1857, administration of the goods and effects of the obligor with the will annexed was granted to the present defendant. In March, 1852, the obligee petitioned the Insolvent Debtors' Court, and his effects vested in the provisional assignee, the present plaintiff, who commenced an action on the bond against the defendant on the 17th of May, 1858. Held, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the right of action was not barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 42, s. 3.

[S. C. 29 L. J. Ex. 472; 6 Jur. (N. S.) 1351; 8 W. R. 653; 2 L. T. 808. Followed, *Swindell v. Bulkeley*, 1886, 18 Q. B. D. 254.]

This was a proceeding in error upon the judgment of the Court of Exchequer upon the special case reported 4 H. & N. 622.

R. E. Turner (with whom was R. G. Williams), for the defendant. (a) The question in this case is whether the same equitable construction is to be put upon the 3rd section of the 3 & 4 Wm. 4, c. 42, which has been put upon the 4th section of the 21 Jac. 1, c. 16, in the cases collected in the notes to *Hodsdon v. Harridge* (2 Wms. Saund. 64 a. b.). Now the statute of 21 Jac. 1, c. 16, is an ancient statute, and a wider and looser rule of construction has been applied to ancient than to modern statutes; with respect to which the established rule is to construe them literally, and to confine them to the cases specified in them, according to the rules enunciated by Lord Tenterden in *Brandling v. Barrington* (6 B. & C. 467, 475) and Coleridge, J., in *Gwynne v. Burnell* (6 Bing. N. C. 453, 476). Secondly, there is [121] evidence in the 3rd section of the 3 & 4 Wm. 4, c. 42, that this equitable construction is not to be applied to it. A period of limitation is fixed in actions for penalties, and, as penal statutes are to be strictly construed, an equitable construction will not be put upon this part of the section: *Adam v. The Inhabitants of Bristol* (2 A. & E. 389). A different construction cannot be put upon the same words as applicable to different parts of the same section. The Court will not construe one part of the section in one way and one in another. [Williams, J., referred to *Knight v. Bate* (Cowp. 738).] The Courts have unwillingly followed the construction given by the earlier cases to this section of 21 Jac. 1, c. 16: *Curlewis v. Earl of Mornington* (7 E. & B. 283; in error, 27 L. J. Q. B. 439) and *Rhodes v. Smethurst* (4 M. & W. 42; in error, 6 M. & W. 351). Lastly, the Court will, if in any doubt, consider the object and spirit of statutes of limitation, viz. ut sit finis litium: Story's Conflict of Laws, s. 576.

(a) June 18. Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., Blackburn, J., and Keating, J.

H. Mills, *contra*, was not called upon.

Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN, J. We are of opinion that the judgment of the Court of Exchequer should be affirmed. If the action in the present case, instead of being upon a bond, had been upon a promissory note, the question would have to be determined by the construction to be put upon the 3rd and 4th sections of the 21 Jac. 1, c. 16. The Courts, in several cases referred to in the argument before us and in the Court below, have determined upon an equitable construction of that Act, that if an action be duly commenced [122] within the time limited by the statute, and afterwards abates without any default of the plaintiff, a second action, commenced within a reasonable time after the abatement, shall be considered as a revival of the first. A similar equitable construction was recognised in the case of *Knight v. Bate* (Cowp. 738).

The question, however, in this case arises in an action on a bond, and is to be determined by the construction to be put upon the 3rd, 4th and 6th sections of the 3 & 4 Wm. 4, c. 42, which limits the time for bringing actions upon bonds or other specialties. The language of this latter statute is the same, *mutatis mutandis*, as that used in the statute of James, and the object seems to have been to add actions upon specialties and some others to those mentioned in that statute. It would therefore seem but reasonable that the same construction should be put upon the provisions of the latter statute as has been put upon the former, so far as such a construction may be applicable. It was said, however, for the defendant in the suit, that the provisions of the 3 & 4 Wm. 4, c. 42, apply to actions for penalties given to the party grieved as well as to actions on specialties, and that to apply the equitable construction contended for by the plaintiff would be contrary to the decision in *Adam v. The Inhabitants of Bristol* (2 A. & E. 389). It is, however, to be observed that the statute which was in question in that case contained no provisions similar to those in the statutes of 21 Jac. 1, c. 16, and 3 & 4 Wm. 4, c. 42, upon which the equitable constructions in question have been put, and the decision in that case can hardly be considered applicable to this; and it may be questionable whether the same equitable construction which might be extended to actions, which being on contracts differed only in this, that in one case the action was upon a contract by specialty, and in another was upon a simple contract only, [123] would be applied to actions for penalties given to the parties grieved, whose situation is in some respects wholly different to that of parties to a contract. It is not necessary, however, to consider this, as we think that the same equitable construction which has been applied to cases of actions upon contracts under the statute of James should be applied to actions upon contracts under the 3 & 4 Wm. 4, and that the defendant in error is entitled to our judgment.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

THE MARQUIS OF SALISBURY v. GLADSTONE. June 19, 1860.—A custom in a manor, that the copyholders of inheritance may, without licence from the lord of the manor, break the surface and dig and get clay without limit in, upon and from and out of their copyhold tenements, for the purpose of making bricks to be sold by them off the manor, is good in law.

[S. C. 30 L. J. Ex. 3; 9 W. R. 642: affirmed 1861, 9 H. L. Cas. 692; 11 E. R. 900 (with note). See also *Mercer v. Denne*, [1904] 2 Ch. 552.]

Error on a bill of exceptions. The action was ejectment to recover possession of certain closes of land in the parish of West Derby, and within the manor of West Derby, in the county of Lancaster, and part and parcel of the said manor.

The bill of exceptions stated that the plaintiff proved that he was lord of the manor of West Derby, and had been such lord since 1824; that the defendant was on the 6th of March, 1856, admitted according to the custom to, and then became a copyhold tenant, to hold to him and his heirs at the will of the lord according to the custom of the manor, of a tenement in the said manor being one of the closes men-

tioned in the writ, he and the other copyhold tenants paying to the lord a fixed annual rent of one shilling, and a fixed fine of four pence on admission, for every customary [124] acre of 9000 yards in respect of the copyhold tenements severally held by them; that the defendant did on divers days after the 4th of August, 1857, and before the commencement of the action, without the licence and against the will of the plaintiff, break the surface and dig and get clay in and upon, and from and out of his said tenement within and parcel of the manor, for the purpose of making the said clay into bricks to be afterwards sold off the manor, and which were afterwards sold by him off the manor for purposes not connected with the manor; and thereupon the counsel for the plaintiff insisted that the tenement of the defendant was thereby forfeited to the plaintiff, and that the plaintiff was entitled to recover possession thereof. Whereupon the counsel for the defendant produced evidence of an immemorial usage in the manor for the copyholders of inheritance of the said manor, without any licence from the lord of the manor, to break the surface, and dig and get clay without limit in, upon, from, and out of their copyhold tenements, situate in and parcel of the manor, for the purpose of making the clay into bricks to be afterwards sold by them off the manor, and to sell the same off the manor for purposes not connected with the manor; and the counsel for the defendant insisted that such usage, if proved to the satisfaction of the jury to have existed from time immemorial, was sufficient to prove a custom in the manor, for the copyholders of inheritance of the said manor, without any licence from the lord of the manor, to break the surface and dig, and get clay without limit in, upon and out of their copyhold tenements, situate in and parcel of the manor, for the purpose of making the clay into bricks to be afterwards sold by them off the manor, and to sell the same off the manor for purposes not connected with the manor, and that such custom was good in law. Thereupon the Justices directed the jury to find their verdict for the defendant, if they [125] should be of opinion that such custom was in fact proved by the evidence; whereupon the counsel for the plaintiff interposed and excepted that such custom was not good in law, and the jury found their verdict for the defendant.

The case was argued (a) by

Manisty (with whom were T. F. Ellis and T. Jones), for the plaintiff. The custom proved is bad in point of law. A custom to take the soil of the lord without stint or limit, and to carry away and use it for purposes not connected with the manor, is wholly inconsistent with the relative rights of the lord and the tenants. It tends to the destruction of the inheritance, and is therefore unreasonable and void in law. It is not contended that there may not be a limited right to take clay, but this alleged custom is a custom for all the tenants of the whole manor to do so to any extent. [Williams, J. It has always been held to be the law that a custom for taking soil in the land of another is bad, except in the case of copyholders claiming against the lord. In *The Marquis of Anglesey v. Lord Hatherton* (10 M. & W. 218) a custom to take the coals in copyhold tenements was set up.] There the jury found that no such custom as that set up existed. Though there may be, by custom, a limited right in a copyholder to do acts in the soil of the lord, which but for the peculiar relation of the lord and the copyhold tenant could not exist, no case is to be found in the books in which a right so large as that now claimed has been established. In *Clayton v. Corby* (5 Q. B. 415), which was an action of trespass for carrying away clay, the defendant justified, as owner of a brick kiln, and pleaded that all occupiers thereof for thirty years had enjoyed as of right, &c., a right to dig, [126] take, and carry away from the close so much clay as was at any time required by them for making bricks at the brick kiln in every year, and at all times of the year. On motion to enter judgment for the plaintiff, notwithstanding a verdict for the defendant on this plea, the Court held that the claim was unreasonable and bad. Lord Denman, in delivering the judgment of the Court, said:—"It is observable that, in all cases of a claim of right in *alieno solo*, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation and restriction." He pointed out that the claim there was "an indefinite claim to take all the clay out of and from the said close in which, &c., or, in other words, to take from the plaintiff, the owner, the whole close." That was not a case between lord and copyholder or it

(a) June 18. Before Wightman, J., Williams, J., Willes, J., Byles, J., Blackburn, J., and Keating, J.

would have decided the present question. In *The Attorney General v. Mathias* (4 Kay & J. 579), it was held that a profit à prendre in another's soil cannot be claimed by custom, however ancient, uniform and clear the exercise of that custom may be; and that a right to carry away the soil of another without stint cannot be claimed by prescription, nor by evidence of a lost grant. [Williams, J. A copyholder of inheritance may be entitled to cut the trees on his tenement, though a custom for a copyholder for life to cut trees is bad. That is fatal to the argument as to the taking in alieno solo. A copyholder of inheritance may by custom work mines; if he may take so much of the soil as consists of coal, why may he not take so much as consists of clay?] He must not destroy the surface. [Williams, J. By custom he may quarry in his own customary tenement. How is that right restrained?] If it be suggested that this is not a claim to take in alieno solo, it must be remembered that the freehold is in the lord, subject to the use by the tenants. In *Lovell v. Lovell* (3 Atk. 11), [127] Lord Hardwicke pointed out that on this ground no precipe could be brought against the tenant of a copyhold. *Mildmay v. Hungerford* (2 Vern. 243) is to the same effect. Two interests are always regarded, the proprietary interest of the lord and the possessory interest of the tenant: *Bourne v. Taylor* (10 East, 189); *Lewis v. Branthwaite* (2 B. & Ad. 437). The interest of the lord is not merely nominal. [Williams, J. If a copyhold tenant commits waste, generally speaking the tenement is forfeited, as a particular estate would be; but by custom a copyholder may commit waste: *The Bishop of Winchester v. Knight* (1 P. Wms. 406).] In *The Dean of Ely v. Warren* (2 Atk. 189; see also *Foiston v. Cruckroode*, 4 Rep. 31 b.), Lord Hardwicke held that copyholders in fenny lands may be entitled to dig up the lord's soil for turf. But peat or turf may be reproduced. [Wightman, J. After the removal of the clay the ordinary vegetable soil may be left. Clay is in the nature of a mineral.] There is a distinction between a right to coal and a right to get coal. If the right claimed had been to get the clay without injuring the surface, that would have been a limit which does not exist here. Though by custom a copyholder may take minerals provided he does not destroy the surface, there is no case which shews that a custom to mine in such a way as to destroy the surface would be good. A Court of equity will not allow tenants for life without impeachment of waste to exercise their privileges in an unreasonable manner, as by cutting trees planted or growing for shelter or ornament: *Obrien v. Obrien* (Amb. 107), *Strathmore v. Bowes* (2 Bro. C. C. 88), *Lord Tamworth v. Lord Fervors* (6 Ves. 419). One of the essentials of a good custom is, that it must be reasonable in itself: Broom's Maxims, p. 824, 3rd ed. *Tyson v. Smith* (9 A. & E. 406), there cited, might appear to militate [128] against the present argument. But, as is pointed out in the judgment of the Court (see p. 425), the distinction between that case and others, to which reference had been made in the argument, was, that the custom gave a certain profit to the owner of the soil for the use of the same. The lord cannot take all the timber trees, but must leave sufficient for necessary reparations: *Heydon and Smith's case* (13 Rep. 67; S. C. Godbolt, 172). If the lord could not make this claim, neither can the tenant, and the reason is that any custom which goes to the destruction of the right either of the lord or the tenant is bad. A custom for the lord to enclose the wastes without limit has been held bad, because it would be in destruction of the right of the commoners: *Arlett v. Ellis* (7 B. & C. 346, 365, 372). In *Ashmead v. Ranger* (1 Ld. Raym. 551), the House of Lords held that the interest of the tenant was subservient to that of the lord. In *Wilson v. Wiles* (7 East, 121), a plea of a custom to take turf from the waste of a manor to make and repair grass plots in the gardens, parcels of the customary tenements was held to be bad, as being indefinite, uncertain and destructive of the common. *The Attorney General v. Gauntlett* (3 Y. & J. 93) and *Valentine v. Penny* (Noy's Rep. 145) are to the same effect. [Wightman, J. That was a claim of right to dig turf in the lord's soil.] In *Broadbent v. Wilks* (Willes, 360; S. C. in error, 1 Wils. 63; 2 Stra. 1224), a custom for the lord and his tenants of collieries to sink pits within the freehold lands for working the same, and to lay the coals, &c., on the lands near to such pits, being customary tenements parcel of the manor, was deemed unreasonable and void. (*Wilkinson v. Proul* (11 M. & W. 33) and *Curtis v. Daniel* (10 East, 273, 277) were also referred to.)

[129] Edward James (with whom was Mellish and Baylis), appeared for the defendant, but was not called on to argue.

Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN, J. This case comes before us upon a bill of exceptions; and the question is whether a custom in a manor, that the copyholders of inheritance may, without licence from the lord of the manor, break the surface and dig and get clay without limit in, upon, and from and out of their copyhold tenements, for the purpose of making bricks to be sold by them off the manor, is good in law.

It was contended for the plaintiff that such a custom was bad, as inconsistent with the right of the lord who had an interest in the soil, and that the custom extended to taking away the soil itself, which the copyholder could, even by custom, have no right to do, to the prejudice of the lord's right, who might become entitled to the immediate possession of the copyhold tenement by forfeiture or escheat.

We are however unable to draw any sound distinction between customs for copyholders to take all the timber or trees, or all the minerals in their copyholds, and such a custom to take clay as that in question. I may observe, that it appears to us that the cases of profit à prendre, or easements in the waste of the lord, or in alieno solo, have no application to the present question. The copyholder may by custom not only have a possessory but a proprietary right in the trees and minerals in his copyhold tenement. In the case of minerals, the taking them is in effect a taking of a portion of the corpus of the copyhold tenement. There appears to be no doubt but that a copyholder of inheritance may not only by custom work old mines already opened, but that he may also by custom dig within his [130] tenement for new ones, and if successful work them. The case of *The Bishop of Winchester v. Knight* (1 P. Wms. 406) is an authority for the proposition, that by custom a copyholder of inheritance may open and work new mines. Lord Chief Baron Gilbert, in his *Treatise on Tenures*, p. 327, says, that "a copyholder of inheritance cannot without a custom dig for mines," obviously meaning that with a custom he could. In *Scriven on Copyholds*, p. 427, 4th ed., it is said, that by custom a copyholder of inheritance may be entitled to the trees and mines in his copyhold. Mr. Manisty, in his argument, did not doubt but that a custom for a copyholder to have and work quarries and mines might be good, but contended that the surface must be left; but no case was cited to warrant such a conclusion. It may be, that the mine or mineral, or a quarry of stone, might occupy the whole surface of the particular copyhold tenement, and that a general right to take stone or minerals would necessarily involve the taking of the surface; but, in the present case, there is nothing to shew that the taking the clay would necessarily involve the taking of the surface,—all the clay might be so situate as to be capable of being got at as coals or other minerals. But, however that may be, we think there is nothing to shew that such a custom as that in question is unreasonable or bad in point of law; and we may further observe that it is said in *Scriven on Copyholds*, p. 26, 4th ed., that a custom is not unreasonable because it is prejudicial to or diminishes the lord's casualty, or profits as to escheat. For these reasons we think that the defendant is entitled to our judgment.

Judgment affirmed.

[131] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

WILLIAM COLLINS v. CAVE. June 18, 1860.—A declaration alleged that the plaintiff, defendant and C. had entered into a joint speculation in railway shares: that C. had advanced 6000l.; 2000l. on his own behalf, 2000l. as a loan to the plaintiff, and 2000l. on behalf of the defendant: that C. was desirous of retiring from the adventure, and the defendant offered to take upon himself the whole of the adventure and debt of 6000l., provided the plaintiff would consent to abandon his share to the defendant, and C. would accept the defendant as his debtor in the place of the plaintiff for the said sum of 2000l.: that the plaintiff did abandon his share of the adventure to the defendant, and the defendant agreed to take upon himself the whole adventure and become debtor to C. for the whole 6000l.; and C., on the faith and in the belief that such an arrangement was made, consented to accept the plaintiff as such debtor in the place of the plaintiff; nevertheless the defendant knowing that he alone was capable of proving that the

plaintiff had assented to the said arrangement, fraudulently, falsely and maliciously, and before the Evidence Act, 14 & 15 Vict. c. 99, and in order to induce C. to believe that the said joint adventure had never been put an end to, and to induce C. to sue the plaintiff for the 2000l., and to deter the plaintiff from calling the defendant as a witness, and to destroy his credit as a witness if so called, wrote and sent to C. a letter purporting to be addressed to the plaintiff but directed to C., wherein he fraudulently and falsely pretended to expostulate with the plaintiff, and asserted that the plaintiff had positively refused to concur in the said arrangement. By means whereof C. was induced to and did believe that the plaintiff had never agreed to retire from the said adventure, and acting on such behalf C. brought an action against the plaintiff to recover the 2000l. : that the said action was referred to an arbitrator upon the terms that neither the plaintiff nor the defendant should be examined; and C. recovered against the plaintiff 2486l., which he was compelled to pay. Held, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the declaration was bad, since it did not appear that the damage to the plaintiff was the natural result of the wrongful act of the defendant.

[S. C. 30 L. J. Ex. 55; 6 Jur. (N. S.) 1160; 8 W. R. 586.]

This was a proceeding in error on the judgment of the Court of Exchequer on demurrer to the declaration. The case is reported, ante, vol. 4, p. 225.

C. E. Pollock, for the plaintiff. The declaration states a good cause of action. It alleges a fraudulent representation by the defendant, and damage resulting therefrom to the plaintiff. In Com. Dig., "Action on the case for deceit" (A. 10), it is said that an action lies "if a man, by a false affirmance of a thing within his knowledge, procure a fact to be done which otherwise would not be done." From the relation between these parties one had a right to expect [132] good faith from the other. In *Gerhard v. Bales* (2 E. & B. 476, 488), the Court treated it as clear law that if A. makes a fraudulent representation, which is false, and which he knows to be false, to B., meaning that B. shall act upon it, and B., believing it to be true, does act upon it, and thereby suffers damage, B. may maintain an action against A. for the deceit. It is not necessary that the representation should be made immediately to the other: *Pilmore v. Hood* (5 Bing. N. C. 97), *Scott v. Dixon* (29 L. J. N. S. Exch. 62, n.), *Seymour v. Bagshaw* (18 C. B. 903; see per Bramwell, B., 4 H. & N. 548). In *Bedford v. Bagshaw* (4 H. & N. 538), Bramwell, B., said, it is not a bad rule that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequence may be. [Wightman, J. Had Charles Collins a good cause of action against the now plaintiff?] Not if all the facts were shewn. [Wightman, J. Then the action is in substance for advising Charles Collins to bring an action which was not maintainable. Might not the plaintiff have had a good cause of action if the defendant had been called as a witness, and had spoken the truth?] If a person who has been party to a particular transaction, and knows that he is the only witness, makes a false statement with intent to induce another to bring an action, and to disqualify himself as a witness, he is liable for the consequences. It will be said on the other side, why did not the now plaintiff call the defendant as a witness? [Blackburn, J. It is not suggested on the record that the defendant would have committed perjury. Williams, J. It is consistent with what appears on the record, that he was called as a witness, and that the arbitrator did not believe him, and decided as he did notwithstanding the defendant's evidence.] It does not lie in the mouth of [133] the defendant to say that the plaintiff was not justified in acting on the representation made by him, or that the damage did not flow from his wrongful act. In *Barley v. Walford* (9 Q. B. 197) it was held to be no answer to an action for deceit that the plaintiff might, by inquiries, have avoided the result which followed from his believing and acting on the fraudulent statement of the defendant. [Willes, J. May not the declaration be good as a count for maintenance? According to *Broughton's case* (5 Rep. 24) terror of suit is a damnification, and in *Pechell v. Watson* (8 M. & W. 691) stirring up a pauper to bring an action was held to be actionable.] It is not necessary to shew that the plaintiff would have succeeded if he had had the benefit of the defendant's testimony. In an action by a plaintiff against a witness for not obeying a subpoena, where there were several issues, it was held that it was not necessary to shew that the plaintiff had a good cause of action

since his evidence might have affected the costs of some of the issues: *Couling v. Coe* (6 C. B. 703). The ground of the decision in *Cotterell v. Jones* (11 C. B. 713) was, that it did not appear that any costs had been incurred or awarded in consequence of bringing the action. Here the institution of the suit by Charles Collins, and the inability of the now plaintiff to defend himself, were brought about by the fraudulent representation of the defendant, and it was, therefore, a natural and necessary consequence of the act of the defendant that the award was made in favour of Charles Collins and against the now plaintiff.

Montague Smith and Flood, who appeared for the defendant, were not called upon.

WIGHTMAN, J. We are all of opinion that the judgment [134] must be affirmed. The action is grounded on a fraudulent representation which induced a person to bring an action, which he ought not to have brought, from which damage resulted to the plaintiff. The difficulty is, to say that the damage necessarily resulted from the fraudulent representation. It is alleged that the representation was made with a view to induce Charles Collins to bring the action and to deter the now plaintiff from calling the now defendant as a witness, and that his evidence would have been that an agreement had been made which was an answer to the action; but it does not appear on what ground the arbitrator formed his judgment, or that the suggested defence was relied upon before him. It is stated that neither the plaintiff nor the defendant were to be examined before the arbitrator, but it is not said that the facts were not admitted. The arbitrator may have considered that the agreement was not binding. There is no sufficient reason why the now defendant should not have been called as a witness, for it is not to be assumed that he would have spoken falsely upon his oath. We cannot infer that the arbitrator had no ground for coming to the decision at which he arrived; and we do not see that the damage which the plaintiff alleges himself to have sustained arose from the acts of the defendant.

WILLIAMS, J., BYLES, J., BLACKBURN, J., and KEATING, J., concurred.

WILLES, J. I concur in the judgment which has been delivered, but it must be remembered that the point as to maintenance is left untouched by this decision.

Judgment affirmed.

[135] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

CUTHBERTSON v. IRVING. July 7, 1860.—An assignee of the reversion may establish his title against the lessee by way of estoppel.—J. B., being mortgagor in possession, on the 22nd of February, 1848, by indenture executed by him and the defendant, demised to the defendant certain premises for seven years, and the defendant covenanted to repair. On the 2nd February, 1854, J. B. executed an indenture, whereby, after reciting the mortgage and that he had sold the equity of redemption to the plaintiff, he “granted, bargained and sold, aliened, released and surrendered the premises, and all his estate, right and title, both at law and in equity therein, to the plaintiff,” &c. The plaintiff sued the defendant for a breach of the covenant to repair. The declaration, after stating the lease and covenant, alleged that J. B. by deed assigned the premises to the plaintiff, whereby the reversion thereof, subject to the term created by the lease, vested in the plaintiff. The defendant pleaded that J. B. did not assign the premises to the plaintiff; nor had he at the time of making the lease any reversion of and in the premises; nor did any reversion in the premises come to the plaintiff: Held, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plaintiff was entitled to have the verdict on this plea entered for him: that the defendant was estopped from denying that the lessor had such a legal estate as would warrant the lease; and as no other legal estate or interest was shewn to have been in the lessor, it must be taken as against the lessee, by estoppel, that the lessor had an estate in fee.

[S. C. 29 L. J. Ex. 485; 6 Jur. (N. S.) 1211; 8 W. R. 704; 3 L. T. 335.]

This was a proceeding in error upon the judgment of the Court of Exchequer on a special case, stated by an arbitrator for the opinion of the Court (reported ante, vol. 4, p. 742).

Udall argued for the defendant.(a) The questions are, first, whether a reversion by estoppel can be conveyed to an assignee; and, if so, whether the assignee can maintain an action of covenant against the lessee. Secondly, whether in this particular case the lessor has effectually assigned his estate by estoppel. Thirdly, whether the declaration properly states the interest of the lessor. In *Armiger v. Parks*, cited in *Awder v. Noke*,(b)¹ it was held that if the first lease [136] were only a lease by estoppel, the assignee of the estoppel should not have an action of covenant. On the authority of that case, in *Noke v. Awder* (Cro. Eliz. 436; S. C. Moore, 419) the Court resolved that an action of covenant never lies upon the assignment of an estate by estoppel. *Noke v. Awder* is a case of the highest authority; it was argued by Sir Edward Coke when Attorney General, and came before the Court several times. In *Lyn v. Wyn* (O. Bridgm. 122, 131), it was held that a lessee by estoppel cannot assign anything over. *Palmer v. Ekins* (2 Ld. Raym. 1550) amounts to no more than this, that a lessee cannot plead nil habuit in tenementis, in any form. [Williams, J. *Palmer v. Ekins* is better reported in *Strange* (2 Stra. 817), where it appears that the 6th resolution was that the plea was ill, on account of the generality of the traverse which tied up the plaintiff to prove the estate alleged in the declaration, when any other estate would do, even a disseisin, where it appeared that the tenant had enjoyed under the lease.] In *Carvick v. Blagrove* (1 Brod. & B. 531), the declaration alleged that S. T. being possessed for the remainder of a term of twenty-two years demised to the defendant, and afterwards assigned his estate and interest to the plaintiff for the residue of the said term of twenty-two years. The defendant pleaded that S. T. was not possessed for the residue of the term of twenty-two years in manner and form as in the declaration mentioned. The Court, on demurrer, held the plea good; they said that the lessee was under no engagement to any one who was not the legal assignee, and that on the trial of the issue the question would be whether S. T. had a larger term out of which he could carve the lesser term. That decision was confirmed and acted upon by the Court of King's Bench in *Seymour v. Franco* (7 L. J. O. S. K. B. 18), and also by the [137] Court of Common Pleas in Ireland in *Lennon v. Palmer* (5 Irish Law Rep. 100, 106). There Doherty, C. J., in delivering the judgment of the Court, said, "It is true that the estoppel will bind the lessee against any one deriving his legal title from the lessor, but it is equally true that the lessee is under no obligation to admit the title of his lessor in any action by any person save that lessor himself, or by any one who is his legal assignee." In *Whilton v. Peacock* (2 Bing. N. C. 411), on a case sent from Chancery, it appeared that a lessor, having only an equitable estate in a certain field, of copyhold tenure, demised a portion of it to a lessee for ninety-nine years, and afterwards acquired the legal estate by surrender and admittance according to the custom of the manor. By various surrenders and admittances the customary estate of the lessor became vested in the plaintiff. The Court of Common Pleas certified that the plaintiff could not maintain an action of covenant against the assignee of the lessee. In *Gouldsworth v. Knights* (11 M. & W. 337), Parke, B., suggested that the reason of that decision was, that the reversion by estoppel on the first lease was not a copyhold transferable by surrender and admittance. [Wightman, J. I think that the Court meant to decide the case upon the grounds taken in the argument.] In *Gouldsworth v. Knights* (11 M. & W. 337), the Court intimated an opinion that the plaintiff, being estopped from disputing the title of the old trustees, could not dispute the title of the new trustees who claimed by an assignment from the old trustees; but they did not decide the case on that ground, and there is no earlier authority for the doctrine. In *Pargeter v. Harris* (7 Q. B. 708), Lord Denman observed this. [Williams, J. In *Pargeter v. Harris* the title of the lessors was shewn on the face of the lease, and the defendants, therefore, were not estopped from shewing that the lessors had not a legal [138] reversion.] In *Sturgeon v. Wingfield* (15 M. & W. 224), the defendant had acquired an interest which fed the estoppel and the term which commenced by estoppel had become an estate or interest.(b)² [Williams, J. When Lord Wensleydale said that the reversion by estoppel is a reversion in fee, he probably meant that it is *prima facie* a fee; but probably the lessor may shew that it is a less

(a) June 20. Before Wightman, J., Williams, J., Willes, J., Byles, J., Blackburn, J. and Keating, J.

(b)¹ Moore, 419; S. C., cited Cro. Eliz. 437, nom. *Armiger v. Purcas*.

(b)² See *Webb v. Austin*, 7 Man. & G. 701, 724.

estate. Were this otherwise there would be a difficulty in cases where a lessee for years, after having mortgaged his estate, grants an underlease. If the reversion upon such underlease must be assumed to be an estate in fee, the heir must bring actions when in fact the beneficial interest would be in the executor.] In *Webb v. Austin* (7 M. & G. 701), the Court does not overrule *Whitton v. Peacock* (2 Bing. N. C. 411), except on the point that the estoppel might be fed. The statute 32 Hen. 8, c. 34, does not give a remedy to any one who is not a grantee or assignee of the land. The persons empowered by it are "all persons having any gift or grant of any lands or other hereditaments, or of any reversion in the same, &c., and all persons being grantees or assignees to or by the king or to or by any other person than the king, &c." Secondly. The declaration is bad on general demurrer for not setting out the title of the lessor: *Thursby v. Plant* (1 Wms. Saund. 233 a.). [Williams, J. Is that a ground of general demurrer?] In *Willett v. Boscomb* (11 Mod. 179), the point arose on motion in arrest of judgment; that was in Trin. T. 7 Anne, after the passing of 4 Ann. c. 16. [Williams, J. If the declaration is insufficient in this respect it may be amended. Wightman, J. For the purpose of the present argument we will treat the declaration as if it averred a seisin in fee, which had been traversed by the defendant.] Thirdly. [139] If the lessor had any legal interest by way of estoppel, he has not assigned it, and such estate remains in him. He has assigned the equity of redemption, which is a mere contract. If, after the assignment of the equity of redemption to the plaintiff, the lessor had acquired the legal estate, the estoppel would have been fed. The reversion could only pass by surrender and admittance. Therefore, even if the reversion by estoppel could, under any circumstances, have been assigned, it has not, in fact, been assigned here. He also referred to *Doe d. Prior v. Ongley* (10 C. B. 25).

Crompton Hutton (with whom was Edward James), appeared to argue for the plaintiff, but was not called upon.

Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN, J. The lessor in this case, being a mortgagor in possession at the time of the granting of the lease, had no legal title to the premises, but only an equity of redemption. His title, therefore, as between him and his lessee is only by estoppel, and if the lessor assign, as he can only assign that which he had, his assignee will either have a title by estoppel as against the lessee, or no title at all. In this case, if the plaintiff had declared in the old form he would have stated the lessor to have been seised in fee, which according to the cases might have been traversed, and if it had, and it had appeared upon the evidence that the lessor had no legal estate or interest whatever in the premises, but only an equity of redemption, the question is, how ought the issue upon the traverse to be found? The answer is, for the plaintiff, because the lessee is estopped from denying that the plaintiff had such a legal estate as would warrant the lease; and as no other legal estate or [140] interest is shewn to have been in the lessor, it must be taken as against the lessee, by estoppel, that the lessor had an estate in fee. It may be difficult to reconcile all the cases upon the point, but they are all discussed in the notes to *Spencer's case*, in the 1st volume of Smith's Leading Cases, p. 66, and in the judgment in this case, delivered by my brother Martin in the Court below; and the result appears to be, that there is no sound reason why the assignee of the reversion should not establish his title by way of estoppel. We, therefore, think that the judgment should be affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

RUSSELL v. THORNTON. June 19, 1860.—The plaintiff, who was agent in London of the foreign owners of a steam-ship, "B," being instructed by them to cause the ship to be insured for a year, from the 21st of January, 1857, employed H. and Co., insurance brokers, to effect the insurance. On the 15th of January, H. and Co. applied to the defendant to become an insurer. On that day the plaintiff received a letter from the captain of the ship informing him that the vessel had been aground and had received some heavy blows, and had made her way in a sinking

state to the port of Carthagena, where she then was. On the same day the plaintiff communicated this letter to H. and Co., but they did not communicate it to the defendant. On the 16th the defendant agreed to become an insurer for 3000*l.*, and debited H. and Co. with the premiums. On the 22nd the plaintiff sent an extract from the captain's letter to Lloyd's. The defendant, who was then for the first time informed of the fact that the ship had been ashore, wrote to H. and Co. as follows:—"Understanding that the ship 'B.' has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." This letter was not answered by H. and Co. The debit of H. and Co. in the books of the defendant remained until after the loss. On the 2nd April, the vessel was surveyed and reported to be perfectly tight and in a condition to undertake a voyage of any description. After several intermediate voyages she was totally lost on the 9th of October, 1857. Held, in the Exchequer Chamber: First, that there was no waiver of the objection to the policy by reason of the concealment of the information that the vessel had been ashore. Secondly, that there was no evidence of a new contract founded on the defendant's letter of the 22nd of January.—Semble, that the letter, even if answered by H. and Co., would not have amounted to a new contract.

[S. C. 30 L. J. Ex. 69; 6 Jur. (N. S.) 1080; 8 W. R. 615.]

This was a proceeding in error on the judgment of the Court of Exchequer for the defendant upon a special case [141] stated for the opinion of that Court (reported 4 H. & N. 788).

The Solicitor General (with whom was Cleasby and Honyman) argued (*a*) for the plaintiff. Three questions arise upon the pleadings. First, was there a concealment of information material to the risk and which ought to have been communicated to the defendant? Secondly, if so, did the defendant waive all objection to the policy by reason of such concealment? Thirdly, was there a new valid contract? Having regard to the facts, that on the 6th January the vessel was in a sinking state, that on the 15th the plaintiff was informed of it, and that on the 19th the defendant signed the policy in ignorance of what had happened to the ship, it is not proposed to argue the first question, for it is conceded that the plaintiff was in possession of information material to the risk which was not communicated to the defendant. Then, secondly, was there a waiver? [Crompton, J. In the case of forfeiture, has it not been decided that there can be no waiver without knowledge of the condition broken?] On the 22nd January the defendant wrote to the plaintiff, saying, "I do not consider that my risk commences until the vessel has been surveyed and repaired." Therefore at that time the defendant knew the circumstance which was material, viz. the nature and extent of the risk. He also knew that the plaintiff was aware of the condition of the ship, and had not communicated it to him when he signed the policy. The letter of the 22nd January is, in legal effect, addressed to the plaintiff, though in form it is addressed to his brokers, and it assumes that they have authority to accept the defendant's [142] offer to insure on the terms mentioned. Besides, the defendant retained the premium. There was either a waiver or a new contract. [Williams, J. When do you say the risk ceased under the new contract?] At the end of the original year, the 19th January, 1858. The defendant in effect says, "I will be bound by the original contract from the time the vessel is surveyed and repaired." It is immaterial whether there was a waiver or a new contract. If a new contract, was it assented to by the plaintiff? There is sufficient evidence of assent. The letter was received by the brokers on the same day, and their silence is equivalent to assent. The defendant having limited the commencement of his liability to the period when the ship should be repaired, it became immaterial to him whether there was a previous concealment; for the only object of the communication is that the person asked to subscribe the policy may himself judge as to the nature of the risk. The fact of the defendant's letter not having been answered is no proof that it was rejected, whilst an assent to it may be inferred from silence coupled with conduct. [Crompton, J. The letter does not look like a new insurance: it merely says that, under the circumstances, there shall be no risk until the vessel has been repaired; that is, under the old

(a) Before Wightman, J., Williams, J., Crompton, J., Byles, J., Willes, J., Blackburn, J., and Keating, J.

contract.] There can be no doubt that the plaintiff received the proposal and acted upon it; and, moreover, the defendant intended that the plaintiff should act upon it, to his detriment. The defendant, having placed the plaintiff in this position, cannot now be heard to say there was no waiver of the non-communication. It is evident that the plaintiff acted on the faith of the letter, for he took no step to effect any other insurance of the ship. The repairs were done, and after the ship was lost the defendant turns round and says, "although you have abstained from effect-[143]-ing another insurance in consequence of my conduct, I will now repudiate the risk." The plaintiff relies on the principle that, if one person by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time: *Pickard v. Sears* (6 A. & E. 469). [Crompton, J. If the parties wished to enter into a new contract of insurance for three quarters of the year, I should have thought that there would have been a demand for the return of a quarter's premium. Wightman, J. My difficulty is this—the plaintiff is silent; he does nothing until the loss occurs and makes it desirable that he should act. His silence may be interpreted thus: "You may consider what you like, but you are bound by the terms of the policy."] The defendant does not demand any answer to his letter. [Keating, J. It is the brokers who are debited, and the case makes no mention of the state of accounts between them and the plaintiff.] The usual course of business in London amongst insurance brokers is, that the premiums are not paid when the insurance is effected, but the debit is considered by both parties as payment.

Lush (with whom were Bovill and C. Pollock) appeared to argue for the defendant, but was not called upon.

WIGHTMAN, J. As to the first count, we are all of opinion that there was no waiver of the omission to communicate the information material to the risk, because a person cannot waive that which he does not know; and it was not until after the policy was effected that the defend-[144]-ant became aware of the state of the ship. Therefore the whole question arises on the second count: and we are all of opinion that there was no evidence of a new contract. All that appears upon the evidence is this (and we are put in the place of a jury):—On the 22nd January, 1857, the defendant thus wrote to the brokers and agents of the plaintiff—"Understanding that the steamer 'Butjadingen' has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." Therefore, even if the brokers had sent an instant answer, saying "We think so ourselves," it is doubtful whether that would have amounted to a new contract. But no answer whatever is sent. The only evidence as to a change of contract is that the defendant uses those expressions in a letter and the brokers say nothing. There is no evidence of any acceptance of those terms, even supposing they would amount to a new contract, and consequently there is no evidence to warrant a verdict for the plaintiff on the second count. For these reasons we think that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

[145] EXCHEQUER REPORTS. MICHAELMAS TERM, 24 VICT.

CHAPPELL v. BRAY. Nov. 3, 1860.—The plaintiff, part owner of a ship, and who acted as ship's husband, being authorized by the other part owners (of whom the defendant was one), to repair and lengthen the ship, gave verbal orders for the repairs, and entered into a written contract with a ship builder for lengthening the ship. Afterwards the plaintiff received a notice from the defendant that he would not be answerable for any alterations in the ship. The work was completed and the plaintiff paid for it, and on telling the defendant the amount, he said that "the ship had better have been sold." The plaintiff having sued the defendant for his proportion of the money paid:—Held: First, that the fact of the plaintiff having acted as ship's husband was sufficient evidence of his appointment, without any formal proof.—Secondly, that the authority to make the alterations could not be revoked after it was acted on, and that it was for the

defendant to prove that his notice was given before the work was commenced.— Thirdly, that the plaintiff need not produce the written contract, since the work was done, the money paid under it, and the defendant, on being told the amount, did not deny his liability.

[S. C. 30 L. J. Ex. 24; 9 W. R. 17; 3 L. T. 278. Distinguished, *Hill v. Nuttall*, 1864, 17 C. B. (N. S.) 262.]

Action for money paid by the plaintiff for the use of the defendant. Plea: Never indebted.

At the trial, before Bramwell, B., at the Cornwall Summer Assizes, 1859, it appeared that the action was brought to recover from the defendant contribution in respect of two sums of 200l. and 110l. 16s. 9d. paid by the plaintiff as ship's husband in repairs and alterations of a ship, of which the plaintiff and defendant were part owners. There was no evidence of any formal appointment of the plaintiff as ship's husband, but it was proved that he had acted in that capacity. On the 22nd of January, 1860, there was a meeting of the owners of the ship, at which the plaintiff and defendant were present, when it was proposed to cut [146] the ship in two and lengthen as well as repair her. The defendant at first said he would rather have the vessel sold, but afterwards he said "he would not stand alone," and the proposal was carried. The plaintiff afterwards gave verbal orders for repairs, and also entered into a contract in writing with a shipbuilder, and the ship was taken into dock and the works commenced. This contract was not produced in evidence, it being unstamped. On the 26th of January the defendant served the plaintiff with the following notice:—"To Mr. Chappell, part owner of the ship, &c., and all whom it may concern. I, William Bray, do hereby give notice that I will not be answerable for any alterations that may be effected in the ship, or any debts which may be contracted on the said vessel from and after the date of this action." The work was completed and paid for by the plaintiff. Afterwards the plaintiff told the defendant of the amount which he had paid, when the defendant said, "You had better have sold her."

It was objected on the part of the defendant: First, that there was no evidence of any authority to the plaintiff to order the repairs and alterations: Secondly, that the work was done after notice from the defendant that he would not be liable: Thirdly, that the written contract ought to have been given in evidence. The learned Judge reserved the points, and a verdict was entered for the plaintiff with 25l. damages; the defendant to be at liberty to move to enter a nonsuit, and the Court to have power to deal with the facts.

Coleridge, in the following term, obtained a rule nisi accordingly, against which

H. T. Cole shewed cause. The defendant would have been liable for work that was necessary, although he was not present when it was ordered, and had not assented to [147] its being done. The law is thus stated in Abbott on Shipping, p. 105, 8th ed.: "With regard to the repairs of a ship and other necessities for the employment of it, one part owner may, by ordering these things on credit, render his companions liable to be sued for the price of them, unless their liability be expressly provided against." It is sufficient if the necessities are furnished to the ship by order of the ship's husband, being himself a part owner: *Helme v. Smith* (7 Bing. 709), *Whitwell v. Perrin* (4 C. B. N. S. 412). Then could the plaintiff bind the defendant in respect of the work not necessary? A special authority was given to him as ship's husband, in pursuance of which he entered into a contract with a shipbuilder and rendered himself liable for the work done under it. The defendant relies on his notice that he would not be answerable for any alterations to the ship; but he was not at liberty to revoke his authority after the work was commenced and the plaintiff became liable to the shipbuilder. Then, with respect to the written contract, it was not necessary to give it in evidence in order to shew the amount of contribution for which the defendant was liable; it was enough for the plaintiff to prove that the work was done and the price of it paid by him. The defendant relies on *Vincent v. Cole* (3 C. & P. 481; Moo. & M. 257); but *Reid v. Batte* (Moo. & M. 413) shews that it is not in all cases imperative on the plaintiff to produce the written contract under which work is done. Lord Tenterden there said, "So much injustice has frequently been done by a rigid adherence to this rule, that I should be reluctant to carry it into strict execution."

Coleridge, in support of the rule. There was no evidence that the plaintiff was ship's husband. Although the appointment need not be in writing, there must be some [148] formal act of appointment. [Wilde, B. If a person acts as ship's husband without any appointment, and the owners of the ship acquiesce in it, that is enough.] A ship's husband has no authority to pledge the credit of the owners for lengthening the ship, but only for necessary repairs. Moreover, before the greater portion of the work was done, the authority from the defendant was revoked by his notice. The contract ought to have been given in evidence; the defendant was entitled to know what portion of the work was done under it. Besides, it was material for the plaintiff to prove that the work was commenced before the defendant revoked his authority, and that would appear by the date of the contract. If the shipbuilder had sued the plaintiff for the work, the former must have produced the contract, and this action equally depends upon it. The defendant is not liable for the money paid by the plaintiff unless it was the plaintiff's duty to pay it, and that can only be ascertained from the contract. [Channell, B. The liability of the defendant depends on the facts that the plaintiff has exercised the authority to order the work, and has paid for it.] Suppose the plaintiff paid more than the contract price, the defendant would not be liable for the excess: that shews that the contract ought to be produced, in order that the defendant may see that he is not charged with more than the plaintiff was bound to pay. *Buxton v. Cornish* (12 M. & W. 426) and *Vincent v. Cole* (3 C. & P. 481; Moo. & M. 257) are authorities in point.

POLLOCK, C. B. We are all of opinion that the rule ought to be discharged. The first objection is, that the plaintiff had no authority to order the repairs and alterations of the ship. It appears to me that the conduct of the defendant at the meeting of the owners, when he said that [149] "he would not stand alone," amounted to an agreement to join the others in giving the order, and therefore he cannot now say that the plaintiff had no authority. In considering the whole case, we ought to bear in mind what was pointed out by my brother Bramwell, that the plaintiff was not merely an agent but a part owner of the ship. The second objection is, that the work was done after notice by the defendant that he could no longer be liable. It may be conceded that an owner of a vessel has a right to say to the other owners that he will not expend money in repairing her, and that if they choose to order repairs it must be on their own responsibility. But here the defendant had authorized the work, and it was for him to shew that the notice was given before the work was commenced. The third objection is, that the contract ought to have been given in evidence. I am not prepared to decide whether it ought or ought not, for on the present occasion it is unnecessary, because when the work was done and the defendant was told the amount he made no complaint that the sum with which he was charged was not strictly correct, nor did he make any inquiry about it, but merely said that it would have been better to have sold the vessel. His conduct is evidence from which a jury might come to the conclusion that the claim was correct, and it is now too late for him to dispute it. For these reasons it appears to me that all the grounds of the rule fail.

BRAMWELL, B. I am of the same opinion. The plaintiff seeks to recover from the defendant a proportion of two sums of 200l. and 110l. 16s. 9d., paid by the plaintiff, as ship's husband, for the repairs and alterations of a ship of which the defendant was a part owner; and the question is, whether the plaintiff has made out his case in respect of either or both of those sums. Now there is no doubt [150] the defendant did agree that the vessel should be lengthened, and that, in point of fact, it was lengthened under a written contract. It was argued, on the part of the defendant, that his obligation was to pay a proportion of that money for which he was liable under the contract, and since the contract was in writing it must be produced. But *Slatterie v. Pooley* (6 M. & W. 664) established that the necessity of proving a written agreement may be superseded by an admission of the defendant. Then the question is, whether there was any evidence of such an admission. The plaintiff says to the defendant, "I have paid 200l. for alterations of the ship," and the defendant does not deny his liability to pay his share of it. In my opinion it cannot be said that the defendant's conduct and demeanour is not an admission by him that the money has been paid. If the defendant relies on a revocation of his authority before the agreement was acted on, he was bound to prove it. It was argued that the plaintiff could not recover for the extras if he could not recover for the work done

under the contract; but as he is entitled to recover the work the argument altogether fails.

CHANNELL, B. In the course of the argument I entertained some doubt, but I am now satisfied that the rule ought to be discharged. The plaintiff, part owner of a ship and also ship's husband, seeks to recover from the defendant, another part owner, a sum which, it is alleged, he is liable to pay, as his proportion of the repairs and alterations of the ship. No question of fact was left to the jury; and, so far as it is necessary for us to discharge the functions of a jury, the parties have given us the power. The first objection is, that there was no proof that the plaintiff was ship's husband, but there was abundant evidence of his having acted in that capacity, and that is sufficient. Then the question arises, what is the position of [151] a ship's husband? And what authority has he to bind the owners in respect of the ship? It is not necessary to determine whether he has authority to lengthen the ship, because in this case, when it was proposed to do so there was a special authority, which would supply the place of any want of authority which the law might imply. Therefore, the ship was lengthened by order of the plaintiff, acting under a special authority. Then it is said that the order was given by a written agreement, which ought to have been produced. No doubt its production would have been one mode, and the most convenient mode, of proving the plaintiff's claim; but I am not prepared to admit that it is the only mode. It was objected that no question as to the written agreement could be asked without producing it; but I think the agreement was not a necessary element in the plaintiff's case, for there was proof that the work was done under it, the amount paid, and that it was not unreasonable; and there were circumstances from which the Court, sitting as a jury, might infer that the defendant adopted the payment. Then, did the defendant so act as to warrant the Court in drawing that inference? He was part owner of the ship, and the work was done while the ship was in dock; and taking the notice that he would be no longer answerable, to have been given on the 26th January, the defendant does not deny that he authorized what was done, nor does he contend that any work was done beyond what he ordered. Moreover, the expression of the defendant when he was told the amount, "that the ship had better have been sold," is evidence to shew that work was done which he had authorized. The only remaining question is as to the revocation of the plaintiff's authority. The agreement was not put in, and there was no evidence of the date; but the plaintiff having made out a *prima facie* case, it was for the defendant to rebut it by setting up [152] the agreement. The defendant merely put in the notice; but it is evident that the notice was given after some of the work had been done.

WILDE, B. I am of the same opinion. The question of fact for the Court to determine is, whether there was any agreement on the part of the defendant that the vessel should be lengthened. There is no doubt the plaintiff made out a *prima facie* case. It appeared that the work was done and had been paid for, and when the plaintiff told the defendant what it cost he did not make any objection, but merely said, "the vessel had better have been sold." If the question had arisen, whether independently of that conversation it was necessary to put in the written agreement, I should not be prepared to hold that the plaintiff was bound to do so, seeing that there was evidence of an authority to enter into the agreement, and that it was executed. Upon that, however, it is not necessary to give an opinion, for the point does not arise. Then, the plaintiff having made out a *prima facie* case, the remaining question is, whether there is evidence that his authority was revoked. The proof of that ought to have come from the defendant. An authority cannot be revoked if it has passed an interest and has been executed. Here it had been executed; for the work was commenced, and consequently there was no power of revocation.

Rule discharged.

[153] WOODALL v. VOIGT AND ANOTHER. Nov. 15, 1860.—The 86th section of the Bankrupt Law Consolidation Act (which entitles a defendant to costs where the plaintiff fails to recover the amount for which he has filed an affidavit of debt), does not apply to cases where the action has been removed by the defendant from an Inferior Court.

[S. C. 30 L. J. Ex. 31; 6 Jur. (N. S.) 1162; 9 W. R. 57; 3 L. T. 334.]

This was a rule calling on the plaintiff to shew cause why the defendants should

not be allowed their costs of this action, pursuant to the 86th section of the Bankrupt Law Consolidation Act, 1849.

The plaintiff had filed in the Court of Bankruptcy at Leeds an affidavit of debt, under the 78th section, in which he deposed that the defendants were indebted to him in the sum of 168l. 6s. 11d. for goods sold and delivered. The plaintiff afterwards brought an action against the defendants for that amount in the Court of Record of Kingston-upon-Hull. The defendants removed the cause by certiorari into this Court, and the plaintiff recovered 132l. 11s. 2d. only.

Digby Seymour shewed cause. This case is not within the 86th section of the Bankrupt Law Consolidation Act, 1849. That section provides "that in every action &c. wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the Court in which such action shall have been brought, provided that it shall be made appear to the satisfaction of the Court in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt as aforesaid, and provided such Court shall [154] thereupon, by rule or order, direct that such costs shall be allowed to the defendant," &c. The 43 Geo. 3, c. 46, s. 3, was in similar terms, and the words "in which such action is brought" were construed to mean "in which such action is originally commenced:" *Connel v. Watson* (2 Dowl. P. C. 139), *James v. Dawson* (1 Dowl. P. C. 341), *Costello v. Corlett* (4 Bing. 474). There is no reason why the 86th section of the Bankrupt Law Consolidation Act, 1849, should not receive the same construction. It is no hardship on the defendant, for he removed the cause from the original Court.

P. Thompson, in support of the rule. There has been no decision on the present Bankrupt Act. In *James v. Dawson* (1 Dowl. P. C. 341) the Court doubted whether the proper construction had been put on the 43 Geo. 3, c. 46, s. 3, but felt bound by the authorities. [Pollock, C. B. This is not a remedial but a penal enactment: it says that the defendant's costs shall be paid by the plaintiff if he shall not recover the full amount of the sum for which he has filed an affidavit of debt, thereby imposing the same penalty whether the deficiency is 10l. or 300l. or any other sum. To extend the construction of such an enactment may in many instances be productive of injustice, since the penalty is not commensurate with the offence.]

Per Curiam.(d) The rule must be discharged.

Rule discharged.

[155] WHEELER AND WIFE v. STEVENSON AND HAGGER. Nov. 25, 1860.—In ejectment for a forfeiture, under the Common Law Procedure Act, 1852, s. 210, it appeared that the plaintiff sought to recover possession of two houses, numbered 13 and 14, which, in August, 1849, with two other houses, numbered 15 and 16, were demised by the plaintiff to L. for twenty-one years at an annual rent of 73l. 10s. payable quarterly.—The lease contained the usual proviso for re-entry on nonpayment of rent. At Midsummer 1858, a year's rent was due, and in July, 1858, the houses, No. 15 and 16, were deserted and a police constable entered and for some time kept possession of them, but afterwards, by the direction of the plaintiff's agent, gave possession to T. to take care of them for the plaintiff; but upon a verbal understanding that if the plaintiff could get possession of No. 13 and 14, the four houses should be let to T. In December, 1859, a distress for 73l., one year's rent, due Michaelmas 1858, was put in on No. 13 and 14, which were then occupied by the defendants. At that time the property on the premises was only worth a few shillings, and there never was, up to the commencement of the action, a sufficient distress to satisfy the arrears of rent. No distress or search was made on No. 15 and 16 after T. took possession, and it was uncertain whether, at the time of the service of the declaration, there were or were not goods on those premises sufficient in value, if distrainable, to satisfy the arrears of rent.—Held. First, that there was no evidence for the jury of an

(d) Pollock, C. B., Bramwell, B., Channell, B., and Wilde, B.

eviction by the plaintiff in respect of the houses No. 15 and 16.—Secondly, that there was evidence of no sufficient distress, since the plaintiff was not bound to shew that there were no goods of sufficient value in No. 15 and 16, inasmuch as the possession of T. must be considered as the plaintiff's possession and, under the circumstances, justifiable.

[S. C. 30 L. J. Ex. 46; 9 W. R. 233; 3 L. T. 702.]

Ejectment to recover possession of two dwelling-houses, Nos. 13 and 14 Portsmouth Street, in the parish of St. Giles in the Fields. The defendant Stevenson did not appear to the writ, and judgment was signed against him. The defendant Hagger defended for the whole of the premises.

The cause was tried before Channell, B., at the Middlesex Sittings in last Easter Term, when it was agreed that a verdict should be entered for the plaintiffs, with liberty to the defendants to move to enter a nonsuit or verdict for the defendants, if the Court should be of opinion that there was no evidence that there was no sufficient distress on the demised premises, or of a sufficient search.

West shewed cause in last Trinity Vacation (June 20); but, at the commencement of his argument, the Court called on G. Browne to support the rule. The facts of the case, and the points, are so fully stated in the judgment [156] that any further report of them is rendered unnecessary. *Doe, Lessee of Smelt v. Fuchau* (15 East, 286) was referred to.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. This was an action of ejectment, tried before my brother Channell, at the sittings in last Easter Term. It was brought to recover possession of premises Nos. 13 and 14 Portsmouth Street, St. Giles in the Fields.

Judgment for non-appearance was signed against the defendant Stevenson. The defendant Hagger defended for both houses.

The premises sought to be recovered were, with two other houses numbered 15 and 16 in the same street, by lease dated the 27th August, 1849, demised by the plaintiff Wheeler to one Leary for a term of twenty-one years, at an annual rent of 73l. 10s., payable quarterly. The lease contained a proviso, which was in the ordinary form, for re-entry on non-payment of rent. The action was brought under the Common Law Procedure Act, 1852, s. 210, for a forfeiture, by non-payment of half a year's rent.

The plaintiffs proved a clear title to recover, provided a forfeiture was established, and insufficiency of distress shewn. Rent was received under the lease up to Midsummer, 1857, leaving at Midsummer, 1858, a year's rent due. It was proved that in July, 1858, the houses numbered 15 and 16 were unoccupied and deserted. Nothing whatever available for the rent was left upon them. A police constable entered upon them and kept possession for some time. He did so to prevent any nuisance which might arise by reason of their unoccupied and deserted state. He afterwards, by [157] the direction of Francis Wigg, acting as the agent and by the authority of the plaintiff Wheeler, gave possession of these two houses to one Tempny. Tempny was let into possession in order to take care of them for the plaintiff, Wheeler; but upon a verbal understanding that if, and when, the plaintiff could get possession of the premises 13 and 14, the four houses would be let to him. Tempny had no interest in the premises, save such as might arise under this verbal agreement.

In December, 1859, a distress for 73l., for one year's rent, due Midsummer, 1858, was put in upon the premises numbered 13 and 14. They were then respectively occupied by the defendants Stevenson and Hagger—Hagger occupying No. 14. The property on those premises at that time was worth but a few shillings—wholly insufficient to meet the arrears of rent reserved under the lease.

On the 5th of January, 1860, a notice was affixed on the door of the premises No. 14, demanding possession of 13 and 14. The doors of those houses were then closed, and kept closed, so that no distress could be made thereon. There was not, at any time between the time of the distress in December, 1859, and the commencement of the present action, any sufficient distress on the premises to countervail the arrears of rent reserved by the lease. Tempny, after the time he was let into possession of Nos. 15 and 16, as before stated, permitted another person to occupy one of such two houses, viz. No. 15. No distress or search was, at any time after Tempny took possession, made on the premises Nos. 15 and 16; and it was left at the trial uncertain

whether, at the time of the service of the declaration, there were or were not goods on those premises sufficient in value, if distrainable, to meet the arrears of rent reserved by the lease.

It was objected, on the part of the defendant Hagger, [158] that there had been an eviction by the plaintiff, Wheeler, in respect of the premises 15 and 16; that, by reason thereof, the rent reserved by the lease ought to be apportioned; that the condition or proviso in the lease for re-entry was entire and gone by the act of the lessor; and that without a right to re-enter under the lease there was no remedy under the statute.

It was further objected that, if the right of re-entry remained, yet, to entitle the plaintiffs to recover under the statute, they must shew an insufficiency of distress with reference to every part of the premises included in the demise out of which the rent issued, and that, as to 15 and 16, no such evidence was given. There was no dispute at the trial as to the facts; no evidence was offered on the part of the defendant; and it was agreed that a verdict should be entered for the plaintiffs, with liberty to the defendant to move to set the verdict aside, and to enter a nonsuit or verdict for the defendant, provided the Court should be of opinion there was no evidence that ought to be left to the jury in support of the plaintiffs' right to recover. It was further agreed that there should be no appeal.

A rule to shew cause was accordingly obtained. This rule came on to be argued before us (a) in last Trinity Vacation. The Court took time to consider its judgment.

It appears to us unnecessary to give any opinion on the point, what would have been the effect on the condition for re-entry reserved by the lease, with reference to a right to recover under the statute, if a clear and undoubted eviction by Wheeler had been proved. We think there was no evidence on which the jury ought to have found, certainly none on which they were bound to find, the fact of an eviction. The authorities upon this subject are collected in the notes [159] to the case of *Salmon v. Smith* (1 Wms. Saund. 204, note (2)). But, assuming their view to be correct, it was then argued that the plaintiffs ought to have shewn that there was not, on any part of the premises demised, including 15 and 16 as well as 13 and 14, any sufficient distress to countervail the arrears of rent. We think the present case must be considered as if the premises 15 and 16, having been wholly deserted by the lessee and all parties claiming under him, Wheeler, the landlord (being in no default himself), had put Tempany into possession, but only for security of the premises; that Tempany's possession must be considered as the possession of Wheeler, justified under the circumstances, and that upon the goods of Tempany, Wheeler would not, having regard to these facts, have had any right to distrain for the arrears of rent due under the lease. We think, also, that this view equally applies to the goods of any person whom Tempany may have let into temporary possession under himself.

It is enough, however, to state that, whatever may be the weight due to the objections made by the defendants, there was yet some evidence to go to the jury of an insufficiency of distress on the premises: if so, by the agreement of the parties, the rule ought to be discharged.

The rule will therefore be discharged.

Rule discharged.

[160] IN THE MATTER OF A PLAINT IN THE COUNTY COURT OF NORTHAMPTONSHIRE, HOLDEN AT TOWCESTER, WHEREIN J. ARIS IS PLAINTIFF AND J. ORCHARD DEFENDANT. Nov. 24, 1860.—The plaintiff went to the defendant's residence, which was beyond the jurisdiction of a particular County Court, and there verbally agreed to purchase of him a horse for 28l., to be delivered on the following day at the plaintiff's residence which was within the jurisdiction of that County Court. On that day the defendant brought the horse to the plaintiff's residence, when he required a warranty which was given and the price paid. The plaintiff afterwards sued the defendant in the County Court for a breach of the warranty: Held, that there was no complete contract until the warranty was

(a) Pollock, C. B., Channell, B., and Wilde, B. Bramwell, B., was present only a part of the time.

given, and consequently the "whole cause of action" arose within the jurisdiction of the County Court.

[S. C. 30 L. J. Ex. 21 ; 9 W. R. 106 ; 3 L. T. 443.]

Griffits, on behalf of the defendant, had obtained a rule calling on the judge of the County Court of Northamptonshire, holden at Towcester, and the plaintiff, to shew cause why a writ of prohibition should not issue to prohibit the said County Court from further proceeding in the plaint.

It appeared from the affidavits, that the defendant resided and carried on his business at Biddlesden, which is within the district of the County Court of Northampton, holden at Brackley ; and that, on the 14th of August, 1860, the plaintiff called at the defendant's residence and verbally agreed to purchase of him a mare for 28l. The mare was to be delivered on the following day at the plaintiff's residence at Leis Weedon, which is within the jurisdiction of the Towcester County Court. Accordingly, on the 15th of August, the defendant brought the mare to the plaintiff's residence at Leis Weedon, when the plaintiff required a warranty of soundness. The defendant gave the warranty, and thereupon the plaintiff paid him the 28l. The plaintiff afterwards entered a plaint in the Towcester County Court for a breach of the warranty. At the trial of the plaint, it was objected on the part of the defendant, that the Court had no jurisdiction, as the whole cause of action did not arise within the Towcester County Court. The judge overruled [161] the objection, on the ground that there was no binding contract out of the district, inasmuch as there was no agreement in writing or part payment of the price ; and a verdict was found for the plaintiff for 12l. 8s. 6d.

C. Pollock shewed cause. By the 9 & 10 Vict. c. 95, s. 60, a County Court summons may issue in any district "in which the cause of action arose." No doubt that means "the whole cause of action ;" and the defendant contends that in this case the whole cause of action did not arise within the jurisdiction, because the contract for the purchase of the horse was not made within it. But there was no binding contract until the horse was delivered and the warranty given. [Martin, B. There cannot be two contracts : if there was a complete contract at common law, the Statute of Frauds does not make a new contract because its requisites are afterwards satisfied. The words of the 17th section are that no contract for the sale of any goods, &c., "shall be allowed to be good." Pollock, C. B. A "cause of action" must arise out of a contract upon which an action can be brought.] On the 14th of August there was a mere preliminary bargain, and if nothing more had taken place the defendant could not have compelled the plaintiff to accept the horse. On the 15th the bargain was completed. The cause of action was the breach of the warranty, which was given within the jurisdiction. *Bloxsome v. Williams* (3 B. & C. 232) is an authority that there was no complete contract until the horse was delivered and the warranty given. *Borthwick v. Walton* (15 C. B. 501) will be relied on by the defendant ; but that case is at variance with *Newcombe v. De Roos* (2 El. & El. 271), where the defendant, by letter written and posted out of the district of a particular County Court, ordered the [162] plaintiff to do certain work : the letter was received and the work done within the district ; and it was held that the whole cause of action arose within the district.

Griffits, in support of the rule. On the 14th of August there was a contract binding at common law ; and the price was paid and the warranty given in pursuance of that contract. [Channell, B. If there was a sale before the warranty, the consideration, being executed, would not support it : *Roscorla v. Thomas* (3 Q. B. 234).] If any part of the cause of action arose in the district where the defendant dwelt, the County Court has no jurisdiction. In an action against an administrator, the grant of letters of administration are part of the cause of action : *In re Fuller* (2 E. & B. 573). Here a combination of various matters constitutes the cause of action, viz., the bargain for the sale of the horse, the delivery, the acceptance, the payment of the price and the warranty. [Wilde, B. Was it necessary for the plaintiff to give any evidence of what took place on the 14th ?] *Borthwick v. Walton* (15 C. B. 501) decided that upon a sale of goods the order for the goods is part of the cause of action. [Pollock, C. B. There the goods were sent in consequence of the order, so that the order and delivery constituted the cause of action.] The warranty given on the 15th was annexed to and became part of the contract made on the 14th. [Pollock, C. B. The cause of

action was not complete until the 15th. Wilde, B. It may be that several events are necessary to entitle a party to sue, but it is not until the last has happened that there is "a cause of action." Where a reward was offered for the apprehension and prosecution of certain offenders, such reward to be paid on conviction, and the plaintiff apprehended an offender within the district of a certain County [163] Court, but the conviction took place in another district, it was held that the conviction was part of the cause of action, and that the County Court had no jurisdiction: *Hernaman v. Smith* (10 Exch. 659). Here, the terms on which the contract was made are part of the cause of action. He also relied on an affidavit that some representation as to the soundness of the horse was made on the 14th of August.

POLLOCK, C. B. We are all of opinion that the rule should be discharged. It is said that some representation was made on the 14th of August, but we must decide on the facts proved before the County Court judge. On the 14th of August there was a bargain between the plaintiff and the defendant for the purchase of the horse, and the price was named, and the time and place of delivery; but nothing was said about a warranty. On the following day a warranty was given, the price was paid and the horse delivered, and the whole cause of action became complete. It cannot be contended that the contract took place on two different days. It seems to me that where there is a contract for the sale and delivery of a horse, the price and every other matter being agreed on except the warranty, and when the parties come to complete the purchase the one refuses to pay unless a warranty is given, whereupon the other gives the warranty, then for the first time the transaction is complete. Here, upon the 14th, there was an agreement to buy the horse, and upon the 15th that was rescinded and a new contract made for the purchase with a warranty. The addition of a new term to a contract does not make it two contracts, but one entire contract. Lord Wensleydale frequently pointed out, with respect to the affirmance of a contract incapable of being enforced, that it is not so much an affirmance of the old [164] contract as the making a new one. It seems to me that what took place on the 14th was a mere bargaining for the horse, and that the contract upon which the plaintiff was suing was the contract made on the occasion when the horse was delivered and the warranty given. The question put by my brother Wilde illustrates this: Was it necessary for the purpose of the plaint that the plaintiff should give evidence of anything which took place on the 14th? In my opinion, it would have been sufficient to prove that the cause of action arose on the 15th, when the warranty was given. If a contract is imperfect, from not being in writing, or for want of part payment, or delivery, it is no contract until those matters exist which render it perfect, and the cause of action is the contract rendered perfect. Suppose two persons are travelling together, and one verbally agrees to purchase of the other his watch for a price then named, and nothing further is said or done until they come to London, when the agreement is reduced into writing; in that case the contract and whole cause of action would be in London. For these reasons I think that the rule ought to be discharged.

CHANNELL, B. I also think that the rule ought to be discharged. I do not desire to interfere with the decisions which have established the principle that the whole cause of action must arise in the county in which the judge exercises his authority; but I think that in this case the contract was made on the 15th, and the true cause of action was upon that contract. Assuming, for the sake of argument, that there was a contract on the 14th, which was reduced into writing on the 15th, I am not prepared to say that the whole cause of action would have arisen upon the 15th because on that day the requisites of the Statute of Frauds were complied with. Here, however, [165] there was no contract on the 14th, and the purchaser might have refused to receive the horse. Then on the 15th the parties met, and the purchaser required a warranty, which was given, and the price was paid. It seems to me that was a renunciation of any terms agreed upon on the 14th, and that the whole cause of action arose upon the 15th, and within the jurisdiction.

WILDE, B. I am also of opinion that the rule should be discharged. The term "whole cause of action" has received a judicial interpretation. All those matters which are necessary to enable a plaintiff to sue constitute part of the cause of action. Then, was it essential for the plaintiff to prove what took place on the 14th? I do not think that any part of the cause of action arose on the 14th. To hold that it did would be carrying the matter further, by way of the division of a contract, than any case has yet gone. A cause of action must be something entire

and indivisible, and I am satisfied that in this case the whole contract was made on the 15th.

Rule discharged.

LEGH v. LILLIE. Nov. 9, 1860.—Declaration, that the defendant covenanted with the plaintiff not to sell or carry away from the demised premises any manure, made &c. on the premises, without the consent of the plaintiff, under the increased rent of 10l. for every ton so given, sold or carried away; and further covenanted that he would pay all the increased rents. Breach: that defendant sold a large quantity of manure made on the premises, to wit 160 tons, and did allow the same to be carried away from the premises; and the plaintiff claims 2000l. Plea: that the defendant brought upon the premises a quantity of manure larger and better in quality than that carried away. Held, first, that the plea was bad; secondly, that the declaration was bad for not alleging that the increased rent was due or that it was unpaid.

[S. C. 30 L. J. Ex. 25; 9 W. R. 55.]

Declaration. That the plaintiff, by deed, let to the defendant "The Marl Fields Farm," to hold for twenty-one years, from the 25th day of March, 1851, and the defendant covenanted with the plaintiff that he would at all [166] times, during the continuance of the said term, have and keep a sufficient stock of cattle &c., and that he would not sell or carry away from the demised premises any hay, straw, clover, or fodder, or any dung, compost, or manure, which should be grown or produced, made, gathered or gotten on the demised premises, without the consent in writing of the plaintiff first had and obtained, under the increased rent of 10l. for every ton so given, sold, or carried away, and so in proportion for any greater or less quantity, but that the defendant would eat and consume, or cause to be eaten and consumed, the hay and straw, fodder and clover, by his own cattle, on the demised premises; and the plaintiff covenanted with the defendant that the above restrictions should not apply in the case of hay and straw, provided that the defendant should, for every ton thereof which he should take from the premises, bring thereon, in lieu thereof, two tons of good rotten dung; and the defendant further covenanted with the plaintiff that he would duly pay all the increased rents, whereof mention was made in the deed. Yet the defendant, without the consent of the plaintiff, &c., did, on the 23rd of March, 1858, sell hay and straw, grown and produced on the demised premises, to wit, six stacks of hay, containing thirty tons of hay, and ten tons of straw, and allowed the same to be carried away from the demised premises and did not in lieu thereof, bring back, upon the demised premises, two tons of good rotten dung for every ton of hay and straw so given, sold, and carried away; and did, without such consent as aforesaid, on the day and year aforesaid, sell a large quantity of farm yard manure, made and gathered and gotten on the premises, to wit, 160 tons of manure, and did allow the same to be carried away from the said premises. And the plaintiff claims 2000l.

The defendant pleaded; fifthly, as to so much of the declaration as relates to the sale and removal from the demised [167] premises of the manure made, gathered and gotten on the premises, that the defendant did, in place of the said manure, and by way of substitution thereof, bring on, to, and upon, and spread upon the said premises a certain other quantity of manure, larger and better in quality than that sold and carried away by him as in the declaration mentioned.

The plaintiff took issue on the plea.

At the trial before the Recorder of London, at the Spring Assizes at Chester, the jury found a verdict for the defendant on the fifth plea.

Welsby, in Easter Term, obtained a rule nisi to enter judgment for the plaintiff on the issue on the fifth plea, notwithstanding the verdict found for the defendant; against which

Grove and Brandt now shewed cause. First, the plea is an answer to the breach to which it is pleaded. The meaning of the covenant, not "to sell or carry away" any manure, is that the defendant shall not remove it so as to deprive the land of the benefit of it. A mere temporary removal of manure is not a breach of the covenant. But, secondly, the declaration is bad. It does not shew that the

increased rent has become due. It is also consistent with the allegations contained in it, that the increased rent has been paid. [Channell, B. If the meaning of the covenant is that the defendant shall not take away the manure unless he pays the penal rent, the breach is bad for not averring non-payment of such rent.] In an *Anonymous case* (Hardres, 320), which was an action on a promise to redeliver some rings to the plaintiff, or else pay him 18l. in money, the plaintiff averred that the defendant had not redelivered to him the rings, but omitted to say "nor paid him the 18l. in money." And this was held to be naught, though after verdict on not guilty found for the plaintiff, because it may well be that the 18l. was paid, and [168] then the plaintiff had no cause of action. If this declaration be treated as claiming the increased rent, it is uncertain and bad for not shewing when it accrued: *Pillarfe v. Darby* (1 Show. 9). Under the declaration in its present form, the plaintiff is not entitled to the 10l., for every ton of manure sold, as liquidated damages, but at most to nominal damages: *Hurst v. Hurst* (4 Exch. 579).

Welsby and Coxon, in support of the rule. First, the declaration is good for the increased rent. [Pollock, C. B. Is not the provision as to the rent void for uncertainty? Bramwell, B. If so, the declaration may be good, the covenant being a prohibition with an unmeaning qualification.] There is a covenant not to sell manure, under a penalty which attaches at once upon the sale. [Pollock, C. B. If land is let at a rent of 10l. a year, the lessor cannot distrain immediately. To what is the "increased rent" to be added? It is an agreed payment in the nature of a reservation upon the doing of the act stipulated against. There is a positive covenant that the defendant will not sell manure; against which no permission to do so can be implied. The cases all shew that, where a particular sum is stipulated to be paid on the doing of a prohibited act, the amount is recoverable as liquidated damages if the act is done. The case of *Hurst v. Hurst* (4 Exch. 597) is not intelligible. Secondly, if the Court is of opinion that the second breach is bad, they will make the rule absolute, and the defendant can then apply to arrest the judgment. The issue on the plea becomes immaterial, and the defendant is not entitled to any judgment in respect of it. [Bramwell, B. The case is similar to that of a demurrer to a plea to a bad declaration.(c) Wilde, B. The plaintiff cannot have judgment unless he is entitled to it upon the whole record.]

[169] POLLOCK, C. B. The question is, whether the plaintiff is entitled to judgment non obstante verdicto. The plea is clearly bad. In answer to a complaint that the defendant has broken his covenant, the plea alleges that the defendant has done something which is as advantageous to the plaintiff as if the defendant had observed his covenant. The defendant has no right to substitute something else for that which he agreed to observe. But, in order to determine whether the plaintiff is entitled to judgment, it is necessary to consider the true meaning of the covenant upon which the action is brought. I have considerable difficulty in saying what, in point of law, is the meaning of a covenant not to do a particular thing "under the increased rent of 10l.;" not saying what is to be increased, whether it is the rent from year to year, or the quarterly rent, or whether it is an additional rent or sum of 10l. to be paid immediately on the act being done. But the result is that, although the defendant covenants that he will not sell or carry away any manure, it is "under" certain conditions, viz. not unless he pays an "increased rent of 10l. for every ton so given, sold or carried away." The word "unless" would give the defendant a permission to remove manure if he paid the increased rent. And it appears to me that, although the covenant is in form absolute, yet its meaning is that the defendant is not permitted to take away manure except on paying a certain price, and if he is willing to pay that price he may remove it. Therefore the defendant can justify the removal provided he pays the increased rent. The cases of *Lowe v. Peers* (4 Burr. 2225), *Anonymous* (Hardres, 320), and *Hurst v. Hurst* (4 Exch. 579), shew that, in suing on such a covenant, the plaintiff must allege that the defendant has not paid the sum which he has the option of paying.

[170] With respect to the case of *Hurst v. Hurst* (4 Exch. 579), my brother Channell has referred me to the report in the 19 Law Journal, Exch. p. 413, which seems to remove the difficulty as to that case. The Court meant to say,—that the

(c) He also referred to the form of judgment none obstante verdicto in Chitty's Forms, p. 828, 7th ed.

20l. was not a penalty, but liquidated damages, but if the plaintiff meant to sue for liquidated damages, he should have alleged that the 20l. was not paid, according to the case of *Lowe v. Peers* (4 Burr. 2225). In *Hurst v. Hurst* (c) the payment of the 20l. was not negatived. What was passing in my brother Parke's mind was that, as the plaintiff had, in his declaration, blended together the 20l. and the value of the trees, the only way to make sense of it was to treat it as a claim for unliquidated damages only.

BRAMWELL, B. I am of the same opinion. The first question is, whether the plea is bad. As my Lord has stated, the defendant attempts to say that by breaking his covenant he has conferred a benefit on the plaintiff. The plain meaning of the covenant is that the covenantor shall not take away manure. Having broken his covenant in that respect, it is no answer that he has brought back an equivalent. But it was contended by Mr. Grove that, if the declaration shewed no cause of action, there could be no judgment non obstante veredicto, because in order to entitle the plaintiff to such judgment the declaration must be good. In *Dr. Bonham's case* (d) it is said, "if it appears upon the whole record that the plaintiff has no cause of action, he shall never have judgment though the bar or [171] rejoinder, &c., be insufficient." Indeed it would be a contradiction in terms to say that the plaintiff shall have judgment non obstante veredicto, when the defendant would have a right immediately afterwards to ask that the judgment should be arrested. I think that the declaration is bad. There are three classes of covenants: first, covenants not to do particular acts, with a penalty for doing them, which are within the statute 8 & 9 Wm. 3, c. 11; secondly, covenants not to do an act, with liquidated damages to be paid if the act is done, which are not within the statute; and, thirdly, covenants that acts shall not be done, unless subject to a certain payment. I think that the meaning of the covenant "not to sell or carry away manure under an increased rent of 10l. for every ton" &c. is that the covenantor may do so on paying that rent. If that is the true construction of the covenant, the declaration ought to have alleged that the increased rent was due and not paid. I cannot help observing that the case of *Hurst v. Hurst* (4 Exch. 579) seems to me to have been rightly decided. There the Court held the covenant to be within the second class of covenants to which I have alluded, viz. that the covenantor should not do the act stipulated against, with a provision for the payment of liquidated damages which was introduced for the benefit, not of the covenantor, but of the covenantee. Suppose a man covenants not to remove manure, and further covenants that if he does he will pay 10l., he may do damage to the amount of 100l. But I think that there the second covenant may be taken to be one for the benefit of the covenantee. That would be the only way to make both covenants intelligible; the other construction would treat the whole as one covenant. It seems to me that on this ground *Hurst v. Hurst* was well decided. [172] There Parke, B., said, that the breach was capable of two constructions—the plaintiff might be seeking to recover damages for the breach of covenant in cutting the trees, or he might be suing for the penalty. Therefore he treated it as if there were two covenants, one an absolute covenant not to cut the trees, the other to pay the penalty if that was done, and that the plaintiff was suing on the first covenant. But we decide this case on the ground that here there is only one covenant—a complex one, and that the plaintiff can only recover the agreed 10l. for each ton of manure sold. Therefore the plaintiff should have alleged, as a breach, that the increased rent had become due and that it was not paid, and, not having done so, the declaration is bad. I have had some doubt whether the declaration might not be taken to allege, by implication, that this increased rent is unpaid; but, on consideration, I think that is not so: and the test is that it would be impossible to plead payment into Court of the increased rent.

CHANNELL, B. I agree that the rule must be discharged. The rule asks for judgment for the plaintiff notwithstanding the finding on the fifth issue. That involves the question whether the plea is good or bad. If that had been the only question there would have been no difficulty; but it is not enough for the plaintiff to establish

(c) In the copy belonging to the Court of Exchequer the report has been corrected by Pollock, C. B., as follows:—Page 579, line 7, for "unliquidated" read "liquidated," and insert after the word "damage," "but the action being brought for the penalty plus the value of the tree, the action is for unliquidated damages."

(d) 8 Rep. 120 b.; see also *Turner's case*, 8 Rep. 133 b.

that the plea is bad, unless he can shew that he is entitled to judgment upon the whole record, or rather upon that part of the declaration to which the plea is pleaded. But in my opinion the last breach is badly assigned, and shews no cause of action. There is no case in point. I do not rely on the case of *Hurst v. Hurst* (4 Exch. 579) which is distinguishable on the ground stated by my brother Bramwell. That decision is explained on referring to the [173] report in the Law Journal, though the variance between the language of the two reports appears at first very slight. We are therefore called upon to put the best construction we can upon the covenant as set out in the declaration. I am of opinion that the covenant is not an absolute covenant on the part of the defendant not to remove the manure, that the breach is bad for not averring that the 10l. was not paid, and that there is no breach of covenant if the defendant has paid the penal rent of 10l. for every ton taken away.

WILDE, B. I am of the same opinion. The plea is clearly bad, and the only question is whether the declaration is good. The declaration sets out a covenant by the defendant that he will not sell or carry away from the demised premises, any manure, &c., without the consent in writing of the plaintiff, under the increased rent of 10l. for every ton so carried away. Now there are various forms in which a covenant of this sort may be expressed; a man may covenant simply that he will not do such an act, or that if he does he shall pay a penalty, or that if he does any such act he shall pay liquidated damages. Had the covenant been in either of those forms, it would have been substantially a covenant not to do the act, with a subsequent covenant that if he did it he should pay a penalty or liquidated damages. But the covenant in this case is not in either of these forms. It is a single covenant, not two covenants, that the covenantor will not remove manure, under an increased rent of 10l. for every ton carried away. The word rent points not only to the injury to the covenantee, but to the benefit the covenantor may derive from doing the act which is prohibited. It is on that ground, amongst other reasons, that I think that the meaning is that the covenantor may remove manure if he chooses to pay the increased rent. It is a mere question of the construction of [174] the covenant, which is to be determined by considering the ordinary and natural meaning of the words. The declaration is bad for not alleging that the increased rent was due, and that it was not paid.

Rule discharged.

THE ANGLO-CALIFORNIAN GOLD MINING COMPANY v. LEWIS. Nov. 16, 1860.—

The deed of settlement of a Joint Stock Company, completely registered under the 7 & 8 Vict. c. 110, contained a clause "that no other business shall be transacted at a special general meeting than the business for which it shall have been expressly called." The Company was afterwards registered under the 19 & 20 Vict. c. 47. After the passing of the 20 & 21 Vict. c. 14, at a general meeting it was resolved that the Company should be wound up voluntarily, and liquidators were appointed. The meeting was held in pursuance of a notice, which however did not state the intention of the Company to appoint liquidators at that meeting. In an action to recover calls made by the liquidators so appointed: Held, that the above clause applied to a meeting held for the purpose of appointing liquidators, and that, no notice of the intention to appoint liquidators having been given, their appointment was invalid.

[S. C. 30 L. J. Ex. 50; 6 Jur. (N. S.) 1376; 9 W. R. 126; 3 L. T. 588.]

Declaration. That before and at the time of the passing of the "Joint Stock Companies Act, 1856," and after passing of the 7 & 8 Vict. c. 110, the plaintiffs had become and were a completely registered incorporated Joint Stock Company, for the purpose of working certain mines, &c. That after the passing of the first mentioned Act, the plaintiffs obtained a certificate of registration and incorporation as a Joint Stock Company, &c. That after the passing of the first mentioned Act, and after the plaintiffs had become a registered, incorporated Joint Stock Company, &c., the said Company, in general meeting duly held under and according to the provisions of the said first mentioned Act, duly passed a special resolution requiring the said Company to be wound up voluntarily. (a) [175] That at a subsequent general meeting of the

(a) There was a demurrer to some of the pleas, and amongst the defendants' points

said Company, of which notice was duly given, and which was duly held according to the provisions of the said first mentioned Act, at an interval of not less than one month nor more than three months from the date of the meeting at which such special resolution was first passed, the special resolution passed at the first mentioned meeting was duly confirmed, at the said second or subsequent meeting, by a majority of such shareholders, for the time being entitled to vote, as were present in person or by proxy at such subsequent meeting. That notice of the said special general meeting and confirmation was duly given in the *London Gazette*, &c. That after the passing of the special resolution, and after the confirmation thereof in pursuance of such special resolution, the Company, in general meeting duly held &c., duly appointed certain persons as liquidators for the purpose of winding up the affairs of the Company, and distributing the property &c. That the liquidators duly accepted the appointment. That the defendant was &c. and is a shareholder, and possessed of 366 shares of 10s. each in the said Company, and at the time of making the call was a contributory, within the true intent and meaning of the Joint Stock Companies Acts then in force, as a shareholder in respect of the said shares, and, as such, a shareholder and a contributory liable to the call hereinbefore mentioned, under and by virtue of the provisions of the said first mentioned Act. That after the passing of the said special resolution and the confirmation thereof, and after the appointment of the liquidators, and their acceptance of such appointment, and before the liquidators had ascertained the sufficiency of the assets of the Company, or the debts in respect of which the several classes of contributories were liable, the liquidators, under and according to the provisions of the Joint Stock Companies Acts then in force, duly called on the defendant, as such shareholder and contribu-^[176]-tory, to pay on a certain day, which elapsed before this suit, 54l. 18s., being a call of 3s. on each of the defendant's shares; which sums did not exceed the extent of the liability of the defendant as such contributory, and which sums the liquidators deemed, and which were in fact necessary to satisfy the debts of the Company and the costs of winding it up; of which call notice was duly given to the defendant, and he was then requested by the liquidators, and by the Company, to pay the same. That all conditions precedent, matters and things, and all times required to have been performed and to have happened and existed, and to have elapsed, in order to the due registration and incorporation of the plaintiffs as such Company, and the certifying thereof, under and in pursuance of the provisions of the several Acts; and in order to the defendant being such shareholder and contributory; and in order to the passing and giving notice of the special resolution for the winding up of the Company, and the confirmation thereof; and in order to the valid appointment of the liquidators, and to their acceptance of such appointment; and in order to the valid making of the call by the liquidators, and to the notice thereof; and to the liability of the defendant to pay the call, were performed and happened &c.: and the defendant thereupon became and was liable to pay the said call &c., yet the defendant has never at any time paid to the said liquidators, or either of them, or to the plaintiffs, the said call or any part thereof, &c.

The defendant pleaded:—Eighthly, that the meeting at which the said liquidators are in the declaration alleged to have been appointed was not duly held as alleged. Ninthly, that no notice of holding the said meeting for the appointment of the said liquidators was ever given to him. Tenthly, that the said Company did not duly appoint the said liquidators as alleged.

On these pleas issues were joined.

[177] At the trial, before Martin, B., at the sittings in London after Trinity Term, it appeared that the Company had been completely registered under the 7 & 8 Vict. c. 110. The deed of settlement contained the following clauses:—

"14. That every general meeting, whether ordinary or extraordinary, whether original or adjourned (provided the day fixed for holding the same adjourned meeting be more than fourteen days after the meeting from which the adjournment shall take place), shall be called by the board of directors or the shareholders signing such requisition and giving such notice as aforesaid, as the case may be, by advertising the

was one "that it is neither expressly or impliedly averred, that the first meeting at which the special resolution was passed was duly convened, or that notice of the intention to propose such a resolution was duly given within the 34th section of the Joint Stock Companies Act, 1856."

same in two or more of the daily newspapers published in London or Westminster, or by such advertisement and other means as the directors shall deem fit; and that such advertisement shall, in the case of an original general meeting, whether ordinary or extraordinary, give at least three, and not more than fourteen, days' notice of such meeting, and the place, day and hour of holding the same; and that such advertisement shall express, in cases where the same shall be required by any of the provisions herein contained the object or objects of such meeting, or the business proposed to be transacted thereat.

"20. That no other business shall be transacted at an extraordinary general meeting than the business for which it shall have been expressly called, and no other business shall be transacted at an adjourned general meeting, or successive adjourned general meetings, than the business left unfinished at the original general meeting whence the adjournment, or successive adjournments, took place; and every adjourned meeting, or successive adjourned meeting, shall be considered a continuance of the original meeting from which the adjournment took place, and be, to all intents and purposes, the same meeting."

The Company was subsequently registered under the [178] Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47). On the 12th of June, 1857, a resolution was passed that the Company should be wound up voluntarily and dissolved. Liquidators were then appointed, and other steps taken for that purpose. In September, 1858, it was discovered that the proceedings were informal; and, on the 8th of that month, an advertisement was published in the *Times* and other newspapers as follows:—

"Anglo-Californian Gold Mining Company, Gresham House, Old Broad Street, Sept. 6, 1858.—Notice is hereby given, that a special general meeting of the shareholders of this Company will be held at the Company's offices on Wednesday, the 29th day of September instant, at one o'clock precisely, when a special resolution will be proposed that the Company be wound up voluntarily. And it will also be proposed that the acts of the liquidators appointed on the 12th of June, 1857, be confirmed and adopted.

"By order.

"Signed. G. F. GOODMAN, Secy."

The following resolutions were passed at the meeting held on the 29th of September:—

"1st. That the Company be wound up voluntarily.

"2nd. That the gentlemen appointed at the special general meeting, held on the 12th of June, 1857, liquidators to wind up the affairs of the Company be, and they are hereby appointed liquidators to wind up the affairs of the said Company under the foregoing resolution, and that their acts, under the appointment made on the 12th of June, 1857, be and they are hereby adopted and confirmed."

Notice of a meeting to confirm the above resolutions was given, and, at the meeting held in pursuance of such notice on the 1st of November, 1858, the above resolutions were confirmed, and liquidators were appointed, who afterwards made the call in respect of which the action was brought.

The learned Judge directed a verdict for the plaintiffs, leave [179] being reserved to the defendant to move to enter a verdict upon the eighth, ninth and tenth pleas, on the ground that the notice of the meeting at which the liquidators were appointed did not state that their appointment was one of the objects of the meeting; and that no sufficient notice of such meeting was given; and that the meeting was not duly convened and held.

Knowles having obtained a rule nisi accordingly,

Watkin Williams now shewed cause. The question is, whether, in the advertisement of the meeting called for the purpose of winding up the Company, it was necessary to give notice of the intention to appoint liquidators. Resolutions for winding up the Company, and for the appointment of liquidators, must be passed at general meetings: 19 & 20 Vict. c. 47, ss. 102, 104. The resolution for appointing liquidators was passed at a general meeting duly held pursuant to the 14th clause of the deed; and, though, by the 102nd section the resolution for winding up the Company is to be a "special resolution," that does not mean that it is to be a resolution passed at an extraordinary general meeting, but refers to the majority by which the resolution is to be passed: 19 & 20 Vict. c. 47, s. 34. "Table B." does not affect

this question. The 113th section of the 19 & 20 Vict. has been repealed by the 33rd section of the 20 & 21 Vict. c. 14. The special provisions of clause 20, as to extraordinary general meetings, do not apply to a meeting for the winding up of the Company, because that was a matter not contemplated or intended to be provided for by the deed of settlement. The appointment of liquidators was therefore good, under the 104th section of the 19 & 20 Vict. c. 47. It may be that notice of winding up the Company necessarily implies that liquidators would be appointed, because a Company cannot be wound up without the appointment of liquidators. If [180] so, in any view of the case, the notice was sufficient. [Channell, B. Liquidators would not necessarily be appointed at the time of the passing of the resolution for winding up the Company. The appointment might take place at a subsequent meeting.]

Knowles and Beresford, who appeared to support the rule, were not called upon.

POLLOCK, C. B. We think that there was no sufficient notice of the business to be transacted at the meeting at which the liquidators were appointed, and that therefore the appointment was invalid. The question turns on the effect of the 19 & 20 Vict. c. 47, ss. 9 and 113, and the 20 & 21 Vict. c. 14, s. 33. The Company was formed under a deed of settlement before the passing of the 19 & 20 Vict. c. 47, and by the 20th clause of their deed it was provided that no other business should be transacted at an extraordinary general meeting than the business for which it should have been expressly called. We have to determine what is the effect of this clause. Mr. Williams contends that, though registered under the Joint Stock Companies Act, 1856, that registration did not make "Table B." binding on the Company, but that they are only bound by their own deed of settlement; and that, as the deed did not contemplate winding up, the 20th clause does not apply to meetings for that purpose. If the 113th section of the 19 & 20 Vict. c. 47, had been still in force, the point would have been clear, because by the registration all the provisions of "Table B." not inconsistent with the clauses of the deed of settlement would apply. But the 113th section of the 19 & 20 Vict. c. 47 is repealed by the 20 & 21 Vict. c. 14, s. 33, by which it is enacted, as to the Companies therein mentioned, that the provisions in the instrument constituting or regulating any Company that has been [181] registered under the 113th section, or that might thereafter be registered under that section, shall be deemed to be regulations of the Company &c., with a proviso that Table B. shall not, unless adopted by special resolution, apply to any such Company. The 20th clause of the deed provides that no business shall be transacted at an extraordinary general meeting other than the business for which it shall have been expressly called. The question then is, Was this meeting an extraordinary meeting? At an ordinary general meeting, which all the members may be expected to attend, the members assembled may bring forward resolutions with or without previous notice; but at an extraordinary meeting nothing can be done unless notice has been given. This regulation would apply to any new matter not coming within the scope of the ordinary business of the Company. The meeting was an extraordinary meeting; therefore liquidators could not be chosen at that meeting because notice had not been given beforehand of the intention to do so. Therefore we are of opinion that the objection to the proceedings is well founded, and the rule must be made absolute to enter a nonsuit.

BRAMWELL, B. I am of the same opinion. The question is, whether the power of the meeting to appoint liquidators is governed by the 20th clause of the deed. If so, the appointment is bad, because there was no notice that liquidators would be appointed at the meeting, as required by that clause. A sort of doubt was thrown out whether the appointment of liquidators was not part of the routine of the business and therefore not within the 20th clause. If the deed had contained the provision of the 19 & 20 Vict. c. 47, as to voluntary winding up, it could not have been doubted but that the appointment of liquidators was a matter of which notice must have been given. [182] The statute incorporates with the deed additional provisions, and Mr. Williams contended that because winding up was not contemplated when the deed was framed, the 20th clause does not apply to provisions not in existence when the deed was framed. But the answer is that the statute incorporates the provisions of the deed, and nothing can be done under the additional powers except in the manner provided by the deed.

CHANNELL, B. The question is, whether the liquidators were duly appointed;

and that turns upon the point whether a special notice that liquidators were to be chosen was necessary. I think it was. If the case turned on the 113th section of the 19 & 20 Vict. c. 47, it would be clear. But that section is repealed by the 20 & 21 Vict. c. 14, s. 33, which provides that Table B. shall not apply to Companies registered under the 113th section unless adopted by special resolution. But the 33rd section sets up the deed of settlement as regulating the Company. Clauses 14 and 20 make it necessary to give notice of the objects of the meeting appointing liquidators, which by concession is an extraordinary general meeting. I am therefore of opinion that the liquidators were not properly appointed, and the rule must be absolute.

WILDE, B. I am of the same opinion. The 113th section of the 19 & 20 Vict. c. 47, having been repealed, the question depends upon the deed of settlement. By the 104th section of the 19 & 20 Vict. c. 47 (3) the Company in general meeting may appoint liquidators. Have they duly appointed liquidators at a general meeting? That depends on the question whether the meeting was duly called under the deed of settlement. The 14th clause speaks of three classes of general meetings—ordinary, ex-[183]-traordinary, and adjourned. It makes provisions as to the necessary notice for the calling of each by advertisement, and it says that such advertisement shall express, when required by any of the provisions of the deed of settlement, the object or objects of such meeting, or the business proposed to be transacted thereat. The 20th clause makes no provision for any notice of the object of an ordinary general meeting or adjourned general meeting; the only case where notice is required is where the meeting is extraordinary. This is exactly what one would expect. Shareholders know that the usual business of the Company will be transacted at the ordinary general meetings, and they might be informed of what would be done at an adjourned general meeting; but in case of an extraordinary general meeting they have no means of knowing what is to be done, unless they have notice by the advertisement calling the meeting. This was an extraordinary business—the appointment of liquidators. It is said that, at the time of executing the deed, the shareholders did not contemplate the appointment of liquidators; but that is equally true of a variety of matters to which their attention might afterwards be directed. For these reasons I think that the rule should be made absolute.

Rule absolute to enter a nonsuit.

[184] PATIENCE SWINFEN *v.* BACON. Nov. 21, 1860.—A tenant holding over after the expiration of a notice to quit, is not liable to pay double value, under 4 Geo. 2, c. 28, s. 1, if such holding over is not wilful and contumacious, but *bonâ fide* and for his own protection.

[S. C. 30 L. J. Ex. 33; 6 Jur. (N. S.) 1257; 9 W. R. 105; 3 L. T. 440: affirmed, p. 846, post.]

Debt, on the statute 4 Geo. 2, c. 28, s. 1, for double the yearly value of a certain farm wilfully held over by the tenant after the determination of the term, the expiration of a notice to quit, and a demand of possession.

Plea (*inter alia*). Thirdly, that the defendant did not wilfully hold over the said tenements after the termination of the defendant's term and tenancy and after the notice. Issue thereon.

By consent of the parties and the order of a Judge a case was stated for the opinion of this Court, in substance as follows:—

For many years previous to the death of Samuel Swinfen the defendant rented the farm from him as tenant from year to year at 430l. a year. S. Swinfen was seised in fee of the farm. S. Swinfen died on the 26th of July, 1854, and the plaintiff alleged that S. Swinfen had devised the said farm to her in fee. The defendant attorned and paid to the plaintiff the rent due at Michaelmas, 1854, and Lady Day, 1855, at which time he took from the plaintiff about 30 acres of land, which came to her under the will, in addition to what he had before, and they agreed upon the rent of 535l. 9s. for the whole. The game was verbally reserved to the plaintiff.

On the 12th of July, 1855, Captain Swinfen filed a bill in Chancery to impeach the validity of the will. The Master of the Rolls directed an issue, *devisavit vel non*. The defendant paid to the plaintiff, at the usual rent day, the rent, as recently increased,

due Michaelmas, 1855. In March, 1856, the issue came on for trial, Mrs. Swinfen being plaintiff, and Captain Swinfen defendant. In the absence and contrary [185] to the instructions of the plaintiff a compromise was arranged between the counsel, on which an order of Nisi Prius, dated the 12th of March, 1856, was made as follows:—

“It is ordered by the Court, with the consent of the parties, their counsel and attornies, that the jury be discharged from giving any verdict in this action upon the following terms; namely: The estate in question in this cause to be conveyed by the plaintiff at law to the defendant in fee, free from incumbrances (if any) created since the death of Samuel Swinfen (such conveyance to bear date from the 29th of September, 1855). The defendant to secure to the plaintiff an annuity of 1000*l.*, &c., such annuity also to bear date and be computed from the said 29th day of September, 1855,” &c.

The order of Nisi Prius was afterwards made a rule of Court, and served on the plaintiff, but she refused to obey it. Captain Swinfen, in June of that year, obtained a rule for an attachment against her, but it was discharged.

On the 20th of June the defendant received from Captain Swinfen’s solicitors a letter stating that, on the 1st of July, they would “attend to receive the half year’s rent due Lady Day last to Captain Swinfen,” and giving the defendant “notice not to pay rent to any other person,” and that if he did he would “be considered as denying Captain Swinfen’s title and treated as a trespasser.”

On the 30th of June the defendant received a letter from the plaintiff’s attorney, stating that the plaintiff alone was “entitled to receive the rents and give a valid discharge for the same,” and that she would “expect the payment in the usual manner.”

On the 1st of July the defendant paid to Captain Swinfen the Lady Day rent. On the 29th of September the plaintiff served on the defendant a valid notice to quit the farm at Lady Day, 1857. The defendant gave the plaintiff and [186] her game-keeper notice not to trespass on the farm. In November, Captain Swinfen obtained a second rule nisi for an attachment against the plaintiff, which was discharged. In December the plaintiff levied a distress on the defendant’s goods for one year’s rent. The defendant replevied. The rent due Michaelmas, 1856, was not paid. On the 14th of February, Captain Swinfen filed a supplemental bill to enforce the compromise.

The defendant did not quit the premises at Lady Day, 1857, pursuant to the notice; and on the 20th of April, 1857, the plaintiff served the defendant with notice that in consequence of his holding over she would require him to pay double the former rent.

The defendant continued in possession.

On the 10th of November the Master of the Rolls dismissed the supplemental bill, and directed the issue to be tried at the March Assizes.

Eventually, the rent due on the 25th of March, 1857, being one year and a half, was paid into the Bank, with the privity of the Accountant General of the Court of Chancery, to the credit of the cause. The plaintiff has since received this money out of Court.

Captain Swinfen appealed to the Lords Justices, and on the 25th of March, 1858, they dismissed the appeal. At the Summer Assizes at Stafford the jury gave a verdict for the plaintiff, establishing the will. In November, 1858, Captain Swinfen made a motion before the Master of the Rolls for a new trial.

On the 9th of February, the defendant, being still in possession, tendered to the plaintiff’s agent the rent which had accrued since the last payment into Court, at the rate agreed upon in March, 1855.

The Master of the Rolls, on the 5th of March, 1859, when the cause came on for further consideration, holding [187] the will to be valid, dismissed that part of Captain Swinfen’s bill.

The defendant continued in possession till Lady Day, 1859, and then quitted.

It was admitted that the defendant held possession of the lands with the consent and at the request of Captain Swinfen, believing that Captain Swinfen was entitled to the estate; and that the defendant was assisting him in asserting his claim thereto; and also that the retention of the farm was of material benefit to the defendant.

All the proceedings and documents which had been used or referred to in the causes of *Swinfen v. Swinfen and Others*, and *Swinfen v. Swinfen* in Chancery, and *Swinfen v. Swinfen* in the Common Pleas, are to be referred to, and the Court are to

have power to draw any inference of fact therefrom as well as from the statements in this case.

The double value is agreed at 214l. &c.

The question for the determination of the Court is whether the plaintiff is entitled to recover double value. If so, judgment is to be entered for her for 1040l. 18s. If she is not entitled, judgment is to be entered for the defendant.

Gray argued for the plaintiff. The compromise, which provided that the plaintiff should convey to Captain Swinfen, admits that the plaintiff was legally entitled to the estate, and therefore able to give a good notice to quit. In holding over, the defendant did so at the request of Captain Swinfen, and was assisting him in asserting his claim. The defendant was acting as a partizan, hostilely to the plaintiff. Having taken an additional quantity of land, at an increased rent for the whole, he was estopped from disputing the plaintiff's title. It is not enough to justify a tenant in refusing to quit, pursuant to notice by his landlord, that some other [188] person has asserted a title, unless the claim of such person be well founded. [Pollock, C. B. The question seems to be whether the holding over was fraudulent or perverse, or under a fair claim of right: *Wright v. Smith* (5 Esp. 203).] In *Reynolds v. Edwards* (6 T. R. 11) it was held that if a trespass is committed after notice, a judge is bound, under the statute 8 & 9 Wm. 3, c. 11, s. 4, to certify that the trespass was wilful and malicious. [Pollock, C. B. I doubt if judges, at the present day, would act upon that authority.] The statute 4 Geo. 2, c. 28, s. 1, is a remedial act: per Gould, J., in *Cutting v. Derby* (2 W. Black. 1075, 1077), *Wilkinson v. Colley* (5 Burr. 2694, 2698). It should therefore receive a liberal construction. He also referred to *King v. Burrell* (12 A. & E. 460).

Manisty (with whom was Macnamara) appeared to argue for the defendant, but was not called upon.

POLLOCK, C. B. Every one acquainted with Mr. Gray's learning and diligence will feel sure that we have had the whole legal question exhausted by his argument. And it is satisfactory to feel assured that there are no authorities which conflict with *Wright v. Smith* (5 Esp. 203, 215) and *Soulsby v. Neving* (9 East, 310, 313). Though the Act was probably passed for the benefit of landlords, we are glad to find so few instances where landlords have attempted to enforce the penalty unfairly. It is creditable to the moderation and kindness which ought to, and, in point of fact, do prevail. It is not necessary to advert to the cases cited for the plaintiff, not one of which appears to have any real bearing on the subject in dispute. In *Wright v. Smith* (5 Esp. 203, 215) the Court of Exchequer held that [189] the Act could never be meant to apply to a case where no fraud was intended, and where the resistance to possession was under a fair claim of right:—"The true construction of the Act appears to be, that where there is clear contumacy in the tenant he shall be within the penalty of the Act; for if there is any doubt, if he had any fair ground of defence, and that defence was bonâ fide taken, it would be a hard construction to subject him to a penalty, for so it is called in the Act, for a fair assertion of title." That decision of the Court of Exchequer in 1805, and the principle upon which it was founded, were recognised by the Court of King's Bench in 1808. In *Soulsby v. Neving* Lord Ellenborough said:—"The decision of the Court of Exchequer in *Wright v. Smith* evidently proceeded on the ground that the statute of 4 Geo. 2 only meant to apply to the case of a wilful and contumacious holding over by the tenant, after notice to quit, and not to a bonâ fide holding over by mistake." In the present case the facts appear to be that the defendant was the tenant of Samuel Swinfen. On the death of Samuel Swinfen the defendant took from the plaintiff some additional land, and agreed to hold at an increased rent. It may be conceded that the old rent was raised, and that there was an attornment by the defendant to the plaintiff. In the mean time Captain Swinfen filed a bill in Chancery against the plaintiff; an issue was directed *devisavit vel non*; the plaintiff was restrained by injunction from interfering with the property; the rents were paid into the Court of Chancery, and the present defendant regularly paid his rent, and the plaintiff received it. But I rest my judgment on other facts. The issue *devisavit vel non* went down to trial, and a compromise was effected by which the estate was given to Captain Swinfen. Mr. Gray relies on the language of the compromise, that "the estate should be conveyed by the plaintiff" to Captain Swinfen. But it is idle to treat that as an acknowledgment of the plaintiff's title. It [190] is an ordinary mode of admitting the title of an heir at law, and a more graceful way of doing it than by stamping the testator as imbecile. It was never under-

stood by Mrs. Swinfen as an acknowledgment of her title. In that state of things, which we may presume the defendant knew and acted upon, the defendant said, "Captain Swinfen is my landlord." Captain Swinfen assumed the control of the property, and the defendant attorned to him, whereupon the plaintiff gave the defendant notice to quit, and because he failed to do so brings this action against him. It appears to me that the occasion justified the defendant in acting as he did. At all events it is clear he held over, not wilfully or contumaciously, but *bonâ fide*. For these reasons, I am of opinion that defendant is entitled to judgment.

BRAMWELL, B. I am of the same opinion. If the plaintiff were entitled to recover, it would be an extreme hardship upon the defendant. It is said that hard cases make bad law; but there is an exception to the rule where it is sought to make a person liable for contumacy. The will was propounded by the plaintiff, and contested by the heir at law, who filed a bill in Chancery to establish his claim. The issue directed by that Court resulted in a compromise, which three judges expressly found to be binding on the plaintiff. All that my late brother Crowder, the Master of the Rolls or the Lords Justices decided was, that the agreement ought not to be enforced in a summary way. Is the defendant to blame if he thought that compromise binding? In fact, there is nothing to indicate that the plaintiff is not bound; for though, afterwards, the compromise may be said to have been set aside, for aught that I know it may still be enforced by action. If it turned out that the compromise was good, or that the will could not have been established, it is clear that Captain Swinfen might have said to the defendant, "You are still my tenant; your tenancy has not [191] been determined." Can he then be blamed for having said to the plaintiff, "I shall not accede to your request, and I insist on remaining in possession of the farm?" Mr. Gray contended that the terms of the compromise are inconsistent with the notion that the plaintiff had no right to give notice to quit, inasmuch as the compromise recognises the plaintiff's title. But my Lord has given the answer to that. It was also contended that, the defendant having taken twenty acres at an increased rent, there was a new taking, and therefore an estoppel, and consequently the defendant could not question the title of the plaintiff. But, in the first place, that does not obviate the objection that arises from the hardship to which the defendant was exposed. Captain Swinfen might still have been at liberty to treat the defendant as his tenant; and though, possibly, it might have been contumacy in a tenant who was an acute real property lawyer or special pleader not to give up possession to the plaintiff under such circumstances, it is a different matter with a tenant farmer. Not that I think it a plain case, but the reverse. If I had been in the situation of the defendant I should have done what he did. For these reasons I think that the defendant is entitled to our judgment.

CHANNELL, B. I agree that the defendant is entitled to judgment. I think this is a very plain case. The question turns upon the construction of the 4 Geo. 2, c. 28, s. 1, and if no judicial construction had been put upon that statute, and I had to look at its language for the first time, I should come to the conclusion that this case is not within it. We must place the same construction on the word "wilful" which it received in *Wright v. Smith* (5 Esp. 203, 215) and *Soulsby v. Neving* (9 East, 310, 313); and, applying the principle there laid down, I think that there is no ground for holding the defendant [192] liable. As I entirely concur in the view of the facts, and in the reasoning of the Lord Chief Baron, I do not think it necessary to say more.

WILDE, B. Unless we are prepared to overrule the prior decisions as to the construction of this statute, we must say that, to subject himself to the penalty, a tenant holding over after the expiration of a notice to quit must do so contumaciously. Then, was the holding over by the defendant in the present case contumacious? The defendant, having attorned to the plaintiff before any question had arisen as to the title, is said by Mr. Gray to have been in the same position as if he had taken a new lease. Captain Swinfen commences a litigation to obtain possession of the estate. There was a compromise, which was embodied in an order of *Nisi Prius*, which the defendant, not being a lawyer, or looking strictly into the rights of the parties, but as one of the public, might fairly presume would be carried out. Any ordinary man, at that time, would suppose that the matter had been decided in Captain Swinfen's favour. I cannot conceive what a tenant could do under such circumstances, except treat as his landlord the person who appeared to have the best right. Mrs. Swinfen gave the defendant notice to quit, and distrained upon him for rent. It would be the hardest

thing possible, in such a case, to make a tenant pay double rent if he failed to find out which of the two was right. The defendant appears to have considered that person as having the right who practically made the matter decided in his favour. The compromise having been set aside, it is said that this was contumacy. But I think it was not contumacy, and that the defendant simply acted with the desire of doing what was right, and that he is, therefore, entitled to our judgment.

Judgment for the defendant.

[193] IN THE MATTER OF WILLIAM THOMPSON, a Prisoner. Nov. 23, 1860.—On a rule to shew cause why a habeas corpus should not issue to bring up the body of a prisoner, it appeared from the affidavits, that the information charged that one W. T. did “unlawfully assault and abuse” Susannah T. In stating the case before two justices sitting in petty sessions, the prosecutrix’s attorney detailed facts, shewing a violation or attempted violation of the prosecutrix’s person against her will. The prisoner’s advocate objected to his giving evidence of anything but a common assault, but, after some argument between the advocates and the justices, it was agreed that the case should be taken under the Aggravated Assaults Act, 16 & 17 Vict. c. 30. The prosecutrix stated that the prisoner began to “rawl” her for about a quarter of an hour; that she rawled till she could not rawl any longer with him, when he put her against a gate and had connexion with her against her will. She was cross-examined as to whether she had not consented to what took place. The justices convicted the prisoner, and in the commitment stated that they found the assault to be proved, and to be of such an aggravated nature that it could not, in the opinion of the justices, be sufficiently punished under the 9 Geo. 4, c. 31; and the justices therefore, in pursuance of the 16 & 17 Vict. c. 30, adjudged the said W. T. to be imprisoned &c. for six months. Held, that the 16 & 17 Vict. c. 30, s. 1, applies only to common assaults, and not to an assault accompanied by any circumstances which make it a distinct offence recognised by the law as something more than a mere assault—such as an assault with intent to commit a rape. *Per totam Curiam.*—*Per Pollock, C. B., and Wilde, B.,* that inasmuch as the charge was not of a common assault, and the evidence did not point to a common assault, but to a rape or an attempt to commit a rape, the justices had no jurisdiction.—*Per Bramwell, B., and Channell, B.,* that the information charged an assault, and that as it was possible that the justices might have disbelieved the charge of rape or attempt to commit a rape, and found that nothing more took place except an assault of an aggravated character, the rule ought not to be made absolute.

[S. C. 30 L. J. M. C. 191; 7 Jur. (N. S.) 48; 9 W. R. 203; 3 L. T. 294.]

Referred to, *Reg. v. Miles*, 1890, 24 Q. B. D. 434.]

Overend had obtained a rule calling on H. Slater and R. Wild, Esquires, two of the justices of the county of Lancaster, and on Susannah Taylor, to shew cause why a writ of habeas corpus should not issue, directed to the keeper of the House of Correction at Preston, commanding him to bring up the body of William Thompson.

From the affidavits on which the rule was moved, it appeared that the information charged that William Thompson on the 29th of October, 1860, at the township of Lower Darwen, “did unlawfully assault and abuse Susannah Taylor, contrary to the statute in such case made and provided.” The material parts of the commitment were as follows:—Whereas William Thompson was “duly convicted before the undersigned &c., upon the information and complaint of Susannah Taylor, of &c., single woman, in that the said William Thompson, within three calendar months last past, to wit, on &c., at &c., did unlawfully assault and abuse the said Susannah Taylor, contrary to the [194] statute in such case made and provided. And the said justices did find the said assault to be proved, and to be of such an aggravated nature that it could not, in the opinion of the said justices, be sufficiently punished under the provisions of the statute 9 Geo. 4, c. 31. And the said justices did therefore, in pursuance of the statute passed &c. (16 & 17 Vict. c. 30), intituled ‘An Act for the better prevention and punishment of aggravated assaults upon women and children, and for preventing delay and expense in the administration of certain parts of the criminal law,’ adjudge that the said William Thompson, for his said offence, should

be imprisoned in the House of Correction at Preston, in the said county, for the space of six calendar months." These, therefore, are to command you &c.

"Given under our hands and seals, this &c.

"H. SLATER.

"R. WILD."

One R. Thompson deposed that he was present at the trial, and heard the evidence of Susannah Taylor and the other witnesses; that the only evidence of the assault was that of Susannah Taylor, who swore that on the 29th of October the prisoner "had committed a rape upon her." The words she used were that "he rawled her and melled her, and had connexion with her against her will," and she stated the same on cross-examination &c.; and that when particularly asked by the justices she said that the said William Thompson put his privates into her, and that she screamed violently. (This did not appear in the depositions, and the magistrates' clerk and other deponents did not recollect it.) Other witnesses were examined, but they did not speak to the said assault, but only to a meeting which had taken place for the purpose of arranging the matter without its going before the magistrates.

Affidavits were filed in opposition to the rule, viz. one by [195] the clerk of the justices, which set out the depositions of the witnesses when before the magistrates, and amongst others that of Susannah Taylor, who said:—When coming to my work I met the prisoner, who after some observation "began to rawl me something like ten minutes or a quarter of an hour. I rawled till I could not rawl any longer with him. He put me against the factory gate and began to mell of, and tried to do, and had connexion with me. I did not consent to his having connexion with me," &c. She was cross-examined by the prisoner's advocate, as to whether she made any outcry or complaint to any person of the prisoner's conduct; she stated that she screamed, but the engine was going, and people could not hear her at some cottages which were near. Other witnesses spoke chiefly as to attempts by the prisoner to settle the matter. Mr. Barlow, an attorney who appeared before the magistrates as advocate for Susannah Taylor, deposed that, "the case having been called on, I proceeded to state the facts to the justices, and whilst doing so Mr. Hall, the prisoner's advocate, objected to my going into anything but a common assault; but after some argument betwixt myself and Mr. Hall, and the justices, it was agreed that the case should be taken under the Aggravated Assaults Act, and it was so taken and dealt with, and the prisoner was committed under that Act."

Kay shewed cause (Nov. 22). First, the commitment is good upon the face of it. The conviction is not before the Court, and unless it is brought before the Court by certiorari they will not look beyond the commitment. The 16 & 17 Vict. c. 30, s. 1, enacts that "when any person shall be charged &c. with an assault upon any female whatever &c., either upon the complaint of the party aggrieved or otherwise, it shall be lawful for the justices &c., if the assault is of such an aggra[196]-vated nature that it cannot in their opinion be sufficiently punished under the provisions of the 9 Geo. 4, c. 31, to proceed to hear in a summary way, and, if they shall find the same to be proved, to convict the person accused; and every offender so convicted shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for a period not exceeding six calendar months" &c. If the justices found that the assault was not merely a common assault, but one within the provisions of this section, they were warranted in convicting the prisoner. [Wilde, B. If the evidence points to a rape, can the justices convict the party charged of an assault?] The information does not charge a rape, but rather points to an indecent assault. The Court cannot hold that the word "abuse" means "ravish." Secondly, the justices who were to judge of the facts may have thought that a charge of rape was not made out, but that the charge of assault was proved. At the hearing before the justices, the advocate for the complainant was about to open a charge of rape, when the prisoner's advocate objected that nothing could be gone into but a charge of assault; and it was ultimately agreed that the case should be gone into under the 16 & 17 Vict. c. 30. The word "unlawfully" is used in contradistinction to "feloniously," so that if the word "abuse" could mean "ravish," the charge would be reduced to something less than a charge of feloniously ravishing. [Wilde, B. Was there any evidence of an aggravated assault except what went to prove a rape?]

Overend and Wheeler, in support of the rule. The addition of the word "abused" shews that something more than an assault was charged. The charge was really one

of rape, and it cannot be reduced to a charge of an aggravated common assault by a private arrangement between the [197] parties. If "abused" means "indecently assaulted," the jurisdiction of the justices is ousted, for the offence is an indictable misdemeanour. Under the 14 & 15 Vict. c. 100, s. 29, the prisoner had a right to have his case considered by a jury, and therefore the magistrates had no jurisdiction: *Ex parte Jacklin* (2 D. & L. 103, 106). Where the charge is not such as, if true, would be within the magistrates' jurisdiction, no finding of facts by the magistrates can alter it: *Thompson v. Ingham* (14 Q. B. 710, 718). The power of the magistrates to deal summarily with cases of aggravated assault, being a statutory power, must be strictly pursued. The Act which originally gave power to justices to deal summarily with cases of assault is the 9 Geo. 4, c. 31. Section 27, after reciting that "it is expedient that a summary power of punishing persons for common assaults and batteries should be provided under the limitations hereinafter mentioned," proceeds to enact "that where any person shall unlawfully beat or assault any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence," &c. The 16 & 17 Vict. c. 30, refers expressly to this Act, and applies merely to cases of common assault of an aggravated character. Therefore the justices never had any power to deal summarily with a charge of abusing the complainant, and could not, on such charge, convict the prisoner of a common assault.

Cur. adv. vult.

The learned Judges, having differed in opinion, the following judgments were now pronounced.

POLLOCK, C. B. In the case of *Ex parte Thompson* an application was made for a writ of habeas corpus. A rule nisi having been granted, cause was shewn, and the Court, [198] being equally divided in opinion, the writ will not issue. I will state the grounds upon which it appears to me that the writ ought to issue.

The conviction and commitment were under the 16 & 17 Vict. c. 30, s. 1, by which two justices are empowered (if an assault is of such an aggravated nature that it cannot, in their opinion, be sufficiently punished under the provisions of the 9 Geo. 4, c. 31), to extend the punishment which may be inflicted under that Act, and award imprisonment, with or without hard labour, for a period of six calendar months. The objection to the conviction was that the magistrates had exceeded their jurisdiction. Now, their jurisdiction is founded on the 9 Geo. 4, c. 31, s. 27, which enables two justices to deal with a complaint of a common assault, and to punish the party guilty of it by inflicting a fine not exceeding 5*l.*, and in default of payment to imprison the offender for a term not exceeding two calendar months. The statute does not speak of an assault merely, but of a common assault, and it is important to consider what is the meaning of that expression. It appears to me to mean an assault not accompanied with any of those aggravated circumstances which give to it the character of a distinct offence recognised by the law as something more than a mere assault. An assault may be accompanied with violence, from which death ensues, and then the offence would be either murder or manslaughter. Or the assault may be accompanied with the violation of the person of a woman against her will, in which case it would be rape; or, though the purpose was not effected, the circumstances might be such as to leave no doubt of an intention to commit a rape, and then the offence would be an assault with intent to commit a rape. Therefore, an assault may amount to a capital felony, or a felony, or a mere misdemeanour, according to the circum-[199]stances with which it is accompanied. In my judgment, an assault, with intent to commit a rape, is an offence as distinct from a common assault as murder is from rape. In all these cases the circumstance that the crime is accompanied with an assault does not make the two offences identical, or make them of the same class.

Then the 9 Geo. 4, c. 31, s. 27, having limited the jurisdiction of the magistrates to charges of common assault, the 16 & 17 Vict. c. 30, s. 1, although it does not repeat that expression, but merely uses the word assault, relates to an assault of the same kind, though of an aggravated nature; for it expressly refers to the punishment imposed by the 9 Geo. 4, c. 31, and provides that, if the justices shall be of opinion that the assault, though a common assault, is of such an aggravated nature that it cannot be sufficiently punished under the provisions of that Act, they may award imprisonment, with or without hard labour, for a period not exceeding six calendar months. It seems to me that, under these statutes, the magistrates have no jurisdiction to entertain any other charge than that of a common assault, and that, as soon

as it appears that the charge of assault involves an offence of a distinct character, the magistrates should refuse to entertain it, and send the case for trial either at the quarter sessions or assizes.

The question then is, what, in point of fact, was the charge before the magistrates? Was it a charge of common assault, or a charge of assault accompanied with circumstances which give to it the character of another and a distinct offence? If the former, the magistrates had jurisdiction to entertain it; if the latter, they had no jurisdiction. The case of *Regina v. Bolton* (1 Q. B. 66) contains a very able summary of the law on this subject; and it points out with remarkable precision the occasions on which the decision of the [200] magistrates is conclusive. Where the jurisdiction depends on certain facts being proved or not proved, and the magistrates have treated them as proved, and adjudicated accordingly, their decision is conclusive, and no Court can inquire into their jurisdiction. But, where the nature of the charge is doubtful, and, in the course of the inquiry, it turns out that it is not one over which they have jurisdiction, there is no authority for saying that the superior Courts of law are precluded from examining the evidence and entertaining the question of jurisdiction.

Then what was the charge on the present occasion? The information contains a charge of assaulting and abusing a certain woman; therefore, on the face of it, there is a complaint of something more than a mere assault. The expression "abusing" appears to me to import "assaulting" and something more; but when the evidence is read all doubt is removed. The Court of Queen's Bench, to which the same application was made, and which refused to grant a rule to shew cause on this point, was not in the same position as we are, for, in addition to the affidavits in support of the application, others have been filed in support of the conviction, so that we have a distinct statement of all that took place before the magistrates. The complainant detailed a case of violation of her person against her will—not a mere assault.

I am not aware that the word "abuse," applied to a woman, is ever used except with reference to sexual intercourse. Certainly, in more than one act of parliament the word "abuse" has had that meaning applied to it, and in my opinion it always imports some offence of that nature. Then we have these facts:—The information was for "assaulting and abusing," and the evidence of the complainant disclosed a complete case of violation of her person against her will. Can any one say that this was a charge of com-[201]-mon assault? In my opinion it clearly was not. If there was no charge of a common assault, and no evidence of a common assault, the magistrates had no jurisdiction.

It is said that this is a decision of the magistrates on a question of fact, and therefore conclusive. I admit it would be so if the question was merely as to the truth or falsehood of the complainer's statement. But that is not the case here. It is suggested that the magistrates may have believed her statement as to the assault, but disbelieved it as to a rape or any attempt to commit a rape. To yield to such a suggestion would, in my opinion, be only trifling with what I consider it our duty to guard against, viz. that magistrates do not exceed their jurisdiction, and unlawfully exercise a power of committing any of her Majesty's subjects to prison for a period of six months, perhaps with hard labour, the effect of which would be to prevent all further inquiry respecting the charge of rape. The magistrates in substance pardon it, by disbelieving the woman and treating the offence as a common assault. The moment it appeared that the charge of assault was accompanied with a charge of rape they should have declined to entertain it, for no consent of the complainant could give them jurisdiction.

Thinking, therefore, that the charge was not that of a common assault, but of a distinct and substantive offence, viz. rape, or an assault with intent to commit a rape; thinking also that the magistrates had no right, when such a charge was made, to give themselves jurisdiction by believing some part of the evidence and disbelieving the remainder, I am of opinion that the writ of habeas corpus ought to issue: at all events I think that the prisoner ought to be brought before us, and that the question whether the conviction and commitment are valid in law should be fully argued.

[202] BRAMWELL, B. I regret that my opinion is opposed to that of my Lord. I think the rule should be discharged. A preliminary objection was taken by Mr. Kay, to which I advert only that it may not be supposed that I think it not well founded. But, assuming that there is sufficient on the face of the documents to warrant the detention of the prisoner, he would be remanded unless he could shew that there was

a want of jurisdiction, the question therefore arises, whether it has been shewn that the magistrates had no jurisdiction. I think it clear that magistrates have no power to convict except upon a charge of the offence upon which they do convict. That seems a truism; but no doubt there are cases where, instead of dismissing the charge, and ordering a new one to be preferred, they might say, "Such an offence is not proved, and we dismiss the charge as to that; but such a matter is proved, and we convict as to that." In this case the question is, whether a charge of common assault was brought before the justices: if so, it was competent to them to hear, entertain and determine it, and if they did determine it we cannot review the propriety of their determination. If the charge was one of rape, they ought not to have convicted the prisoner as they have done. So also, if the charge was of any of the assaults to which my Lord has referred, not being common assaults. But I think there was a charge of assault before the justices. The information states that the prisoner "did unlawfully assault and abuse" the complainant. To my mind the word "abused" conveys no definite meaning: it is not a word of art; in popular language it means calling names—abusing by words. The only instance in which it is used as a term of art shews that it does not mean "ravish," because I find in the 9 Geo. 4, c. 31, s. 18, as to trials for the crimes of "rape and of carnally abusing girls" under the ages therein men-[203]-tioned the term "carnally abusing" is used as meaning something different from rape. The word "abusing" without the concomitant words "unlawfully and carnally" has no definite meaning. The expression "unlawfully assaulted and abused" alleges an assault, with a word which may mean that the prisoner did something else. On the written information, then, there was nothing to preclude the magistrates from entertaining a charge of assault. The only other matter was the opening statement of the prosecutor's attorney. The prisoner's advocate objected that the charge as opened could not be entertained; that the information did not charge a rape. That was agreed to, and the charge of assault was then gone into. The charitable construction is, not that all the parties did what they ought not to have done, but that the prosecutor's attorney agreed that the objection was well founded. The charge appears to me to be a charge of assault, and not of any of the statutory offences which have been spoken of. If the magistrates had jurisdiction, if the charge was one which they had power to entertain, there is an end of the case, because it is possible that the magistrates may have believed that nothing more took place except a common assault of an aggravated character. It is perfectly possible, in point of fact, that the prisoner may have violently laid hold of the woman and insisted on kissing her: that would not be an attempt to commit a rape, but might be a very aggravated assault. Therefore I think that this rule should be discharged, because if the prisoner were brought up he would have to be remanded.

But lest it should be supposed that I think that the magistrates were right in what they did, I wish to make a few observations. I am not disposed to make harsh observations, because I dare say they thought they were warranted in [204] doing what they did. The effect of what have they done is, probably, as my Lord has pointed out, that the prisoner is released from all further or other proceedings, civil or criminal, for the same charge. [Pollock, C. B. In my opinion that is the effect of the 9 Geo. 4, c. 31, s. 28.] But whether that is so or not, the magistrates were wrong in dealing with the case as they did. It is impossible that they could have heard the story of the complainant without believing that either a rape or an indecent assault had been committed. The cross-examination of the complainant was directed solely to shew that what had taken place was with her consent; in fact, the only doubt suggested was whether or not she was a consenting party. If so, the first thing to be considered was whether the charge was true. If the magistrates thought it was, they were bound to commit the prisoner on the charge of rape. If they found that what took place was with her consent, they should have dismissed the charge. If they believed that it was not with her consent, they should have dismissed the summons, but they should have committed the prisoner to take his trial. But while I am satisfied that the offence of which the prisoner has been convicted was one into which the justices had the power to inquire, and to convict if they were satisfied that the offence had been committed, yet I think, with my Lord, that it is clear upon the evidence that the magistrates ought not to have come to the conclusion they did. We have, however, no power to review their decision in that respect.

CHANNELL, B. I concur in the expression of regret that has fallen from the rest

of the Court, that there should be a difference of opinion upon this subject, particularly as the liberty of the subject is concerned. Having given the case [205] the best consideration I am able, I think that no rule should be drawn up in the nature of a rule absolute. It seems to me the question is not whether the magistrates acted wisely or discreetly; and as that is not the question I do not upon that point express any opinion. The question is, whether the magistrates had jurisdiction or not; if they had jurisdiction I think we ought not to interfere. I agree as to the necessity of inquiring into the facts in some cases in order to ascertain whether jurisdiction exists or not; but in this case all the facts were proved which gave jurisdiction. But it is said that in the course of proving those facts something else came out in the evidence which destroyed the jurisdiction. I do not think the magistrates were bound to credit all the evidence of all the witnesses to the full extent; they were at liberty to believe or disbelieve part of the evidence, and if, upon the evidence believed, the case was within their jurisdiction, they had a right to exercise that jurisdiction. This case differs from *Regina v. Bolton*, in which the complaint itself stated something upon the face of it which in terms destroyed the jurisdiction of the magistrates. The magistrates who there convicted found the fact to be as stated in the complaint. The information in this case is laid under the 16 & 17 Vict. c. 30. The objection is, not that the magistrates have not found in terms that there was such an aggravation of the assault that it could not be sufficiently punished under the 9 Geo. 4, but that they found the complaint stated in the information to be true, and it is said the complaint stated in the information is one that took away the jurisdiction of the magistrates. The complaint is that "William Thompson did unlawfully assault and abuse one Susannah Taylor." I think the word unlawfully may be connected with the assault and go far to negative any assault of a felonious character. But by the use of [206] the word abuse it is said that the jurisdiction under the statute 16 & 17 Vict. c. 30, is taken away. I cannot come to that conclusion. The word "abuse" may be surplusage, or it may mean something. I do not think it can be reasonably understood in the sense that opprobrious epithets were used, and that the assault committed was the more aggravated because it was accompanied by such epithets. I think it must be read as meaning some abuse of the person, that there was an assault and some indecency committed with regard to the person of the complainant. But I am unable to come to the conclusion that the assault is not an aggravated assault, within the meaning of the 16 & 17 Vict. c. 30, because it is also an indecent assault. The indecency may well be the very aggravation connected with the assault which gave the magistrates jurisdiction, and yet the assault stop short of felony. If this had been a charge of rape, I agree with the rest of the Court that the jurisdiction is entirely gone. I do not put this case on the ground of any agreement to give the magistrates jurisdiction. I utterly repudiate that. I think, on reading the affidavit, that no such agreement was come to. The affidavit is drawn up in a very loose way, and the information is framed in a very loose way. It appears to me that the person who framed the information and the affidavit did not rightly understand what he was about. I apprehend the true meaning of the affidavit to be, that an objection was taken that the magistrates had no jurisdiction if it was a charge of rape. That was acquiesced in. The prosecutor went on to prefer the charge in the information. The 16 & 17 Vict. c. 30, gives the magistrates jurisdiction in cases of an assault, if it shall appear to be such an aggravated assault that it cannot be properly punished under the 9 Geo. 4. The words are "an assault;" that is the only expression in this statute. In the 9 Geo. 4, [207] the words "common assault" are used; but the word "common" is not in the 16 & 17 Vict. c. 30, s. 1. In my opinion the aggravation may consist of indecency, stopping far short of anything like an intent to commit a felony. For these reasons it appears to me, if I am to consider the question of jurisdiction only, there is nothing before us that can enable us to say that the magistrates have exceeded their jurisdiction. I distrust my own opinion, as being in opposition to my Lord Chief Baron and my brother Wilde; but my brother Bramwell concurs in the result: and though the matter was not fully argued in the Queen's Bench, the Judges in that Court refused the application for a rule nisi.

WILDE, B. I am of opinion that this rule ought to be made absolute; and as I entirely agree with the Lord Chief Baron, if this were not a case of considerable importance in its several bearings, I do not know that I should add anything to what has fallen from him; but seeing that the Court is divided in opinion, and that the

question raised here is one of very general interest, I propose to add a little to what has been already said. The prisoner has been convicted before two justices sitting in petty sessions of an aggravated assault, and sentenced to six calendar months imprisonment. The question is, whether under the circumstances the magistrates had jurisdiction. What is the jurisdiction under the Act under which alone they had power to deal with this matter? The 9 Geo. 4, c. 31, enumerates a variety of assaults differing from common assaults, such as assaults with intent to commit a felony; assaults on peace officers or revenue officers in the execution of their duty, or upon any person acting in aid of such officers; assaults with intent to resist lawful apprehension, assaults committed in pursuance of a conspiracy to [208] raise the rate of wages; for which the Court may award imprisonment for any term not exceeding two years. But no power is given to two justices sitting in petty sessions to deal with an assault with intent to commit a felony. Having mentioned these assaults, the statute goes on in the 27th section to say, "And whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided under the limitations hereinafter contained." So that justices in petty sessions can deal only with common assaults and batteries. Section 29 enacts, that in case the justices shall find the assault to have been accompanied by any attempt to commit a felony, they shall abstain from adjudication thereupon. Nothing can be plainer than that, under this act of parliament, justices sitting in petty sessions have only power to determine summarily cases of common assault and battery. Then, has their jurisdiction been amplified by the 16 & 17 Vict. c. 30? Section 1 enacts, that where any person shall be charged before two justices of the peace with an assault upon any female whatever, or upon any male child, if the assault is of such an aggravated nature that it cannot be sufficiently punished under the provisions of the 9 Geo. 4, c. 31, the justices shall have the power, instead of imprisoning for two months, under the 9 Geo. 4, to imprison for six months. I cannot read that section as meaning anything more than that where the justices have convicted an offender, under the 9 Geo. 4, of an assault, which, though a common assault, is accompanied with such cruelty or violence as not to be sufficiently punished, under the 9 Geo. 4, by two months imprisonment, they are to have the power of imprisoning him for six months. Though the statute gives jurisdiction, it is a jurisdiction to deal with common assaults only, and to increase the punishment if [209] the common assault is accompanied by circumstances of an aggravated character. The next point is, what was the matter brought before the magistrates on the occasion in question: first, by the information; and secondly, by the facts appearing in evidence? The information charges the defendant with "unlawfully assaulting and abusing" the complainant. I am not prepared to say that the word "abusing" must necessarily be understood as charging violation. If the question turned on the information alone, I should entertain serious doubts whether it must necessarily be read as charging that the prisoner ravished the complainant, though it is capable of being so interpreted. There is however something more than the information. *Regina v. Bolton* (1 Q. B. 66) shews that we are entitled to look into the facts; and, upon the affidavits filed in answer to the rule, the whole matter is before us. When the evidence is examined, it is clear that it was evidence of a rape or nothing. There was no beating, no violence to the person beyond the violence in the attempt to commit the offence. What then was the duty of the magistrates? I do not mean to say that if there is evidence of an offence over which the magistrates have no jurisdiction, the magistrates may not come to the conclusion that such an offence is not proved, and find that a less offence, over which they have jurisdiction, has been proved. If I could be satisfied that the magistrates had ignored the charge of rape or attempt to commit a rape, and had bona fide come to the conclusion that all that took place was a common assault, I should be of opinion that the magistrates had acted rightly and that there would have been no ground for this rule. But it is because I am satisfied that such was not the case, that I think the rule ought to be made absolute. The evidence [210] clearly shewed that the charge was one of rape. Looking to the affidavit of the prosecutrix's attorney, we find an explanation of the anomaly of the prisoner having been convicted of a common assault, and then sentenced to six months imprisonment. He says that when the facts were stated, the prisoner's advocate objected to his going into anything but a common assault, and after some argument between the attorneys and the justices "it was agreed that the case should be taken under the Aggravated Assaults Act." I cannot, with

that statement before me, shut my eyes to the fact that the charge being one of rape, the parties agreed to withdraw it from the proper jurisdiction and turn it into a charge of a common assault of an aggravated description. I think that the magistrates had no jurisdiction, and they could not give themselves jurisdiction by the consent of the prisoner to be tried on a charge of a different character from that which was really before them. I cannot come to the conclusion that the magistrates *bonâ fide* believed that only a common assault had been committed. The prisoner ought to have been tried by a jury for the offence with which he was charged. If this practice were allowed it would lead to the most serious abuses. However, as the Court is equally divided the rule drops.

Rule discharged.

[211] GEE AND OTHERS, *Appellants*, THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY, *Respondents*. Nov. 14, 1860.—The plaintiffs delivered to the defendants, who were carriers, ten tons of cotton to be carried from Liverpool to Oldham. In the usual course the cotton should have been received on the following day, but it did not in fact arrive till four days afterwards. In consequence of the delay a new mill of the plaintiffs was stopped for want of cotton to go on with. At the time of the delivery of the cotton to the defendants nothing was said as to the particular inconvenience likely to result from the delay in forwarding it. But on the day before it was delivered to the defendants, and repeatedly on each succeeding day until it arrived at Oldham, one of the plaintiffs called to inquire about it; and on each occasion told the manager of the goods department at the Oldham station that the mill was at a stand, solely on account of the non-delivery of the cotton. In an action against the defendants for neglect in delivering the cotton, the plaintiffs proved that during the time the mill was at a stand they had paid in wages 7l.; and that the profit which would have been made if the mill had been at work was 7l. 10s. The judge of the County Court told the jury, that when, as in the present case, by the neglect of a carrier, a man had no material to carry on his business, he had a right to charge as legal damage such loss as naturally and immediately arose from stopping the mill; that the plaintiffs were entitled to the money they had actually paid as wages, 7l., and that the profit which the plaintiffs would have made was a fair subject of calculation; and the jury should therefore give, over and above the sum of 7l., such amount as would be the actual loss and detriment the plaintiffs had suffered by the non-arrival of the cotton in due course. Held, that this was a misdirection, and that the plaintiffs were not entitled to the amount of wages paid and of the profits lost as legal damages, inasmuch as it assumed that the stoppage of the mill arose entirely from the non-delivery of the cotton, when in fact it arose partly from that and partly from the plaintiffs having no cotton to go on with.—*Semble*, that the jury might have properly given the amount of the wages and loss of profit as damages, if they had found as a fact that the stoppage of the mill was a consequence of the non-delivery of the cotton which, either from express notice or the course of business in the district might have been anticipated by the parties at the time of making the contract.—*Quære*, per Bramwell, B., whether if, in the course of the performance of a contract, one party gives notice to the other of any particular consequence which will result from a breach of the contract, and the latter, after that notice, persists in breaking the contract, the former may not hold him responsible in damage for the consequences if they result from the breach, though they are not such as would naturally arise, and were not in contemplation of the parties at the time of the contract.—Where, on an appeal from a County Court, a new trial is ordered on the ground of misdirection, the Court will not give costs to the appellant.

[S. C. 30 L. J. Ex. 11; 6 Jur. (N. S.) 1118; 9 W. R. 103; 3 L. T. 328. Referred to, *Wilson v. Newport Dock Company*, 1866, L. R. 1 Ex. 185; *Hobbs v. London and South Western Railway*, 1875, L. R. 10 Q. B. 123. On point as to costs, dissented from, *Schroder v. Ward*, 1863, 13 C. B. (N. S.) 410, and not followed, *Conybeare v. Farries*, 1869, L. R. 5 Ex. 16.]

This was an appeal from the decision of the judge of the County Court of Lancashire holden at Oldham.

The particulars annexed to the summons were as follows:—The plaintiffs seek to recover damages, “For that the defendants, being common carriers, agreed with the plaintiffs for reward to carry duly upon the defendants’ railway, and to deliver duly to the plaintiffs, fifteen bales of cotton: yet the defendants broke the said agreement by not carrying and delivering within a reasonable time, and neglected and refused to carry and deliver the same for seven days, whereby the plaintiffs were injured in their trade [212] and business as cotton spinners, and they were prevented from working their mill and machinery during each of the said days, and incurred expenses in compensating their workmen for loss of time, and lost great profits.”

The case was heard before the judge of the County Court and a jury.

Thomas Gee, one of the plaintiffs, stated that a short time ago the plaintiffs rented a mill at Bottom-o’-the Moor, near Oldham, which they intended to work, in addition to another mill which they had previously worked. At the beginning of the week commencing on the 22nd of January the mill was ready, and the plaintiffs had engaged a number of hands for it. On Tuesday the 24th, Thomas Gee went to Liverpool and purchased a quantity of cotton for the mill. Ten bales of cotton, part of the purchase, were, on Thursday the 26th of January, about eleven o’clock in the forenoon, delivered to the defendants at the station at Liverpool, to be carried to Oldham to the plaintiffs’ mill there.

It was proved that the plaintiffs had been constantly in the habit of purchasing cotton at Liverpool for their old mill and having the same carried by the defendants; and that, on all former occasions, the cotton delivered to the defendants at Liverpool on the afternoon of one day had been delivered at the plaintiffs’ mill at Oldham by nine o’clock on the following morning at latest.

The cotton in question was not delivered at the plaintiffs’ mill until Monday the 30th at half-past eleven o’clock in the forenoon; and in consequence of the delay the plaintiffs’ mill was prevented from being worked on Friday the 27th, Saturday the 28th and half of Monday the 30th. He stated that

His work people were kept idle for the time, to whom he had to pay wages	£7 0 0
[213] The rent of the mill was 410l., of which a proportion for the time was	3 10 1
A capital of 8000l., the interest of which, for the time in question was	2 10 0
Profits that would have been made by working the mill for the time in question	7 10 0

Thomas Gee further stated, that he expected that the cotton would arrive at Oldham on Wednesday the 25th, and that on that day he made inquiries about the cotton at the defendant’s station at Oldham of Jackson, the manager of the goods department. On Thursday the 26th, he again made inquiries of Jackson, and being told that the cotton had not come requested Jackson to telegraph to Liverpool about it. At twelve o’clock on the same day he called at the Oldham station, and was informed by Jackson that he had telegraphed to Liverpool but that no answer had been received. Subsequently he went to the Oldham station several times that day, but could get no information respecting the cotton. On Friday, at nine in the morning, he again called and requested Jackson to telegraph again to Liverpool respecting the cotton. He called several times during the day but was informed that no answer had been received. On Saturday the 28th, about nine o’clock in the morning, he called again and was told that the cotton was then lying at the Middleton station on the defendants’ railway, about a mile and a half from Oldham, and that the plaintiffs should have it by ten o’clock in the forenoon.

The first time that Thomas Gee saw Jackson, and on every occasion when he made inquiries, he told them that the mill would be at a stand solely in consequence of the non-delivery of the cotton, and that the plaintiffs would look to the Company for compensation for the loss occasioned. On cross-examination Thomas Gee said, that the fact that the [214] mill would be at a standstill if the cotton was not delivered immediately, was not stated to the defendants or their agent at Liverpool by the person who delivered the cotton there at the time of such delivery; that the cotton was delivered in the ordinary way without any special terms or contract as to the

delivery thereof at the plaintiffs' mill at Oldham, and that the Company had a daily delivery of goods at Oldham.

The judge told the jury that he thought it was too nice to seek as damages the interest of capital and the proportion of rent; and that the jury must not consider those items in estimating the damages; but when, by the neglect of the carrier, a man had no material to carry on his business, he had a right to charge as legal damage such loss as naturally and immediately arose from the stoppage of the mill. He asked them what was the actual loss and detriment that the plaintiffs suffered by the non-arrival of the cotton in due course. He said the plaintiffs were entitled to the money they had actually paid as wages, viz. 7l., and that the profit the plaintiffs would have made was a fair subject of calculation. Mr. Thomas Gee had put it at 7l. 10s. No doubt, however, he had calculated it at the highest amount. The jury therefore should give such damages as they should think proper over the sum of 7l., such amount in fact as in their opinion would be the actual loss and detriment that the plaintiffs had sustained by the non-arrival of the cotton in due course.

The jury found a verdict for the plaintiffs, with 15l. damages.

The defendants were dissatisfied with the direction of the judge as to the damages: therefore they appealed.

Gray now argued for the appellants. The judge of the County Court was in error in telling the jury that [215] the plaintiffs were entitled to recover, as damages, the wages of their workmen while the mill was at a stand, and the loss of their reasonable profits during that time. In *Le Peintre v. The South Eastern Railway Company*, which was an action for not delivering certain cases of kid skins, Keating, J., ruled that the plaintiffs were not entitled to recover the wages of workmen kept unemployed in consequence of the non-arrival of the skins, or the loss of the profits on the sale of gloves which would have been made had they arrived in due course; and that ruling was upheld by the Court of Queen's Bench (2 L. T. 170). It may be said that this case is distinguishable from *Hadley v. Baxendale* (9 Exch. 341) because the plaintiff, Thomas Gee, told the servant of the Company that the mill was at a stand. But that was only after the loss, and the notice was not given to the proper person. [Pollock, C. B. Common sense and common justice require that a carrier should only be called upon to pay such damages as may fairly and reasonably be supposed to result from his breach of the contract to deliver, unless he is informed of some special circumstances. Channell, B. referred to *Portman v. Middleton* (4 C. B. N. S. 322). Wilde, B. The vice of the summing up appears to be, that it makes the matters alluded to the measure of damages. Many circumstances may be taken into consideration by the jury in estimating damages, which cannot be treated as damage to which, as matter of law, a judge can say that the plaintiff is entitled.]

Wheeler, for the respondents. The result of the argument on the other side is that the plaintiffs are not entitled to any damages. The cotton was delivered to the defendants at Liverpool on Thursday the 26th, and on that day, before the cotton came into their possession, they [216] had notice that the mill was stopped for want of it. The notice was given to the Company's servant at Oldham: and he telegraphed to Liverpool. [Wilde, B. Not until after the goods had been received. Pollock, C. B. Was not the information given at Oldham, that the mill was at a standstill for want of the cotton, too soon on Wednesday and too late on Thursday?] It was sufficient to bring the damages within the rule in *Hadley v. Baxendale* (9 Exch. 341), viz., such as were in the contemplation of the parties at the time of the contract.

POLLOCK, C. B. This is an appeal against the decision in the County Court, on the ground that the law was improperly laid down by the judge in directing the jury what damages they were to give. In the first place he told the jury that the plaintiffs were entitled to the money they had paid for wages, which was 7l. This he treats as a positive item—an amount which the jury ought to give. Then he said that the plaintiffs were entitled to recover whatever actual damage or detriment they had sustained from the non-delivery of the cotton in proper time; that the plaintiffs put the loss of profit at 7l. 10s., but no doubt they put it at the highest amount. He assumes this loss to have been sustained in consequence of the non-arrival of the cotton, while in fact it was not in consequence of the non-arrival of the cotton alone, but in consequence of that fact and of the plaintiffs having no other cotton in stock. If it had been established that such is the practice amongst cotton spinners, so that every carrier must have known that the mill would be at a standstill until the cotton

arrived, the damages would have been properly assessed. And that would be so whether the carrier had actual notice of the fact, or notice from the well understood course of business. But the business of life is conducted with reference to the necessity [217] of guarding against certain accidents, and owners of cotton mills may fairly be expected to guard against the risk of being delayed, by having something in stock. Is a railway Company bound to take notice, that in a particular case a mill would be at a stand if goods were not delivered on a particular day? I think not. I think a carrier is not responsible for such consequences, unless distinct notice is given at the time of the sending of the goods to be carried. If the plaintiffs had said, "Now there must be no mistake, the cotton must be delivered immediately; it is required for a mill which is actually at a stand for want of it, and if it is not delivered in due time you will be responsible for all the consequences;" probably the railway Company would not have taken it except at a high rate. Common carriers are bound to carry goods at a reasonable rate, but not to incur such a responsibility as would be imposed upon them if the direction of the judge in this case were correct. I think that the rule as to damages of this sort was correctly laid down in *Hadley v. Baxendale* (9 Exch. 341), and that the judge did not follow it because he assumed that the whole loss arose entirely from the default of the defendants in not delivering the goods, whereas it arose partly from that and partly from the plaintiffs having no cotton to go on with.

BRAMWELL, B. I am of the same opinion, though I think it likely that the same damages may be given if the case is again tried. The law on this subject is laid down correctly in *Hadley v. Baxendale* (9 Exch. 341). To ascertain the damage, it is necessary to find out how much better off the plaintiffs would have been if the contract had not been broken. The plaintiffs are not necessarily entitled to recover the whole amount given. *Hadley v. Baxendale* (9 Exch. 341) decides that a de-[218]-fendant is not liable, except for such damages "as may fairly and reasonably be considered, either arising naturally, i.e., according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." I am not sure that another qualification might not be added which would be in favour of the plaintiffs in this case, viz. that in the course of the performance of the contract one party may give notice to the other of any particular consequences which will result from the breaking of the contract, and then have a right to say: "If, after that notice, you persist in breaking the contract I shall claim the damages which will result from the breach." But in any case you must first find out the loss sustained by the plaintiff, and afterwards give it him minus any damages excluded by these rules. And I cannot but think that if the judge had left it to the jury to determine the damages in that way, they would probably have given the same sum which they have already given. But suppose it had appeared that cotton spinners usually keep a stock sufficient for a mill's consumption in hand; the inconvenience of the delay in delivering the cotton would be comparatively small. It may turn out that the plaintiffs ought not to receive more than that, because the damage which resulted is not such as in the usual course of things would result. Therefore we cannot say as a matter of law that the plaintiffs were entitled to recover the two sums in question. Mr. Wheeler contends that, on a fair construction of the summing up, the judge did not lay down as matter of law that the plaintiffs were entitled to those sums, but asked the jury what was the actual damage and detriment that the plaintiffs had sustained by reason of the non-delivery of the cotton. If the judge had said, as a proposition of fact, "I think [219] that you will consider that the plaintiffs are entitled to claim for wages," I doubt if there would have been any objection to the summing up. But he says, "Where, under circumstances such as exist in the present case, by the neglect of a carrier a manufacturer has no material to carry on his business, he has a right in my opinion to charge as legal damage such loss as naturally and immediately arose from the stoppage of his mill." He should have added, "If the jury are of opinion that the stoppage was the natural consequence of the non-delivery of the goods." I say this in order that the County Court judge may not suppose on the next trial that we think that these two sums are not recoverable; for I do not say so; and I do not understand that the other members of the Court think so.

CHANNELL, B. The rule as to the measure of damage was rightly laid down in

the case of *Hadley v. Baxendale*. But it is contended that upon the facts of the present case it is distinguishable from *Hadley v. Baxendale*, and that the ruling of the judge is not inconsistent with the rule laid down by the Court in that case. Taking the whole of the summing up together, it appears to me that the County Court judge did direct the jury to consider the wages and the loss of profit as the measure of damages. As to the profit, he gave them an opportunity of correcting the plaintiff's estimate of the amount, if they thought it erroneous. But he made them understand that, after setting right the amount of profit, they were to take the loss of profit and wages as the measure of damage. I think that was wrong. It cannot be said, as a matter of law, that these were damages which naturally flowed from the breach of the contract; or that any thing had passed to shew that they were in the contemplation of the parties when the contract was entered into.

[220] WILDE, B. The plaintiffs' claim for damages is divided into four heads. The County Court judge told the jury to dismiss two of them from their consideration. As to the other two, the claim for loss of wages paid, and for anticipated profits, he told them that the plaintiffs had a right to charge as legal damage such loss as naturally and immediately arose from the stoppage of the mill. He then pointed out what was the "legal damage," intimating that it was for them to estimate the amount; as to the wages, that the plaintiffs were entitled to the money they had actually paid, which was 7l.; as to the profits, that the jury were to estimate them, and having done so to give as damages, over and above the sum of 7l., such amount as, in their opinion, would be the actual loss and detriment that the plaintiffs had suffered, having previously pointed out that this was the loss resulting from the stoppage of the mill. The question is whether that is correct. According to the case of *Hadley v. Baxendale* the damage which, as a matter of law, must be considered as a measure of damages, is such as either arises naturally from the breach of contract, or such as both parties might reasonably have expected to result from a breach of the contract. It has been pointed out by the Lord Chief Baron that the stoppage of the mill was not a natural consequence of the non-arrival of the bales of cotton, but of the non-arrival of the bales and of the plaintiffs' having no cotton to go on with. Was it damage which the parties might reasonably expect? It would be, if it were the practice to work all the cotton mills in the neighbourhood from hand to mouth, and not the practice for mill owners to keep any stock of cotton in hand. We are pressed to say what is the rule as to damages. All I mean to say is that these claims are not the measure of damages. A judge cannot lay down that the plaintiffs, as a matter of law, are entitled to them as the legal measure of damage. My [221] brother Bramwell has pointed out that, on a second trial, the jury may possibly give similar damages when the matter is submitted to them in a more general way. For my own part I think that, although an excellent attempt was made in *Hadley v. Baxendale* to lay down a rule on the subject, it will be found that the rule is not capable of meeting all cases; and when the matter comes to be further considered, it will probably turn out that there is no such thing as a rule, as to the legal measure of damages applicable in all cases.

Order for a new trial.

Gray applied for costs. As a general rule the costs of County Court appeals follow the event. [Channell, B. Does that apply where the decision is that there must be a new trial on the ground of misdirection?] In *Alcock v. Delay* (4 E. & B. 660) the plaintiff obtained judgment in the County Court, and the defendant having appealed, on the ground of the erroneous ruling of the County Court judge, the Court of Queen's Bench ordered a new trial, the costs of the first trial and of the appeal to be paid by the respondents. [Bramwell, B. No additional costs have been incurred by the appellants in consequence of the respondents' appearance in this Court, because, whether the respondents appeared or not, the appellants must have appeared and asked for judgment.]

POLLOCK, C. B. It is an inflexible rule of the Courts in Westminster Hall, that if a new trial is granted on the ground of misdirection no costs are given, because there is no fault in the parties, but the miscarriage takes place in [222] consequence of the error of the judge on a point of law. We think that precisely the same rule ought to apply in the case of appeals from County Courts, and that we should

assimilate the practice to that which prevails with respect to the proceedings of higher tribunals. There will, therefore, be no costs.

BRAMWELL, B. I think that when the act of the one party has occasioned costs to the other, that other ought to get costs from him. Is that the case here? I think not; and therefore I agree that there must be no costs.

ELLIS, *Appellant*, KELLY, *Respondent*. Nov. 14, 1860.—K., who was legally qualified as a surgeon and apothecary, and registered as such under "The Medical Act," 21 & 22 Vict. c. 90, was, before the time of passing of that Act, possessed of a German medical diploma, and called himself Dr. K. He continued to use that description after the passing of the Act, though not registered as doctor of medicine. Held, no evidence that he had wilfully and falsely pretended to be, or taken or used the name and title of a doctor of medicine so as to render him liable to a penalty under the 40th section of that Act.—On an appeal, under the 20 & 21 Vict. c. 43, against the decision of justices dismissing the complaint, the appellant begins.

[S. C. 30 L. J. M. C. 35; 6 Jur. (N. S.) 1113; 9 W. R. 56; 3 L. T. 331. Followed, *Reg. v. Baker*, 1891, 17 Cox, C. C. 575; 66 L. T. 416; 56 J. P. 406; *Hunter v. Clare*, [1899] 1 Q. B. 635.]

This was a case stated by two justices under the 20 & 21 Vict. c. 43. The information charged that the defendant H. Kelly did on the 2nd of November wilfully and falsely pretend to be, and did take and use the name or title of, a doctor of medicine, thereby implying that he was so registered under the 21 & 22 Vict. c. 90.

The defendant having appeared on a summons to answer the information, it was proved that the defendant had for years past, and on the day named in the information, a brass plate affixed to the outer gate of his residence, on which was the name "Dr. Kelly." The informant put in a published copy of the Medical Register, in which the defendant's name appeared as "Kelly, Hubert, Pinner, Middlesex, Mem. Royal College of Surgeons, England, 1856. Lic. Soc. Apoth. Lond. 1856," and further proved that the [223] defendant had called himself "Dr. Kelly." There is no other Dr. Kelly at Pinner.

For the defence, a document purporting to be a diploma of the University of Erlangen, in Bavaria, was put in. A witness named Strauss proved that he was acquainted with diplomas of that University; that one of the seals attached to that produced was that of the Great University, and the other the seal of the Medical Faculty: that the diploma permitted the person therein named to practice medicine throughout Germany. He believed the signature of Professor Rosshuit attached to the diploma to be genuine, as he had received a letter from Professor Rosshuit, though he had never seen him write. Adolph Reinecker proved the seals of the University, and said that no one who was residing in England could obtain a medical diploma from a German University without examination.

The complainant contended that it was not legally proved that the diploma put in by the defendant was authentic and genuine, nor that the person named in it was the defendant: that even if these facts had been proved, the defendant, not being registered as qualified by that diploma to practice as a doctor of medicine, committed the offence charged by having the title "Doctor" on the brass plate in front of his house: that the possession of the foreign diploma did not entitle the defendant to use the title of "Doctor of Medicine," without being liable to a penalty.

The justices dismissed the information for the following reasons:—

"That it was proved that the defendant had practised in Pinner as a medical man, assuming the title of doctor of medicine; and that he was not registered in the Medical Register as a doctor of medicine. That the document purporting to be a diploma of the University of Erlangen was not proved. That the possession of that document so [224] far justified the defendant in assuming the title of doctor of medicine that he could not be said to have assumed such title wilfully and falsely within the meaning of the Act."

The opinion of the Court is requested:—First, whether the 21 & 22 Vict. c. 90, prohibits the taking and using of the title of doctor of medicine by any medical man

in England, unless the said title be duly registered according to the provisions of the Act.

Secondly, whether, if the Act does prohibit the assuming of such title, the defendant, under the circumstances, can be held to have so done wilfully and falsely within the meaning of the 40th section.

If the Court shall be of opinion in the negative, the judgment will be confirmed, &c.

Codd, for the appellant, claimed a right to begin. He referred to *Jones, App., Taylor, Resp.* (1 E. & E. 20).

B. C. Robinson. The practice is for the respondent to begin: *The Liverpool Library v. The Mayor, &c., of Liverpool* (5 H. & N. 526).

BRAMWELL, B. On an appeal against a conviction the respondent begins, because the onus lies on the party seeking to sustain the conviction; but this reason does not apply where the magistrates have dismissed the complaint. In such a case the party who appears in support of the complaint must begin.

Codd, in support of the appeal. The preamble of "The Medical Act," 21 & 22 Vict. c. 90, recites, "that it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners." The de-[225]-fendant's name did not appear as a doctor of medicine in the Medical Register. The absence of his name from the copy produced is, by the 27th section of the Act, evidence that he was not registered under that Act. The justices found that the document put forward as a diploma was not proved; therefore they should have determined that the defendant was wilfully and falsely pretending to be, and using the title of a doctor of medicine, and consequently liable to the penalty imposed by the 40th section of the Act. [Wilde, B. The magistrates seem to have considered that the defendant having in his possession a document, purporting to be a diploma from a German University constituting him a doctor of medicine, could not be said to have used the title wilfully and falsely. Bramwell, B. How can it be said that the diploma was not proved? Two witnesses proved the seal of the University.] Even if the defendant were duly qualified, it is submitted that he is liable to a penalty if not registered. [Pollock, C. B. He is registered as a surgeon and apothecary. If qualified and duly registered, may he not call himself what he pleases? Suppose he had been a doctor of laws and known as such, as Dr. Johnson was, would he have been liable to a penalty for using his original title? It is not stated that he practised as doctor of medicine.] *Pedgrift, App., Chevallier, Resp.* (8 C. B. N. S. 246), and *Rex v. Barnard* (7 C. & P. 784) were referred to.

Robinson appeared for the respondent, but was not called upon to argue.

POLLOCK, C. B. The Act was probably intended to prevent any person from practising without being registered. The respondent is registered in respect of two qualifications, either of which gives him a right to practise. He is charged [226] with falsely pretending to be a doctor of medicine; and he had been in the habit of calling himself "Dr. Kelly" for many years previous to the passing of the Act. The question is, whether he wilfully and falsely pretended to be so. I think there is no evidence of that.

BRAMWELL, B. I do not think it has been shewn that any offence has been committed, whether the diploma is taken to be proved or not. The 32nd section contains a prohibition against persons not registered recovering their charges. The 40th section is intended to guard the public against being imposed upon by a person pretending to have a qualification when in fact he has none. It applies to the case of a person using a title falsely implying that he is registered or has a title to be registered. The object is to prevent people from assuming titles in respect of a qualification when they have none. It is contended that any person who wilfully and falsely calls himself a doctor of medicine, when not registered as such, is liable to the penalty though a member of the College of Surgeons and registered as such. But assuming that contention to be well founded, he is not liable, unless he does it wilfully and falsely. If the intention of the legislature had been to punish a person for incorrectly describing himself, the language would have been different. As it is, it points to wilful falsity. Then, did the respondent wilfully and falsely, in other words, criminally, pretend to be, or use the title of a physician? There is nothing more than this, that having a foreign diploma he chose to put the word "Dr." before his name. I think that the magistrates took the right view of the case. They seem to have held that the respondent might well call himself "Dr. Kelly," on the supposition that he

had a right to do so. I do not say that if he continues to use [227] that description after what has taken place he may not be responsible.

CHANNELL, B. On one of the two points that have been argued, I am of opinion that the appellant must fail. I think that the respondent has not wilfully and falsely used the title of "Dr." As to the other point I give no opinion.

WILDE, B. The only question is, what is the meaning of the words "wilfully and falsely" in the 40th section. I think that section refers to a case where a man wilfully pretends to be a doctor of medicine when he is not. The defendant had a German diploma, which he might reasonably believe entitled him to describe himself as he did. In a similar case, *Ladd v. Gould* (Q. B. Hil. T. 1860), the Court of Queen's Bench held that it was a question of fact for the magistrates whether the party used the particular description, knowing he was not entitled to it and with intent to deceive the public.

Appeal dismissed.

WRIGHT v. HALE. Nov. 23, 1860.—The 23 & 24 Vict. c. 126, s. 34, which provides that when the plaintiff in any action for an alleged wrong recovers by the verdict of a jury less than 5l., he shall not be entitled to any costs, if the Judge certifies to deprive him of them, enables a Judge to certify in an action commenced before the passing of that Act.

[S. C. 30 L. J. Ex. 40; 6 Jur. (N. S.) 1212; 9 W. R. 157; 3 L. T. 444. Followed, *Kimbray v. Draper*, 1868, L. R. 3 Q. B. 160. Applied, *Singer v. Hasson*, 1884, 50 L. T. 327. Adopted, *Attorney-General v. Theobald*, 1890, 24 Q. B. D. 560. Dicta applied, *The Ydun*, [1899] P. 236; 8 Asp. M. C. 551.]

This was an action of trespass, with a count in trover for converting the plaintiff's goods.

The writ issued on the 15th of February, 1860. The cause was tried before Bramwell, B., on the 7th of November in this term, and after the passing and coming into operation of the 23 & 24 Vict. c. 126; when a verdict was [228] found for the plaintiff, with 40s. damages. The learned Judge immediately afterwards certified on the back of the record, that the action was not really brought to try a right beyond the mere right to recover damages, that the trespass or grievance, in respect of which the action was brought, was not wilful and malicious, and that the action was not fit to be brought.

A rule nisi to set aside the certificate having been obtained,

Hawkins and Cave now shewed cause. The 23 & 24 Vict. c. 126, s. 34, enacts, that "when the plaintiff in any action for an alleged wrong in any of the superior Courts recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defendant any costs in respect of such verdict," if the Judge certifies. The question is, whether this section applies to actions pending at the time of the passing of the Act. There is a distinction between statutes which interfere with vested rights and those which merely affect procedure. The only vested right which the plaintiff had in the present case was to bring his action. *Moon v. Durden* (2 Exch. 22) may be relied on by the other side, but that decision proceeded on the ground that the plaintiff had a vested right of action to recover money due in pursuance of the terms of the wager. The same principle was applied in *Hitchcock v. Way* (6 A. & E. 943), which was an action by the bonâ fide holder against the acceptor of a bill of exchange given for a gaming consideration, in which issue was joined before the passing of the 5 & 6 Wm. 4, c. 41, but the trial took place after. In *Towler v. Chatterton* (6 Bing. 258), it was held that the 9 Geo. 4, c. 14, which directs what evidence shall be required for proof of a promise [229] to pay a debt barred by the Statute of Limitations, applied to the case of a promise made before the passing of that Act. In *Freeman v. Moyes* (1 A. & E. 338), the Court of Queen's Bench held that the 3 & 4 Wm. 4, c. 42, s. 31, made executors liable to costs in suits pending at the time of the passing the Act; and that decision was acted upon in *Pickup v. Wharton* (2 C. & M. 401, 406) and *Grant v. Kemp* (2 C. & M. 636). *Charrington v. Meatheringham* (2 M. & W. 228) is an authority that a claim to treble costs under a statute existing at the commencement of a suit is not a vested right; and *Cox v. Thomason* (2 C. & J. 498) decided that a rule of Court introducing a new rule

as to the taxation of costs applied to all taxations after the passing of the Act. It is a fallacy to say that, in giving effect to the certificate, the Court are giving to the statute a retrospective operation. If the learned Judge had no power to give the certificate, it is null and void and need not be set aside.

M. Chambers and Beasley, in support of the rule. It is a well known general principle that statutes shall not be held to operate retrospectively, unless they contain express words to that effect. They must be construed prospectively, unless the intention of the legislature to the contrary is unequivocally expressed. The rule is so stated by Wilde, C. J., in *Marsh v. Higgins* (9 C. B. 551, 567, 568). "It is a rule and law of parliament that Nova constitutio futuris formam imponere debet non præteritis:" 2 Inst. 292, Bac. Abr. Statute (C.). In *Williams v. Smith* (4 H. & N. 559), and *Jackson v. Woolley* (8 E. & B. 778, 784) it was held that the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97) could not be treated as having a retrospective operation. So it has been held that the 32nd section of the Com-[230]-mon Law Procedure Act, 1854, which enacts that error may be brought on a special case, does not apply to judgments upon special cases stated before the passing of that Act: *Hughes v. Lumley* (4 E. & B. 358). This is an instance of the application of the rule to an Act regulating procedure. [Channell, B. Since the passing of that Act, error cannot be brought on a special case if it be agreed by the parties that there shall be no appeal. A case stated before the passing of the Common Law Procedure Act, 1854, may be supposed to have been stated subject to that condition.] In *Vansittart v. Taylor* (4 E. & B. 910), the Court of Exchequer Chamber held that the rule applied to the 34th section of the same Act, and therefore that no appeal was given in the case of a rule to enter a verdict, granted after the Act came into operation, on a point reserved at the trial before the Act received the Royal assent. [Wilde, B. The leave to move is by consent, and it would have been unjust to treat the Act as altering the terms of the consent.]

POLLOCK, C. B. I do not think that our decision will interfere with the great constitutional principle to which the plaintiff's counsel have referred. There is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in Courts of justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts. If an act of parliament were to provide that in matters of mere opinion no more than three witnesses shall be called, after that no person would be entitled to call more than three witnesses on such points in any pending suit, because it would be a mere regulation of practice. Rules as to the costs to be awarded in an action are of that description, and are not matters in which there can be [231] vested rights. When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does apply to such actions. Here the plaintiff had an opportunity of discontinuing the suit. The Act passed on the 28th of August, and contains a provision that it should come into operation on the 10th of October. The 34th section enacts that where the plaintiff in any action for an alleged wrong in any of the Superior Courts recovers by the verdict of a jury less than 5l., he shall not be entitled to recover any costs if the Judge certifies to deprive him of costs. That is an act to be done at the trial, which was after the passing of the Act. I think, then, that we are not giving to the Act any retrospective operation, and the wrong supposed to be done by an ex post facto law does not arise. The rule must be discharged. It is satisfactory to think that, if we are wrong, our judgment can be reviewed, whereas if we had been of a different opinion there would have been no means of appealing against our decision.

BRAMWELL, B. I think that the certificate was properly given. I am struck by what has fallen from the Lord Chief Baron, that if the certificate be set aside the defendant would have no means of appealing from our decision, while, if the plaintiff is entitled to his costs notwithstanding the certificate, the judgment would be erroneous and he might still get them. I think that this reason alone ought to induce us to refuse to set aside the certificate if there were any doubt about its validity.

CHANNELL, B. I agree that the rule should be discharged. In dealing with acts of parliament which have the effect of taking away rights of action, we ought not to [232] construe them as having a retrospective operation, unless it appears clearly that such was the intention of the legislature; but the case is different where the Act merely regulates practice and procedure. If there had been no case which affected

the present question, the inference from the language of the Act would have been clear: it points to an act to be done at the trial. I think, however, that the case is virtually concluded by the cases I refer to: *Freeman v. Moyes* (1 A. & E. 338), where Littledale, J., at first doubted, but the decision was afterwards followed by all the Courts, and *Towler v. Chatterton* (6 Bing. 258), where Lord Tenterden's Act, as to the evidence of a promise to bar the Statute of Limitations, was held to apply to all trials after the passing of the Act. These cases appear to me to be conclusive, but if there is any doubt I agree that the rule ought not to be made absolute.

WILDE, B. I am prepared to decide this case upon principle. The rule applicable to cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the Act an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. That this is the true principle sufficiently appears from the cases that have been referred to on both sides. The cases cited by Mr. Chambers are cases relating to rights, which were not affected; those referred to by Mr. Hawkins were cases relating to procedure. Enactments as to costs have been held by all the Courts to apply to actions commenced before the passing of the Acts in which they are contained. In *Cox v. Thomason* (2 C. & J. 498), it was held that a rule of Court relating to the taxation of costs, [233] which was general in its terms, applied to all taxations after the period when it came into operation, whether the action was commenced before or not. Mr. Chambers says that the enactment now in question takes away a right from the plaintiff. I do not agree with him. The right of the suitor is to bring an action and have it conducted according to the practice of the Court. Pending the action the procedure may be varied, but his right is to have his action conducted according to the existing course of procedure, whatever that may be.

Rule discharged.

ROBERT GRAVES IBBETT v. DE LA SALLE. Nov. 26, 1860.—A landlord signed a warrant of distress in the following form:—"I hereby authorise R. I., or his agent, as my agent, to seize and distrain the goods on the premises, now in the possession of M. G., for 9l., being the amount of rent due to me; and for your so doing this shall be your sufficient warrant, authority and indemnification against all costs and charges in respect to any law expenses, action or actions that may arise, as well as any other and all charges or expenses which you or your agent may be at or brought against you or your agent on this account." W. H., the servant of R. I., having distrained, an action of trover was brought against him by the tenant for the conversion of certain goods, some of which were alleged not to have been in the inventory, in which action the plaintiff was nonsuited. Held, that, assuming that W. H. had done nothing wrong, the indemnity extended to the costs of defending the action brought against him.

[S. C. 30 L. J. Ex. 44.]

This was an action in the Mayor's Court. Declaration: that whereas, heretofore, to wit, on, &c., at the parish &c., and within the jurisdiction of this Court, in consideration that the plaintiff, at the request of the defendant, would by himself or his agent seize and distrain the goods then on the premises of one Galvin, situate &c., for the sum of 9l., being the arrears of rent alleged by the defendant to be due to him for the same at Christmas Day then last, the defendant then and there, within the jurisdiction, promised the plaintiff to indemnify him against all costs and charges in respect of any law expenses, action or actions, that might arise or be brought against the plaintiff or his agent, by reason or in consequence of the said distress; and against all [234] other charges and expenses, action or actions, that might arise or be brought against the plaintiff or his agent, by reason or in consequence of the said distress; and against all other charges and expenses which the plaintiff or his agent might be at on the said account. Averment: that the plaintiff did, by W. H. Ibbett, his agent, seize and distrain, &c.; that in consequence of the distress an action was then and there, and within the jurisdiction, brought by Galvin against W. H. Ibbett, as and being the agent of the plaintiff; and the plaintiff thereby, then and there and within the jurisdiction, incurred and became liable to pay certain costs, to

wit 100l., and was and is damnified to the amount thereof; whereof the defendant, then and there and within the jurisdiction, had notice; yet the defendant did not nor would indemnify the plaintiff against the said costs, charges and law expenses, and neglected and refused so to do, &c.

Plea, non assumpsit.

At the trial, it appeared that the defendant being the owner of a house, No. 33 Jewin Street, gave to the plaintiff a warrant to distrain, which was as follows:—

“Warrant to Distrain.

“Know all men, by these presents. I do hereby authorize R. G. Ibbett, or his agent, as my agent, to seize and distrain the goods and chattels on the premises, now in the possession of Mr. Galvin, situate &c., for the sum 9l. 5s., being the amount of rent due to me for the same on Christmas Day last; and for your so doing this shall be your sufficient warrant, authority and indemnification against all costs and charges in respect to any law expenses, action or actions that may arise, as well as any other and all charges or expenses which you or your agent may be at, or brought against you or your agent on this account; nor do I hold you responsible for any goods or chattels clandestinely [235] removed from the said premises; and I hereby agree to allow you five per cent. on the amount levied for.

“As witness my hand this 5th day of March, 1859.

“J. T. DE LA SALLE.”

The distress was made by W. H. Ibbett, the son of the plaintiff, and the goods were subsequently appraised and sold. An action of trover was commenced by Galvin against W. H. Ibbett for the alleged conversion of certain goods; and it appeared from the attorney's letter that it was charged against him that he had disposed of certain goods beyond those in the inventory; that he had not sold some of those in the inventory, and had not returned to Galvin such goods as remained unsold. At the trial of that action Galvin failed to make out his case and was nonsuited. The bill of costs for defending this action amounted to 9l. 16s. 8d. This the plaintiff had paid, but he had not received the amount from Galvin. Upon these facts the learned Judge who tried the cause, being of opinion that the indemnity did not extend to these costs, nonsuited the plaintiff, giving him leave to move to enter a verdict.

Joyce having obtained a rule to set aside the nonsuit and for a new trial, upon the ground that the evidence given and facts admitted disclosed a good cause of action,

Philbrick now shewed cause. The action by Galvin against W. H. Ibbett was for selling goods other than those comprised in the inventory. Now, although it may be true that the defendant is bound to indemnify the plaintiff against all actions brought on account of any act done in the conduct of the distress, the indemnity does not apply to a case where the action is brought for alleged illegal acts done by the broker's man distinct from the distress. In *Draper v. Thompson* (4 C. & P. 84), which was an action on a similar indemnity, Tindal, C. J., said:—“It never could be intended [236] that the defendant was to indemnify the plaintiff against the acts of his own servants, and I am of opinion that it (the indemnity) only applies to cases where a distress was illegal, because the landlord had no right to put in such distress.” The case resembles in principle *Dudley v. Folliot* (3 T. R. 584), when it was held that a covenant in a conveyance of lands that the grantee might peaceably enjoy without interruption of the grantor and his heirs, or of any other person, does not extend to the acts of wrong doers, but only of persons claiming by a legal title. The indemnity extends to all acts complained of, as the wrongful acts of the landlord alone or of the landlord and broker. It could not be contended that it was an indemnity to the broker against an unfounded charge of assault. It was only intended to extend to those acts which the broker was bonâ fide entitled to do in exercise of the authority to distrain. [Pollock, C. B. The effect of the indemnity is, “If you take my place in doing this act I will indemnify you against all costs you may incur, provided that what you do is not illegal on your part.” Here the broker is charged with doing something which, in point, of fact, he did not do. As to the case of a charge of assault, that is simply a personal charge and wholly beside the distress, and therefore quite different from

a charge of doing something wrong with respect to the distress.] Secondly, the plaintiff was not bound to pay the costs of the action of *Galvin v. W. H. Ibbett*, and therefore he was not legally damnified.

Kenealy, in support of the rule. *Toplis v. Grane* (5 Bing. N. C. 636; S. C. 7 Scott, 620) is an authority that when an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, if such act is not apparently illegal in itself, but is done honestly and bonâ fide in compliance with the defendant's [237] directions, he shall be bound to indemnify the plaintiff against the consequences thereof. The plaintiff was therefore bound to indemnify his agent, W. H. Ibbett. In *Toplis v. Grane* the Act of the broker was a wrongful act. Here the plaintiff's agent did no wrong. All that can be said is that, while executing the warrant of distress properly, he was charged with having done wrong.

POLLOCK, C. B. We are all of opinion that there must be a new trial; and we think that we ought not to send down the case for that purpose without some direction as to the law applicable to the facts. The action appears to have been brought against the broker merely because he was the instrument by means of which the landlord made the distress. It does not appear that he had done anything wrong. The landlord intended to say, "I appoint you as my agent; if you are put to any costs in consequence of acting for me, I agree to indemnify you." According to all that we know of it, this was a vexatious and groundless action against the broker, and therefore within the indemnity. The indemnity does not extend to misconduct on the part of the broker, such as an assault, or seizing goods which he has no right to take, but merely to matters properly arising out of the distress.

BRAMWELL, B. The case ought to go down to a new trial if we see that the Judge was wrong in nonsuiting the plaintiff. I have some difficulty in construing the indemnity. I think Mr. Philbrick's argument is intelligible and clear; and I am by no means sure that it is not well founded. It may be that the defendant says, "I give you authority to distrain; and, so far as that authority extends, I agree to indemnify you." It may mean, "If it should turn out that I have no title to distrain, I indemnify you." [238] If the broker had done wrong, we should probably hold him not entitled to recover upon this indemnity. The indemnity may extend to rightful acts done by the broker in the course of his duty, but for which he may be subjected to an action by the tenant. Again, the construction may be, "I will not be responsible for what is charged as your wrongful act; but I indemnify you against what is said to be my wrongful act." The words are, "And for so doing, this shall be your sufficient warrant, authority and indemnification." The authority and indemnification are thus coupled together. I cannot say that I have a clear opinion upon the construction of this document.

CHANNELL, B. I think that there ought to be a new trial. The nonsuit proceeded upon the ground that the claim of the plaintiff to be indemnified was not made out. I agree with the view of the Court of Common Pleas in *Toplis v. Grane* (5 Bing. N. C. 636). A broker employed to make a distress may refuse to do so if he think fit. He may say, "I know that the tenant is so obstinate that I will not distrain unless I am indemnified against the consequences of all proceedings that may be taken against me." Here the distress appears to have been regular; and, that being so, the broker has a right to be indemnified. If he had been guilty of any misconduct, he could not have maintained an action to recover damages the result of his own misconduct or default.

WILDE, B. Having read the indemnity, I think it was intended to apply to all actions to which the broker might be subjected, except for the actual misconduct or default of himself or his servants.

Rule absolute.

[239] *LAVERY v. TURLEY*. Nov. 5, 1860.—To an action for goods sold the defendant pleaded, that he was possessed of a public house, and it was agreed that, in consideration that the defendant would give up possession of the same, the plaintiff would pay the defendant 100l., and discharge the defendant from the debt; that the plaintiff paid the 100l., and the defendant quitted the house. The agreement was not in writing. Held, that, having been executed, it was

receivable as evidence to prove the plea.—Semble, that the plea, though pleaded as an equitable defence, was a good plea at common law, by way of accord and satisfaction.

[S. C. 30 L. J. Ex. 49.]

Debt, for goods sold &c.

Plea (inter alia), upon equitable grounds. That after the accruing of the causes of action the defendant was in possession of a public house and stock in trade, and thereupon it was agreed that in consideration that the defendant, at the request of the plaintiff, would quit the said public house and premises, and deliver up possession of the same and the stock in trade to the plaintiff, the plaintiff would pay to the defendant the sum of 100l. and give up and discharge and exonerate the defendant from all debts and claims and causes of action in respect of the causes of action in the declaration mentioned. That the plaintiff in pursuance of the agreement paid the 100l., and the defendant then quitted the house and gave up possession of the stock.

Issue thereon.

At the trial before Wilde, B., at the last Summer Assizes at Liverpool, the facts stated in the plea were proved by the evidence of the witnesses for the defence; but the agreement did not appear to have been reduced to writing. The jury found a verdict for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him if the agreement relied upon by the defendant ought to have been in writing.

S. Temple now moved to enter the verdict accordingly. The agreement was a contract for an interest in or concerning land, and therefore one which by the 29 Car. 2, c. 3, s. 4, is required to be in writing: *Smart v. Harding* (15 C. B. 652).

[240] POLLOCK, C. B. We are all of opinion that there ought to be no rule. The objection is that the agreement is one which, by the Statute of Frauds, is required to be in writing; and that would be so if it were sought to enforce it as an agreement. But it is pleaded as a fact that the defendant performed the agreement, and the plaintiff accepted such performance in satisfaction. The objection that the agreement was not in writing is got rid of. The 4th section of the Statute of Frauds does not exclude unwritten proof in the case of executed contracts. A familiar instance is that of letting land for a period longer than three years, where, if the premises have been occupied, evidence may be given of the terms of the holding.

BRAMWELL, B. I am of the same opinion. I think the plea is a good plea at common law.

CHANNELL, B. I think there is an accord and satisfaction, and the defence might have been so pleaded. This case is distinguishable from *Smart v. Harding* (15 C. B. 652), because in that case there was no right of action unless the contract was proved.

WILDE, B., concurred.

Rule refused.

[241] BAYLEY v. THE WOLVERHAMPTON WATERWORKS COMPANY. Nov. 5, 1860.—By the 8 & 9 Vict. c. cxxxv., s. 53, the Wolverhampton Waterworks Company, at the request of the Commissioners under an Act for improving the town, were required to fix proper fire plugs in the main and other pipes belonging to the Company. By the 54th section, “the Company shall, at the cost and charges of the said Commissioners, from time to time, repair, renew and keep in proper order every such fire plug.” By the 55th section, “the costs of such fire plugs and the expense of fixing, placing and maintaining the same in repair shall be defrayed by the Commissioners.” The Company having put down plugs in the streets the Commissioners paid for them; and by the 54 Geo. 3, c. cvi., and subsequent Acts the plugs became the property of the Local Board of Health. A horse was injured by getting its foot into one of the plugs, the cap of which was broken. Held, that the Company and not the local Board was liable to an action for the neglect to repair.

[S. C. 30 L. J. Ex. 57.]

Declaration. That the defendants [were possessed of and] wrongfully, negligently and carelessly kept and maintained a water plug or fire plug in a certain highway

unprotected, and without any cover or lid or stop thereto over the hollow thereof, and in an insufficient and insecure state, so as to be, and the same then was, dangerous and likely to cause injury to horses lawfully passing in and along and using the said highway, by reason whereof a horse of the plaintiff, which he was lawfully driving along the highway, put one of his feet therein, and the foot became fastened therein, and the horse in endeavouring to release itself was injured, &c.

Pleas. First: Not guilty. Secondly: That the defendants were not possessed of the plug as alleged. Whereupon issues were joined.

At the trial, before Byles, J., at the last Staffordshire Summer Assizes the plaintiff proved that in February 1860, as he was driving a horse and cart through Bilston Street in the town of Wolverhampton, his horse got its foot in a plug hole, whereby the hoof was seriously injured and the horse was rendered useless. It was further proved that the cap of the plug had been broken for a considerable time. The plug was used for the purpose of watering the roads. The defendants were incorporated in 1855, and in [242] 1856 had purchased the works and plant of a former Company, which had been incorporated in 1845. The plug in question had been put down by the old Company in 1846. At that time an Act (54 Geo. 3, c. cvi.) "for improving the town of Wolverhampton, in the county of Stafford, and for removing and regulating the markets in the said town," was in force, by which certain Commissioners were appointed for the purpose of putting the Act into execution; and by the 14th section it was enacted, that "the property of and in the several streets, &c., within the said town of Wolverhampton, &c., and all materials, implements and other things thereto belonging, or which shall be purchased or provided by virtue or for the purposes of this Act, shall belong to and be the property of and are hereby vested in the said Commissioners." By "The Wolverhampton Waterworks Act, 1845" (8 & 9 Vict. c. cxxxv.), the Wolverhampton Waterworks Company was incorporated, and by the 53rd section it was enacted, "That the Company at the request of the Commissioners acting under the 54 Geo. 3, c. cvi., shall and they are hereby required to fix proper fire plugs into the main and other pipes belonging to the Company, &c., at such places as may be considered most proper and necessary for the supply of water in extinguishing fire." By the 54th section, "the Company shall at the cost and charges of the said Commissioners, &c., from time to time repair, renew, and keep in proper order every such fire plug; and as soon as any such fire plug shall have been completed, the said Company shall deposit a key thereof at each place within the limits of this Act, where any public fire engine shall be kept," &c. By the 55th section, "the costs of such fire plugs and the expense of fixing, placing, and maintaining the same in repair, and of providing such keys as aforesaid, &c., shall be defrayed by the Commissioners."

[243] The Commissioners paid to the Company 7l. each for the pipes and plugs put down. In 1847, the town of Wolverhampton obtained a charter of incorporation, which was confirmed by the 11 & 12 Vict. c. 93, and the whole of the powers vested in the town Commissioners by their special Act were transferred to the corporation. By the 13 & 14 Vict. c. 90, a provisional order for the application of "The Public Health Act, 1848" (11 & 12 Vict. c. 63), was confirmed, and by the provisional order so confirmed the mayor, aldermen, and burgesses of the borough of Wolverhampton, by the council of the said borough, were constituted the local Board of Health for the borough.^(a) By the 68th section of "The Public Health Act, 1848," the streets "and the pavements, stones and other materials thereof, and all buildings, implements and other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the local Board of Health." By "The Wolverhampton Improvement Act, 1853" (16 Vict. c. xxviii.), the 54 Geo. 3, c. cvi., was repealed; and by section 10 it was enacted, "that notwithstanding the repeal of that Act, the corporation and local Board respectively shall by virtue of this Act be and remain seised and possessed of and entitled to all the buildings, &c., property, effects, &c., to which the corporation or the local Board are respectively by virtue of that Act, and for any of the purposes of that Act," entitled. By the 18 & 19 Vict. c. cli., which embodies in it the Waterworks Clauses Act (10 & 11 Vict. c. 17), in 1855, the defendants were incorporated. In 1856, under the 19 & 20 Vict. c. lvii., they obtained

(a) The copy of this order is given at length in Schedule (I.) of the 16 Vict. c. xxviii.

a transfer of the old Wolverhampton Waterworks, and took possession thereof. The 16th section of the last men-[244]-tioned Act enacts that "the new Company shall be subject to and perform all duties, obligations, and liabilities to which the old Company" were subject. It was proved that the Company was in the habit of keeping the plugs in repair, but that they did not repair until after notice by the local Board.

Upon these facts, it was objected that the defendants were not possessed of the plug, and that the action should have been brought against the local Board of Health and not against the defendants. The learned Judge ordered the declaration to be amended by striking out the allegation that the defendants were possessed of the plug; and a verdict was found for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them, if the Court should be of opinion that the action should have been brought against the local Board.

Phipson now moved accordingly. The property in the plug was vested in the Commissioners, who are now represented by the local Board of Health. By the 54th section of the 8 & 9 Vict. c. cxxxv., the Company are to repair at the cost and charge of the Commissioners, this is at their request. It was not shewn that the local Board had requested the Company to repair. The repairing is a duty as between the defendants and the local Board, not as between the defendants and the public. It is merely to keep the plugs in repair as fire plugs capable of supplying water. The plugs were the property of the local Board, in their possession, and used by them for their own purposes.

POLLOCK, C. B. The 54th section of "The Wolverhampton Waterworks Act, 1845," casts on the defendants the burden of repairing, renewing and keeping the fire plugs in proper order, though not at their own expense. Therefore I am of opinion that the defendants are responsible.

[245] BRAMWELL, B. I understand that it is admitted that an action lies either against the local Board or the Company. But the local Board would say, "We have no right to repair the plugs though we pay for the repairs." Mr. Phipson, for the defendants, would contend that the property in the plugs is in the local Board, and that if the defendants made default in repairing, they might do the repairs themselves. The only doubt in my mind was, whether, as the property in the plugs is in the Commissioners, they are not responsible for their condition. But I think that the Act creates a duty as between the defendants and the public.

CHANNELL, B. I am of the same opinion. It is conceded that the plaintiff has a right to maintain an action against somebody, either the local Board or the Company. Now the duty of keeping the fire plugs in repair is cast by the Act upon the defendants. They have a right of direct and immediate interference with the plugs so far as regards repairing, renewing and keeping them in order.

WILDE, B., concurred.

Rule refused.

FANNY DAVIS v. BOMFORD. Nov. 5, 1860.—In an action for breach of promise of marriage, it was proved that the defendant, having written a letter to the plaintiff desiring to terminate the engagement, called at her father's house, and a conversation took place respecting the return of letters. The defendant returned the plaintiff's letters; the plaintiff said "No, I can't give up your letters; it would be like giving you up altogether." The plaintiff left her home and went to reside with an aunt for a long period, and no correspondence took place between the parties for a period of two years. Held, that this was evidence from which the jury might infer that the plaintiff had exonerated the defendant from his promise before any breach.

[S. C. 30 L. J. Ex. 139; 3 L. T. 279.]

Declaration. That the plaintiff and the defendant agreed to marry one another, and a reasonable time for such marriage had elapsed; that the plaintiff had always been ready and willing to marry the defendant until the [246] defendant married another woman; yet the defendant made default, and married another woman.

Plea. That, after the agreement and before breach, the defendant exonerated and discharged the defendant from the agreement and the performance thereof.

At the trial, before Hill, J., at the last Worcester Assizes, it was proved that in 1857 the defendant was in the habit of visiting the house of the plaintiff's father at Worcester as an accepted suitor. In the month of September of that year the defendant wrote to the plaintiff stating his desire to put an end to the engagement. He called at the house of the plaintiff, and in the presence of her brother a conversation took place as to returning letters. The defendant returned the plaintiff's letters, and requested the plaintiff to give back his letters to her. The plaintiff said: "No Tom; I can't give up the letters, it would be like giving you up altogether." The plaintiff left Worcester and went to stay with an aunt in London, where she remained until after the defendant's marriage. The action was commenced in March 1860. No explanation of the delay was given.

The learned Judge asked the jury whether they thought that before any breach the plaintiff and the defendant had agreed to absolve each other from the promise, and observed strongly upon the delay in bringing the action. The jury found a verdict for the defendant.

Pigott, Serjt., now moved for a new trial, on the ground of misdirection and that the verdict was against evidence. The evidence shewed that the defendant had repudiated his contract. [Channell, B. The plaintiff received back the defendant's letters. Wilde, B. The defendant asks to be exonerated. May not the jury have thought that by her conduct the plaintiff acceded to it? Pollock, C. B. [247] A promise of this sort is subject to certain implied exceptions, as, "If I am alive," "If I am in health;" and it is a thing to be performed promptly and speedily. If an interval longer than that over which persons usually allow the contract to extend is permitted to pass without any intercourse or correspondence between the parties, the contract may be presumed to have been abandoned. Bramwell, B. If the defendant had said, "I will not marry you," the plaintiff's going away would not lead to the inference that she exonerated him from his promise; but here he asked to be exonerated.] The plaintiff did not give up the engagement when the defendant asked for his letters, and from her subsequent silence no intent to exonerate him can be inferred. [Wilde, B. Is not that a question for the jury?]

POLLOCK, C. B. The learned Judge who tried the cause reports that he is satisfied with the verdict, and that the only question is, whether there was evidence for the jury upon the plea. In the matter of actions for breaches of promises to marry, as the parties cannot be witnesses the whole contract is a matter of vague surmise. Most people would infer, if one party went to one place and the other to another, and no communication took place between them for a considerable time, that the engagement was given up and that each was free. I think that the question was properly left to the jury, and that they came to a right conclusion.

BRAMWELL, B. I am of the same opinion. As to the question whether the verdict was against evidence, the learned Judge is satisfied with it, and I concur in thinking that there was evidence, and satisfactory evidence, in support of the plea. The defendant expressed a disinclination to go on with the engagement and desired to be released [248] from it. The presumption is that, upon that, both parties would give it up. Though the plaintiff might feel regret, it is improbable that she would wish to insist on marrying the defendant. My brother Pigott says that the plaintiff did not give up the defendant at the time of his communication, and that mere silence afterwards was not exoneration. I think he is wrong. This is not a silence which would be equally consistent with her treating the promise as subsisting. She went away and did not ask the defendant if he meant to carry out his engagement. Suppose the plaintiff hoped that the defendant at some future time might voluntarily marry her, and therefore did not wish to give him up; and the defendant at the end of two years had called on the plaintiff to marry her and she had said, "Two years ago we gave each other up;" surely a jury would say that the discontinuance of the correspondence justified her in doing so.

CHANNELL, B. I agree that there ought to be no rule. My brother Pigott says that there was no evidence to support the plea. I do not attach much importance to the retention of the letters. It is clear that there was no promise after the day when the defendant's letters were given up. From the expressive silence and the plaintiff's change of residence, I should infer that there had been a mutual exoneration.

WILDE, B. I rest my judgment on the narrow ground, that the promise, in an action of this kind, where the parties themselves cannot be called, is usually proved

by their conduct. Then the question is, whether the conduct of the parties was such that the jury might infer from it a rescission of the contract. A conversation leading to such a result was proved, after which the parties [249] ceased to see or communicate with each other, or do that which they would naturally or ordinarily do if the promise had continued to subsist. Without saying that I should have found the same verdict, the question was one for the jury, and they have decided it: therefore there will be no rule.

POLLOCK, C. B., added—In *Lowe v. Peers* (4 Burr. 2225, 2230), Lord Mansfield said:—"When persons of different sexes attached to each other, and thus contracting to marry each other, do not marry immediately, there is always some reason or other against it, as disapprobation of friends and relations, inequality of circumstances or the like. Both sides ought to continue free; otherwise such contracts may be greatly abused, as by putting women's virtue in danger by too much confidence in men, or by young men living with women without being married. Therefore these contracts are not to be extended by implication." It is clear that he thought that such contracts if not speedily carried into effect might be considered as abandoned.

Rule refused.

[250] MICHAELMAS VACATION, 24 VICT. IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

HIPKINS v. THE BIRMINGHAM AND STAFFORDSHIRE GAS LIGHT COMPANY. Dec. 1, 1860.—The 6 Geo. 4, c. lxxix., incorporated a Company for the purpose of supplying the town of Birmingham with gas. By the 8 & 9 Vict. c. lxvi., s. 160, it is enacted, "That if the Company shall at any time cause or suffer to be conveyed or to flow into any stream, reservoir, aqueduct, pond or place for water, within the limits of the said Act, any washing, substance or thing which shall be produced by making or supplying gas," they shall forfeit 200l. In 1854 the Company erected a gas tank about forty-five yards from the plaintiff's well. The site was selected by an engineer on behalf of the Company, and the tank was erected on solid sandstone and with proper materials. The Company knew that mines in the neighbourhood had been worked, but they did not know that mines had been worked under or near to any part of their land. In 1838 there were workings under half the Company's land, and from 1848 to 1855 these workings were brought to within about sixty yards of the tank, in consequence of which the floor of the tank cracked, and the washings in it flowed out and percolated to the plaintiff's well, thereby rendering the water in it unfit for domestic purposes. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the Company had suffered the washings to flow into the plaintiff's well within the meaning of the 8 & 9 Vict. c. lxvi., and consequently were liable to the penalty of 200l.

[S. C. 30 L. J. Ex. 60; 7 Jur. (N. S.) 213; 9 W. R. 168. Followed, *Millington v. Griffiths*, 1874, 30 L. T. 68.]

This was a proceeding in error on the judgment of the Court of Exchequer for the plaintiff on a special case stated for the opinion of that Court. The pleadings and special case fully appear in the report, 5 H. & N. 74.

Sir F. Kelly (with whom was Whateley and Phipson), argued for the defendants. (a) The land on which the works were erected was selected by an experienced mining engineer; and the tank was constructed with proper materials and with due care. The plaintiff must contend, that if an earthquake or any other convulsion of nature had [251] destroyed the tank, and caused the washing to flow into his well, the defendants would be liable. Or suppose a trespasser had entered in the night time and bored a number of holes in the tank, whereby the plaintiff's water was contaminated, could he maintain an action against the Company? [Cockburn, C. J. My doubt is whether there is any default in the Company unless they have had an

(a) Before Cockburn, C. J., Wightman, J., Williams, J., Hill, J., Keating, J., and Blackburn, J.

opportunity, that is a reasonable time, to repair. It occurred to me whether that was not an element in the case which has hitherto been overlooked.] It is conceded that, by the 162nd section of the 8 & 9 Vict. c. xlv., the Company are liable to a penalty of 20l. for each day the fouling shall continue after twenty-four hours' notice of it; but under the 160th section they are not liable unless they have "caused or suffered" the fouling. [Cockburn, C. J. Can a person be said "to suffer" what he cannot prevent?] The damage has arisen from the act of a person over whom the Company had no controul; and if they are liable in this action they are insurers against such an event however caused. The flow of the washing from the tank was caused by the cracking of its walls, and that again was caused by the working of the mines. The Company have a common law right to the support of the mines, but they have no power to prevent the owner from working them, nor any means of ascertaining the effect of the working. The word "suffer" should receive its ordinary construction, and its meaning is "to allow that which a person has it in his power to prevent." [Wightman, J. Suppose the water had been contaminated by gas, under the 165th section the Company would have been liable to a penalty of 20l. without any default or negligence on their part.] That clause has been inserted in order to relieve the party injured from proving actual negligence. If a gas pipe, which passed through a person's land, burst, and thereby the gas con-[252]-taminated his water, the Company might be liable under that clause, although no reasonable diligence or attention could have prevented the mischief. But under the 160th section the injury must have been caused by something which the Company might have prevented and failed to prevent. If the plaintiff's construction of the word "suffer" prevails, the Company might be liable although they used their utmost endeavour to prevent; for instance, if rioters had broken into the Company's premises and demolished the tank, notwithstanding the Company struggled to prevent it. [Cockburn, C. J. The Company selected the spot over the mines on which they built their works, and they accumulated a quantity of foul water which found its way to the plaintiff's well; therefore they are the immediate cause of the injury. It was incumbent upon them to construct their works with greater care and skill than would be required if there were no mines under them.] If the legislature had intended to make the Company insurers against contamination caused by the wrongful act of any person, they would not have called it an "offence." He referred to *Harris v. Ryding* (5 M. & W. 60), *Humphries v. Brogden* (12 Q. B. 739), and *Fletcher v. The Great Western Railway Company* (4 H. & N. 242).

The Court intimated their wish to hear the argument for the plaintiff on the first count.

Scotland (Macnamara with him), for the plaintiff. There is nothing unreasonable in these provisions, and the legislature has inserted them for the protection of persons in the neighbourhood from injury by works of this description. The act of parliament does not impose upon the Company the obligation of erecting their works on any particular spot, and at the time they purchased the land [253] on which the tank was built mining operations were going on under it. The Company had the means of knowing that, and ought to have chosen a different site. It is for them to shew that they have taken every possible means to prevent damage to any one from their works. This they have not done. The case only finds that they have taken every precaution with reference to an ordinary state of things. They might have obtained power to purchase the mines. The Company are receiving a great benefit from their act of parliament, which is in the nature of a contract between them and the legislature acting on behalf of the public. The tank might have been constructed on an embankment of cast iron, so that a crack in the surface land would not affect the tank. The case finds that the surface soil of lands in the neighbourhood of mines, without any superincumbent weight, is frequently cracked by the subsidence or the lateral sinking of the earth, by the giving way of the ribs and pillars of coal which are left in the mines, when the coals are worked, to support the surface. That leads to the inference that the first working of the mines might have caused a subsidence, though the second working had never taken place. There is nothing unreasonable in construing the 160th section as meaning that the Company shall be responsible as insurers against injury to the neighbourhood from their works. The legislature has granted them a monopoly in the supply of gas to the neighbourhood, and has enabled them to divide great profits. [Cockburn, C. J.

Is this a contract for an absolute guarantee, or merely that the Company shall be liable if they do not prevent? The words "suffer to flow" mean "allow to flow." [Cockburn, C. J. Suppose the Act used the word "allow," does a person "allow" if he neither has the means, the power, nor the opportunity of preventing?] It is not necessary to contend that the Com-[254]-pany would be liable if the injury was occasioned by vis major, because their responsibility arises from their contract. The not taking extraordinary care is, in effect, "to suffer." The word "negligently" would have been introduced if the legislature intended to limit the liability to ordinary neglect. The term "offence" does not necessarily imply a criminal act: *King v. Burrell* (12 A. & E. 460): here it is used in the sense of offensive act. The words in the 160th section, "or shall do any act to the water whereby it shall be fouled," apply to acts knowingly and intentionally done. By the 161st section the penalty shall be recovered "by the person into whose water such washing, substance, or thing shall be conveyed or shall flow, or whose water shall be fouled or corrupted thereby." That is an exposition of the previous section. By the 162nd section the Company are liable to an additional penalty of 20l. "for each day such washing, &c. shall be conveyed or shall flow as aforesaid" &c. after twenty-four hours' notice. The 163rd section supports the construction contended for. There the legislature, in imposing a penalty for the escape of gas, makes knowledge of it a necessary element in the offence. The 165th and 166th sections, the object of which is to prevent the contamination of water by gas, contain substantially the same provisions as the 160th and 162nd. As regards liability, there is a wide distinction between officers acting in discharge of a public duty and a Company carrying on an offensive trade for their own profit. In the latter case, the employment of skilled persons will not protect them if they have not taken proper precautions against injury. He referred to *Scott v. The Mayor, &c., of Manchester* (2 H. & N. 204).

Phipson replied.

[255] COCKBURN, C. J. We are all of opinion that our judgment must be for the plaintiff. At first I entertained some doubt upon the main question for our decision, viz. whether the Company are responsible at all events and under all circumstances, having undertaken to guarantee against all possible contamination of the water in the neighbourhood. The doubt in my mind was as to the construction of the 160th section of the Act—whether an individual or a corporation can be said to "suffer" a thing to be done, when they have taken every care to prevent it, or until an opportunity has been afforded them to repair the injury. I desire not to be considered as deciding that point affirmatively; and if it were necessary I should require further time for consideration. The decision of the case does not necessarily depend upon it, and my judgment proceeds on the ground urged by Mr. Scotland in his able argument, that the Company have not exonerated themselves from negligence, and that the fact of the plaintiff's water having received contamination makes them *prima facie* liable. If there was negligence on the part of the Company, they may be presumed to have suffered the act which by due and proper care they might have prevented. All that they say is, that they have constructed their works with due and proper care and security, with reference to ordinary circumstances. But here the circumstances are not ordinary, but extraordinary. The works were constructed on a spot where the ground, to a considerable extent, had been excavated; and, upon the facts stated, it does not appear that they might not have constructed their tank in a different position, or that they might not, by constructing the tank of different materials or by other mechanical means, have prevented the mischief. I think, therefore, that the Company have failed to shew that they are exempt from liability. The injury having proceeded immediately [256] from their works, the onus was on them to get rid of the presumption of negligence; and, not having done so, they may be properly said to have "suffered" this evil to take place. That being so, it is not necessary to say anything upon the second question.

WIGHTMAN, J. I am of the same opinion. From the terms used in the 160th section, I think that the object of the legislature was to make the Company insurers at all events against any contamination of the water in the neighbourhood by the access to it of the residuum of their gas works. It seems to me very reasonable that those who bring into a neighbourhood such works as are likely to be injurious (and it is clear that the escape of gas may have the effect of contaminating one of the first necessities of life), should be bound by the conditions upon which they obtained their

act of parliament. In my opinion, the Act imposes on them the duty of taking care at all events that the public shall not suffer. The words of the 160th section are consistent with that view of the case—"if the Company shall at any time cause or suffer to be conveyed or to flow into any stream &c. any washing, substance or thing which shall be produced in making or supplying gas" &c. It is said to be a great hardship to charge the Company with a penalty of 200l. without any neglect or default on their part; but it may be that the legislature considered that, if the Company had such a stringent rule imposed upon them, it would have the effect of causing them to exercise more caution in choosing the place where they constructed their works. Then the 165th section says that, if any water is contaminated by the gas of the Company, they shall forfeit for every such offence 20l.; in other words, imposing on the Company an absolute obligation to prevent, under any circumstances, the water in the neighbourhood from [257] being fouled by the escape of gas from their works. For these reasons I think that the plaintiff is entitled to judgment.

WILLIAMS, J. I am also of opinion that the judgment of the Court below should be affirmed. It has not been shewn that the manufacture of the gas might not be so conducted as to prevent the washing from flowing into the neighbouring wells. If it does, that is an offence within the meaning of the Act. I can see no hardship in the enactments, and no improbability that the legislature meant to enact that the Company shall carry on their works upon the terms of their preventing at all events the offensive fluids which they themselves create from being a nuisance to the neighbourhood. Moreover, it does not appear that the works might not be so conducted as to give no cause of complaint.

WILLES, J., HILL, J., KEATING, J., and BLACKBURN, J., concurred.
Judgment affirmed.

[258] EXCHEQUER REPORTS. HILARY TERM, 24 VICT.

ROBSON v. LEES. Jan. 12, 1861.—A Judge at Nisi Prius has no power, under the Common Law Procedure Act, 1854, to order a compulsory reference of matters of account, since the 3rd section of that Act only applies to a reference before trial, and the 6th section to a reference by a Judge on a trial without a jury.

[S. C. 30 L. J. Ex. 235; 7 Jur. (N. S.) 244; 4 L. T. 516. Referred to, *Morgan v. Ainslie*, 1873, 28 L. T. 121.]

This cause came on for trial before Blackburn, J., and a jury at the Liverpool Spring Assizes 1860, when the plaintiff's counsel applied to the learned Judge to refer some of the issues to an arbitrator under the 17 & 18 Vict. c. 125, on the ground that they were mere matters of account which could not be conveniently tried in the ordinary way. The learned Judge, being of that opinion, made an order referring the issues to a Master of this Court.

Spinks, in the following term, obtained a rule calling on the plaintiff to shew cause why the order of Blackburn, J., should not be rescinded, on the ground that he had no power to make such an order when the cause was tried by a jury.

C. Hutton shewed cause in last Trinity Term (June 22). The learned Judge had power to make the order, under the 3rd section of the 17 & 18 Vict. c. 125. By that section, "If it be made appear, at any time after the issuing of the writ, to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute con-[259]-sists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary way, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court, &c., and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred." The 6th section only applies to cases where, under the provisions of the 1st section, the parties leave the decision of any issue of fact to a Judge without a jury. [Bramwell, B. If the 3rd section applied to a reference at the trial, there would be no occasion for the 6th.]

Spinks, in support of the rule. The 3rd section only provides for a reference by

the Court or a Judge before trial. The 6th section empowers the Judge, at his discretion, to refer matters of account upon a trial without a jury. That section says, "that the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial," that is, the award or certificate of a referee appointed under the 3rd section. That section excludes a Judge of assize. By the interpretation clause (section 99), the word "Judge" shall be understood to mean a "judge or baron of any of the superior Courts of Common law at Westminster." He also referred to the form of proceeding under this statute prescribed by the Reg. Gen. Mich. Vac. 1854.

Cur. adv. vult.

MARTIN, B., now said—The question in this case is, whether the learned Judge before whom, with a jury, the cause [260] was tried, had power to make a compulsory order of reference; and it depends on the construction of the 3rd and 6th sections of the Common Law Procedure Act, 1854. (His lordship read the 3rd section.) If this had been the only enactment on the subject, it might have been contended with considerable force that its provisions would enable a Judge to refer matters of account under circumstances like the present. It is perhaps better that we should not state what we know to be the history of these clauses, for we ought to decide solely on the language of the legislature. We must, however, take into consideration the 6th section. (His lordship read the 6th section.) It appears to us that, upon the true construction of the three sections, the power which a Judge at a trial has to make a compulsory order of reference, is restricted to those cases where, under the 1st section, he is trying an issue in fact without a jury; and that the 3rd section is limited to cases where a compulsory order is made upon a summons before a Judge at Chambers or on application to the Court in the ordinary way, and that it does not apply to a Judge at Nisi Prius trying a cause with a jury. The rule will therefore be absolute, to set aside the order of my brother Blackburn, and there must be a new trial unless the parties will consent to a reference.

Rule accordingly.

[261] ADAMS v. READY. Jan. 29, 1861.—The bringing an action on a judgment under 20l. with the object of obtaining a judgment above 20l. and issuing thereon execution against the person, is an evasion of the 7 & 8 Vict. c. 96, s. 57, and the Court in the exercise of their discretion, under the 43 Geo. 3, c. 46, s. 4, will not allow the plaintiff his costs.

[S. C. 7 Jur. (N. S.) 267; 9 W. R. 438; 3 L. T. 892. Dissented from, *Dickinson v. Angell*, 1863, 3 B. & S. 840.]

The plaintiff in this case had brought an action against the defendant and obtained judgment for 18l. 4s. 6d. debt, and 3l. 14s. 8d. costs. The plaintiff, not being able to obtain satisfaction by fi. fa., brought an action on the judgment, to which the defendant pleaded nul tiel record; and on production of the record judgment was entered for the plaintiff. An application was then made to Martin, B., at Chambers to allow the plaintiff his costs of the action on the judgment, under 43 Geo. 3, c. 46, s. 4. The defendant opposed the application, and the learned Judge referred the matter to the Court.

C. Pollock, in last Michaelmas Term, obtained a rule nisi accordingly; against which

The defendant, in person, shewed cause in the same term (Nov. 24), and contended that the action on the judgment was an evasion of the 7 & 8 Vict. c. 96, which prohibits execution against the person on a judgment for a sum not exceeding 20l.

C. Pollock, in support of the rule. Under the 43 Geo. 3, c. 46, s. 4, it is in the discretion of the Court or a Judge to allow the costs of an action on a judgment. *Slater v. Mackay* (8 C. B. 553) is an authority in point. There the plaintiff had obtained judgment by default against the defendant for 15l. 3s. 6d. debt and 5l. 12s. 6d. costs. The defendant having no available property, the plaintiff brought an action on the judgment, to which the defendant pleaded nul tiel [262] record, and judgment was given for the plaintiff for the amount of the debt and cost. The plaintiff having applied to the Court to allow him his costs, under the 43 Geo. 3, c. 46, s. 4, it was held that he was entitled to them, notwithstanding the original cause of action was

one for which he might have entered a plaint in the County Court. [Martin, B. The proper criterion is whether the plaintiff is entitled to costs at the time he commences his action: his right to costs cannot depend upon whether the defendant pleads nul tiel record.] The defendant ought not to have pleaded a false plea. [Pollock, C. B. The statute having given us a discretionary power over the costs, why should we not give the costs of the false plea, and refuse the rest?] *Hall v. Pierce* (5 Dowl. P. C. 603) is an authority that the costs cannot be severed. There, judgment having been obtained against the defendant, he rendered in discharge of his bail and was superseded. The plaintiff brought an action on the judgment, to which the defendant pleaded nul tiel record. The plaintiff having applied for costs under the 43 Geo. 3, c. 46, s. 4, on the ground that the defendant had pleaded a false plea, Parke, B., said, "The plaintiff is seeking to rectify his blunder in not having charged the defendant in execution. The question then is, whether the defendant ought to pay, or the plaintiff to suffer the consequences of his own negligence. If the costs could be separated, the defendant ought to bear the expense of his false plea; but the Act gives no power for us to award part of the costs." Where a defendant against whom judgment had been obtained sued out a writ of error, and, the plaintiff having brought an action on the judgment, the defendant pleaded nul tiel record, the Court allowed the plaintiff his costs, observing that the defendant, instead of pleading nul tiel record, ought to have applied to stay the proceedings. [263] [Martin, B. *Bell v. Waldron* (9 Jur. 510) is an authority against the application.] In that case the defendant did not plead nul tiel record, but *nunquam indebitatus*, so that, in effect, the action was undefended. He also referred to *Gray on Costs*, 168, and 1 Chit. Arch. 470, 10th ed.

Cur. adv. vult.

MARTIN, B., now said:—This case involves a question which has been much agitated in the Courts. The plaintiff recovered judgment for a sum less than 20l., and being unable to obtain satisfaction by *fi. fa.* he brought an action on the judgment and recovered a sum above 20l. An application was made to me at Chambers to allow the costs of this judgment. I referred the parties to the Court, and the question was argued last term. We have given it great consideration, having been much perplexed by the course taken in cases of this kind. We had intended to consult the Judges of the other Courts, but as there is a difficulty, owing to the pressure of business, in seeing any considerable number of them, we have considered it our duty to deliver our judgment on the matter.

The 7 & 8 Vict. c. 96, s. 57, after reciting that "it is expedient to limit the present power of arrest upon final process," enacts "that from and after the passing of this Act no person shall be taken or charged in execution upon any judgment obtained in any of her Majesty's Superior Courts, or in any County Court, court of requests or other inferior court, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20l., exclusive of the costs recovered by such judgment." It is impossible that there could be a more direct enactment by the legislature that a right to execution against the person should not exist unless the sum recovered exceeds 20l. exclusive of costs; and we think this enactment is binding on all Courts of [264] law in this country, and that they ought to give effect to it. The legislature must be understood as having taken into consideration the circumstance that judgments are often recovered against persons whose property is not sufficient to satisfy them, and to have enacted that even in these cases there shall be no execution against the person. However, any person who has recovered judgment for a debt under 20l., but which with the costs exceeds 20l., may bring an action on that judgment, though for the avowed purpose of obtaining a judgment for a debt above 20l.: there is no law to prohibit him, and he may do so as a matter of right. But then the 43 Geo. 3, c. 46, s. 4, provides that the plaintiff in an action upon a judgment shall not recover or be entitled to any costs, unless the Court or a Judge shall otherwise order; and the question we have to consider is whether, when a person brings an action on a judgment with the express object of evading the 7 & 8 Vict. c. 96, s. 57, we are to interfere and allow him his costs. We have been pressed with the decision in *Slater v. Mackay* (8 C. B. 553). That was an application for the costs of an action on a judgment, and as the defendant had pleaded nul tiel record, the Court of Common Pleas considered that this circumstance enabled them, in the exercise of their discretion under the 43 Geo. 3, c. 46, s. 4, to allow the plaintiff his costs.

The judgment of the Court of Common Pleas is entitled to the greatest respect, and we have given it the fullest consideration; but we are at a loss to understand how the pleading a false plea can render the original bringing of the action right, so as to entitle the plaintiff to the costs of it. The question is, whether the bringing the action is an evasion of the 7 & 8 Vict. c. 96, s. 57; and how can it be affected by the circumstance of the defendant pleading a false plea? If we could give the plaintiff the costs of the false plea we would do so, but I doubt our [265] power. In *Bell v. Waldron* (9 Jur. 510), Wightman, J., considered that if a plaintiff has been guilty of an evasion of the 7 & 8 Vict. c. 96, s. 57, he ought not to be allowed his costs. If a plaintiff thinks proper to bring an action on a judgment for a debt under 20l., for the purpose of recovering a sum above 20l. and issuing an execution against the person, we are of opinion that we carry out the intention of the legislature by holding, in the exercise of our discretion, that he must bear the expense of it, and ought not to be allowed his costs.

Rule discharged.

MORGAN v. RAVEY AND ANOTHER. Jan. 11, 1861.—Wherever a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or a jury may infer, a promise by each party to do what is to be done by him.—Therefore an action may be maintained against the executors of an innkeeper on his implied promise to keep safely and without diminution the goods of his guest.—The executors are also liable in “tort,” the loss of the goods being a wrong committed within the meaning of the 3 & 4 Wm. 4, c. 42, s. 2.—An innkeeper, though guilty of no negligence but even diligent, is liable for the loss or injury of the goods of his guest not arising from the negligence of the guest, the act of God, or the Queen’s enemies.

[S. C. 30 L. J. Ex. 131; 9 W. R. 376; 3 L. T. 78. Discussed, *Baylis v. Lintott*, 1893, L. R. 8 C. P. 348; *Batthyany v. Walford*, 1887, 36 Ch. D. 280; *Jackson v. Watson*, [1909] 2 K. B. 204. Referred to, *Medawar v. Grand Hotel Company*, [1891] 2 Q. B. 11. Applied, *Robb v. Green*, [1895] 2 Q. B. 11.]

This was an action against the defendants as executors of the will of Joseph Dethier, deceased. The declaration stated that the said Joseph Dethier in his lifetime, before and at the time of the making of the promise and thence until the loss hereinafter mentioned, was an innkeeper and kept a certain common inn for the reception, lodging and entertainment of travellers, and whilst the said Joseph Dethier was such innkeeper and so kept the said inn as aforesaid, theretofore in consideration that the plaintiff, at the request of the said Joseph Dethier, then put up and was received by the said Joseph Dethier in the said inn, to abide in the said inn as such traveller as aforesaid, the said Joseph Dethier promised the plaintiff to keep the goods and chattels brought, or which whilst the plaintiff should so abide in the said inn as such traveller, should be brought by the plaintiff into the said inn, safely and without diminution or loss while they should be within the said [266] inn and the plaintiff should abide there as such traveller: that while the plaintiff was abiding in the said inn as such traveller as aforesaid, he (the plaintiff) had, and up to the time of the loss hereinafter mentioned continued to have, with him, as such traveller as aforesaid in the said inn, certain goods and chattels of great value, to wit, a watch, a chain, a ring, a silver pencil case, a knife, a purse and certain monies belonging to the plaintiff, which goods and chattels the plaintiff brought into the said inn as aforesaid. Yet the said Joseph Dethier, while the plaintiff was abiding in the said inn as such traveller, and the said articles and monies were so within the said inn, broke his said promise in this, that he did not keep the said goods and chattels safely and without diminution or loss, and by reason thereof the said goods and chattels were wrongfully taken away by some person or persons to the plaintiff yet unknown, and were, and still are, lost to the plaintiff.

Pleas (inter alia). First: That the said Joseph Dethier did not promise the plaintiff as alleged. Thirdly: That the said Joseph Dethier did not break his said promise as alleged. Issues thereon.

At the trial, before Pollock, C. B., at the Middlesex Sittings, after Trinity Term

1860, the following facts appeared*—On the 14th December, 1859, the plaintiff, who was a Manchester manufacturer, came to London and went to the Great Northern Hotel, which was at that time kept by the defendants' testator, Joseph Dethier. The plaintiff occupied a bedroom on the third floor, and over the mantel-piece was the following notice :—

“TAKE NOTICE.

“*This Building is Fire Proof.*

“Several robberies having taken place during the night in the principal hotels of London, the proprietor of the Great Northern Hotel respectfully requests all visitors to use the [267] night bolt. Money, jewellery, or articles of value are requested to be left at the bar, otherwise the proprietor will not hold himself responsible for any loss. “F. DETHIER, Proprietor.”

The plaintiff had with him a gold repeater watch and chain, a gold ring, a silver pencil case, a knife, and a purse with 5l. 15s. in it. On the night of the 15th, when he retired to rest, he placed his watch on a round pedestal at the side of the bed, and the other articles on the dressing table. The plaintiff stated that he locked the bedroom door and left the key in the lock. Witnesses were, however, called, on the part of the defendants, to prove that the plaintiff had told them he had not locked the door. When the plaintiff awoke on the following morning he found that his watch and the other articles were gone, and the door of his bedroom was slightly open.

On cross-examination the plaintiff admitted that he had seen the notice over the mantel-piece, but said that he did not read any more than the word “Notice.” He did not use the night bolt.

It was submitted, on the part of the defendants, that the action was not maintainable against executors; and that there was no evidence of the promise as laid in the declaration. The learned Judge reserved the points, giving the plaintiff leave to amend; and his lordship left it to the jury to say whether the plaintiff was guilty of negligence in not reading the notice, or in not locking the door. The jury having found a verdict for the plaintiff,

Phinn, in last Michaelmas term, obtained a rule nisi to enter a nonsuit on the grounds, first, that no such action lies against executors; secondly, that the promise, as laid in the declaration, was not proved; thirdly, that, if proved, it was qualified by the notice, and that the defendant's testator was protected [268] thereby: or why a new trial should not be had, on the ground of misdirection in this, that the learned Judge should have directed the jury that, if there was no negligence on the part of the defendants' testator, the defendants were not liable.

Honyman shewed cause. First, this is not an *actio personalis*, which dies with the person. An action might have been maintained against the testator, either in case on his common law liability, or in *assumpsit* for a breach of contract, and, if the latter form were adopted, the money counts might be joined. A carrier may be sued in *assumpsit*, because a promise is implied from his duty to carry safely: *Max v. Roberts* (12 East, 89). The rule of law is thus stated by Lord Mansfield in *Hambly v. Trott* (1 Cowp. 371, 375):—“As to those which survive or die; in respect of the form of action. In some actions the defendant could have waged his law; and, therefore, no action in that form lies against an executor. But now other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where, in form, the declaration must be *quare vi et armis et contra pacem*, or where the plea must be not guilty, can lie against the executor. . . . An action on the custom of the realm against a common carrier if for a tort and supposed crime; the plea is, not guilty; therefore it will not lie against an executor. But *assumpsit*, which is another action for the same cause, will lie. So, if a man take a horse from another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.” In *Powell v. Layton* (2 Bos. & P. N. R. 365, 370), Sir J. Mansfield, C. J., said, “I suppose there [269] can be no doubt, and, indeed, it is so stated by Lord Mansfield in *Hambly v. Trott* (1 Cowp. 375), that if a common carrier accept goods to carry, and then die, an action will lie against his executor. How is that? Why, because the action is founded on contract.” [Wilde, B. In *Story on Bailments*, sect. 470, p. 495, 5th ed., it is said that “the custody of the

goods may be considered as accessory to the principal contract.”] Before the statement of a promise was abolished by the Common Law Procedure Act, 1852, s. 49, it was usual to declare against a carrier on his promise “safely and securely to carry and convey.” This subject was discussed in *Boorman v. Brown* (3 Q. B. 516; 11 Cl. & F. 1), which established this principle, that wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or on contract. That was an action against a broker for a breach of duty in delivering goods without payment of the price, and as the duty arose from express contract it was held that he was liable either in assumpsit or case. Tindal, C. J., in delivering the judgment of the Court of Exchequer Chamber, said (3 Q. B. 525):—“That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or nonperformance is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attornies, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against ship-owners on bills of lading, against bailees of different descriptions; and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff.” [Channell, B. The [270] rule must be taken with this limitation, that a plaintiff cannot, by changing the form, make the defendant responsible in the one action when he would not have been responsible in the other.] *Tattan v. The Great Western Railway Company* (2 El. & El. 844) will be relied on, but that case only decided that an action against a common carrier for the loss of goods, being founded on a breach of the common law duty, was not within the 19 & 20 Vict. c. 108, s. 30, which deprived a plaintiff of costs where the defendant suffered judgment by default in an action to recover a sum not exceeding 20l. At all events the declaration may be amended by inserting a count founded on the 3 & 4 Wm. 4, c. 42, s. 2, which provides “that an action of trespass, or trespass on the case, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person’s death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate,” &c. Secondly, it is objected that the promise as laid in the declaration was not proved. [Pollock, C. B. It was proved if such a promise can be implied.] In *Ross v. Hill* (2 C. B. 877), which was an action against a cab proprietor for the loss of a portmanteau, the declaration alleged that the defendant promised the plaintiff to carry him and his luggage safely and securely: it was objected that the promise was laid too largely, inasmuch as it cast on the defendant the liability of an insurer, as a common carrier: but the Court of Common Pleas held that the words “safely and securely” might receive a more modified construction, and be held to mean safely and securely, regard being had to the relative rights and duties [271] of the parties. So here the word “safely” may be construed to mean “with due and reasonable care.” Thirdly, the promise is not qualified by the notice. [Pollock, C. B. In my opinion the notice does not apply to articles which a person ordinarily carries about him. He must take his watch into his bedroom, or it would be of no use to him. If the watch was set with valuable diamonds, the notice might apply.] It is not competent for an innkeeper to repudiate all responsibility for loss. The right of a carrier to limit his common law liability has been set at rest by the 11 Geo. 4 & 1 Wm. 4, c. 68; but the notice for that purpose is inoperative unless it comes to the knowledge of the party: *Kerr v. Willan* (6 M. & Sel. 150). Here there is no evidence that the contents of the notice were known to the plaintiff; and therefore he did not become a guest on those terms. Moreover the notice does not apply to such articles as the plaintiff lost. Fourthly, there was no misdirection. The fact of goods being stolen from a public inn is *prima facie* evidence of negligence on the part of the innkeeper: *Dawson v. Chamney* (5 Q. B. 164). In that case the nature of the inquiry left the cause wholly doubtful, and, therefore, it was a question for the jury, whether it arose from want of care on the part of the innkeeper. [Wilde, B. In *Story on Bailments*, sect. 472, p. 498, 5th ed., it is said:—“But innkeepers are not responsible to the same extent as common carriers. The loss of the goods of a guest while at an inn will be presumptive evidence of negligence on the part of the

innkeeper or his domestics. But he may, if he can, repel this presumption, by shewing that there has been no negligence whatsoever; or that the loss is attributable to the personal negligence of the guest himself." The law is thus stated in *Bac. Abridg.* "Inns and Innkeepers," (C.) 4. "Innkeepers are clearly chargeable for the goods of [272] guests stolen or lost out of their inns, and this without any contract or agreement for that purpose; for the law makes them liable in respect of the reward, as also in respect of their being places appointed and allowed by law, for the benefit and security of traders and travellers." A person who takes in horses to agist, does not, like an innkeeper, insure their safety: *Broadwater v. Blot* (Holt, N. P. 547). In *Burgess v. Clements* (4 M. & Sel. 306), the goods were lost through the negligence of the plaintiff, out of a private room which he had hired for the purpose of trade, and not as a guest. Lord Ellenborough, C. J., there points out "that the law obliges an innkeeper to keep the goods of persons coming to his inn, *causa hospitandi*, safely, so that, in the language of the writ, *pro defecto hospitatoris damnum non eveniat ullo modo*." But where a traveller went to an inn and desired to have his luggage taken into the commercial room, to which he resorted, from whence it was stolen, it was held that the innkeeper was responsible, although he proved that according to the usual practice of his house the luggage would have been deposited in the guest's bedroom, and not in the commercial room, if no order had been given respecting it: *Richmond v. Smith* (8 B. & C. 9). Bayley, J., there said:—"It appears to me that an innkeeper's liability very closely resembles that of a carrier. He is *primâ facie* liable for any loss not occasioned by the act of God or the King's enemies, although he may be exonerated where the guest chooses to have his goods under his own care." [Wilde, B. That is a mere dictum, not necessary for the decision of the case.] By the custom of the realm innkeepers are bound to keep the goods and chattels of their guests, which are within their inns, without subtraction or loss by day or night: *Calye's case* (8 Rep. 32 a.). In delivering the judgment of the Court in *Cashill v. Wright* (6 E. & B. 891, 900), Erle, J., said:—"We think that [273] the rule of law, resulting from all the authorities, is that in a case like the present, the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances." He also referred to Story on Bailments, sects. 468, 470, 471, 472, 482.

Phinn and W. H. Lloyd, in support of the rule. First, there is no instance of an action against an innkeeper upon a promise to keep the goods of his guest safely. The form of action has always been case upon the custom of the realm. Neither is there any instance of an action against an innkeeper in which the breach has been laid so widely as in this declaration. The promise alleged is not that implied by law. This declaration can only be supported by proof of an express promise. The authorities, from the earliest case to that of *Cashill v. Wright* (6 E. & B. 891), shew that an action against an innkeeper is founded on a breach of duty. The extent of his obligation is the duty cast upon him by law, and his liability does not arise out of any relation between him and his guest, from which a promise is implied. The doctrine on this subject has been borrowed from the Roman law; but by that law an innkeeper might elect whether he would receive a guest, whereas by the common law he is bound to do so, if he has room. Suppose an innkeeper refused to receive a guest, who thereupon tendered him a reasonable sum for his lodging, upon which the innkeeper received him, could it be said that there was a contract between them? There is no authority for saying that a presumption of negligence, on the part of the innkeeper, arises from the [274] loss of the guest's goods. The form of writ in *Calye's case* (8 Rep. 32 a.) states that the horse was stolen, "*pro defectu ipsius B.*," shewing that there must be a default on the part of the innkeeper. It is true that in some cases an innkeeper is liable in *assumpsit*, as, for instance, upon his undertaking to provide food and lodging; but there is no authority that an action founded on contract will lie against an innkeeper for the loss of his guest's goods. The authorities relied on are all actions against carriers. The dicta of Lord Mansfield in *Hamblly v. Trott* (1 Cowp. 371, 375) were extrajudicial, the only question being whether trover would lie against an executor. The observations of Sir J. Mansfield, in *Powell v. Layton* (2 N. R. 365, 370), were merely in illustration of that particular case, *Pozzi v. Shipton* (8 A. & E.

963), and *Marshall v. The York, Newcastle and Berwick Railway Company* (11 C. B. 655), shew that the liability of a carrier is not founded on contract, but on the general custom of the realm. The decision in *Tattan v. The Great Western Railway Company* (2 El. & El. 844) proceeded on the express ground that the common law duty to carry safely arises independently of contract. A legal duty is not necessarily convertible into a contract. [Pollock, C. B. It is the duty of a returning officer to make a proper return; but there is no contract on his part that he will do so.] Even assuming that the duty of an innkeeper could be converted into a contract, it would not be such a contract as is stated in this declaration. Secondly, the learned Judge misdirected the jury. An innkeeper is not an insurer. He is only bound to use reasonable care and diligence in keeping the goods of his guest; and if he has done so, he is not responsible for their loss. In this declaration the promise and breach are too large; the [275] innkeeper is treated as an insurer. In *Ross v. Hill* (2 C. B. 877), where the duty alleged was to carry "safely and securely," there was a long series of precedents which justified the Court in construing those words with reference to the duty or promise implied by law from the relation of the parties. Here the duty alleged should have been to take due and proper care, as an innkeeper, of his guest's goods; and then the defendant might have taken issue on the breach. There is no precedent in which the loss or injury is not stated to have occurred through the default of the innkeeper. In these cases the proper direction is that of Cresswell, J., in *Dawson v. Chamney* (5 Q. B. 164), who told the jury to find for the plaintiff, if they were of opinion that the defendant, by himself or his servants, had been guilty of direct injury or of negligence, otherwise for the defendant. The plaintiff was warned that robberies had taken place in the night at hotels, and was advised to use the night bolt, which he neglected to do. Thirdly, assuming that such a promise as here laid can be implied, it was qualified by the notice: 1 Smith's Lead. Cas. 175. In *Richmond v. Smith* (8 B. & C. 9), Lord Tenterden, C. J., said "It is clear that, at common law, when a traveller brings goods to an inn the landlord is responsible for them. And if it had been intended by the defendant not to be responsible, unless his guests chose to have their goods placed in their bedrooms, or some other place selected by him, he should have said so." In the fourth resolution in *Calve's case* (8 Rep. 33 a.) it is said: "The innkeeper requires his guest that he will put his goods in such a chamber, under lock and key, and then he will warrant them, otherwise not, the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest, as it was [276] held in 16 Eliz. Dyer, 206." [Pollock, C. B. That is very different from the notice in this case. Probably at that time few persons could read.] If the guest is guilty of negligence, conducing to the loss, the innkeeper is not liable: *Armistead v. Wilde* (17 Q. B. 261), Story on Bailments, sect. 472, p. 439, 6th ed.

Cur. adv. vult.

The judgment of the Court was now delivered by

Pollock, C. B. This was a rule to set aside the verdict for the plaintiff and enter a nonsuit, or for a new trial. The action was by a guest against the executors of an innkeeper, whose property had been stolen during the night. The jury found a verdict for the plaintiff.

We are of opinion that this rule should be discharged. We think the plaintiff proved the declaration as it stands. We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him. We cannot distinguish this case from the case of a carrier. If so, the objection that such an action would not lie against executors because it is for a tort does not arise. It is not, however, necessary to determine this if the plaintiff elects to amend, which he may do, and we think successfully; because it seems to us, notwithstanding the ingenious argument of Mr. Phinn, that if the claim against the defendants is for a tort, it is for a "wrong committed," within the meaning of the 3 & 4 Wm. 4, c. 42, sect. 2.

Then, being, for these reasons, of opinion that the action [277] will lie against the executors if it would have done so against the testator, it remains to consider whether the direction to the jury was correct. We think it was. The objection was that it assumed the defendants were liable if there was negligence in the

plaintiff, and that therefore the defendants would be liable, though not only not negligent, but even diligent. But we think that is the law. It is true the expression in the forms in "tort" is, that the loss was "propter defectum" of the innkeeper; but we think the cases shew that there is a defect in the innkeeper, wherever there is a loss not arising from the plaintiff's negligence, the act of God or the Queen's enemies. The only case that points the other way is *Dawson v. Chamney*, as reported 5 Q. B. 164. According to the report, however, of that case in 7 Jurist, 1037, "there was no evidence of the manner in which the horse received the injury for which the action was brought." (a) This may be the explanation of that case; for though damage happening to the horse from what occurred in the stable might be evidence of defectus or neglect, still, if it was not shewn how the damage arose, it was not even shewn that it arose from what occurred in the stable. This would reconcile that case to the general current of authorities.

Rule discharged.

[278] *MILLER AND OTHERS v. TETHERINGTON*. Jan. 28, 1861.—A custom that underwriters are not liable under the ordinary form of policy, for general average in respect of the jettison of goods stowed on deck, is a valid custom and does not contradict the terms of the policy.

[S. C. 30 L. J. Ex. 217; 7 Jur. (N. S.) 214; 9 W. R. 437; 3 L. T. 893:
affirmed 1862, 7 H. & N. 954.]

Declaration. That the plaintiffs made their policy of insurance in the words and figures following:—"Be it known that Miller, Houghton and Co., as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance, and cause themselves, and them and every of them, to be insured, lost or not lost, at and from Miramichi to Liverpool, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel call the new ship, declared 'The Chatsworth,' 9th September, whereof

is master, &c., beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, upon the said ship, &c., including collision clause, and so shall continue and endure during her abode there, upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at as above, upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to, and touch and stay at any port or places whatsoever, without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the insured, by agreement between the insured and insurers in this policy, are and shall be valued at on ship, valued at 8000l.,

[279] warranted to sail on or before the 1st September, 1859. Touching the adventures and perils which we, the insurers, are contented to bear and do take upon us in this voyage; they are, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and people, of what nature, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, and ship, &c., or any part thereof; and in case of any loss or misfortune, it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof we, the insurers, will contribute, each one

(a) This report is evidently incorrect. The judgment, which was written, commences thus (5 Q. B. 168):—"This was a motion for a new trial on the ground of misdirection, the learned Judge having told the jury that the innkeeper was not answerable for injury done to the horse of a guest placed in his stable by the kick of another horse, unless there was some negligence proved in the innkeeper."

according to the rate and quantity of this sum herein insured. And it is agreed by us, the insurers, that this writing or policy of insurance, shall be of as much force and effect as the surest writing or policy of insurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London; and so we, the insurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the insured, their executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this insurance by the insured, at and after the rate of 40s. per cent. In witness whereof we, the insurers, have subscribed our names and sums insured in Liverpool. N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under [280] 5l. per cent.: and all other goods, and also the ship and freight, are warranted free from average under 3l. per cent., unless general, or the ship be stranded. And we further agree, that in case the said ship shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay, and shall pay (as damages to the owners or charterers of such other ship or vessel, or to the owners or consignees of the cargo thereof, or to the master and crew or passengers thereof), for the loss of or injury to their goods and effects on board such other vessel, or for costs (but not for damages for loss of life or personal injury to individuals), any sums not exceeding the value of the ship or vessel, new ship, and her freight, by or in pursuance of the judgment of any Court of law or equity, or of the Court of Admiralty, or by or in pursuance of any award made upon any reference entered into by the insured, with our previous consent in writing, we will severally bear and pay such proportion of three-fourth parts of sums so paid as aforesaid, as our respective subscriptions hereto bear to the value of the said ship or vessel hereby insured, and her freight, warranted free from capture, seizure, or detention, and all other consequences of hostilities." That thereupon, afterwards, in consideration that the plaintiffs then paid to the defendant a certain sum of money, to wit 34s., as a reward and premium for the insurance of 85l. upon the premises in the said policy mentioned, the defendant became and was an insurer on the said policy, and duly subscribed the same as such insurer of the said sum of 85l. upon the said premises in the said policy mentioned; and the plaintiffs, or some or one of them, were and was interested in the said ship, the matter of the said insurance, to the whole value so insured, and the said insurance was so made for their use and benefit, and divers goods were shipped on board of the said ship for the voyage in the said [281] policy mentioned, and were lawfully on board the same, to be carried for certain freight and hire; and the ship, with the goods lawfully on board, departed and set sail from the port of Miramichi, on the voyage in the policy mentioned, and all things happened and were done of every kind to entitle the plaintiffs to maintain this action; and while the said ship was proceeding on the said voyage with the said goods so lawfully on board, the said ship was, by divers of the perils insured against, damaged, to the great loss and damage of the plaintiffs; and also during the said voyage and risk certain of the said goods, and part of the said ship and freight, were necessarily sacrificed, and part of the said goods was necessarily jettisoned, for the safety of the said ship, freight, and cargo, and for the safety of the said ship from the perils insured against, to a great value; and divers sums were expended and sacrifices made by the plaintiffs in and about the suing, labouring and travelling in and about the safeguard of the ship; and the plaintiffs lost the said sums so expended, and had also to pay and contribute, and did pay and contribute, as and for general average, and as and for the contribution due and owing for the ship, &c.

Pleas. First, as to so much of the declaration as relates to the jettison of the goods: that the goods so jettisoned consisted of timber stowed upon the deck of the ship for the voyage, being a voyage from a port in British North America to a port in England; and that the policy was made in Liverpool; and that, before and at the time of the making of the policy, there had been and was, at Liverpool and elsewhere in England, a well-known and approved usage and custom of trade among shipowners and underwriters, in the trade of carrying timber from British North America to England, that underwriters on ships are not liable, under the ordinary form of policy, such as the policy in the declaration mentioned, to pay or contribute towards any general average or contribution payable by the [282] shipowner on

account of the jettison of any timber stowed upon deck ; of which usage and custom the plaintiffs and the defendant, at the time of the making of the policy, had notice, and made the policy with reference thereto.

Secondly, as to so much of the declaration as relates to the jettison of the goods : that the goods so jettisoned consisted of timber stowed upon the deck of the ship for the voyage, being a voyage from a port in British North America to a port in England ; and that the policy was made in Liverpool ; and that, before and at the time of the making of the policy, there had been and was, at Liverpool and elsewhere in England, a well-known and approved usage and custom of trade among shipowners, shippers, merchants, and underwriters, in the trade of carrying timber from British North America to England, that the loss occasioned by the jettison of timber loaded on deck, for the preservation of the ship and cargo in such voyages, is not contributed for by any general average among all the owners of the ship, freight, and cargo on board such ship, but the loss so occasioned by such jettison is, in the first place, apportioned over the ship, the freight of cargo both on and under deck, jettisoned and not jettisoned, and the cargo both on and under deck, both jettisoned and not jettisoned, according to their respective values, by a statement which is called general contribution ; but no owner of any of the above interests is, by custom, liable for the proportion falling on his interests, except those who are parties to the contract for the carriage of cargo on deck ; and by the same usage and custom no underwriter on a ship is liable, under the ordinary form of policy, such as the policy in the declaration mentioned, to pay or contribute towards the amount of the said general contribution payable or to be borne by the shipowner on account of the jettison of any timber stowed upon deck ; of which said usage and custom the plaintiffs and the defendant, at the time of the making of the said [283] policy, had notice, and made the said policy with reference thereto. And that, by reason of the said usages and customs, the plaintiffs, as the owners of the said ship, had not become liable to pay, nor had they paid, any sum, as general average, on account of the jettison of the goods in the declaration mentioned, but had become liable to contribute towards such general contribution as aforesaid, which was the only loss sustained by the plaintiffs, as the owners of the said ship, on account of the jettison of the goods.

Demurrers to pleas.

Replication to first plea. That there had been and was a known and approved usage of trade among shippers and carriers of timber from British North America to England, for the carrying of timber upon deck during the season of the year wherein the carrying of timber upon deck is not prohibited by statute ; and a known and approved usage of trade, whereby the underwriters at Liverpool insure such timber carried partly below and partly above deck, or all below or all above deck, by the words "on and over all ;" and that the said timber was being carried during the season when such carrying upon deck is allowed and permitted by law, and was well and safely stowed according to the said usage and custom for carrying the same.

Replication to second plea. That at the time aforesaid there had been and was a known and approved usage and custom of trade among shippers and owners of timber from British North America to Liverpool and elsewhere in England, and at Liverpool aforesaid, for the carrying of timber upon deck during the season of year wherein the carrying of timber upon deck is not prohibited by statute ; and a known and approved usage of trade between merchants and underwriters of Liverpool aforesaid, whereby underwriters insure such timber so carried along with other timber by the words in the policies "on and over all ;" and that such timber in [284] the plea mentioned was being carried upon deck during the season when such carrying was not prohibited by statute, and was allowed and permitted by law, and was well and safely stowed according to the said usage and custom for carrying the same ; and that the said general contribution, in the plea mentioned as a contribution to which the plaintiffs were liable, amounted to a greater sum than a general average contribution.

Demurrers to replications.

Broun, for the plaintiffs. The pleas are bad. They set up customs which contradict the terms of the policy by which the underwriter is responsible for general average. The obligation to pay general average arises from law, and there cannot be a custom not to pay that which a person has undertaken to pay. In *Hall v. Janson* (4 E. & B. 500), which was an action on a policy of insurance, with "freight warranted free from average under 5l. per cent., unless general," the interest insured being "money advanced

to the insured as owner of the ship," on account of the freight and cargo loaded on board and subject to the risk of the voyage, this was held an insurance on freight, and that a custom in a particular place that insurers of money advanced on freight were not liable to make good an average loss, was inconsistent with the policy, and therefore inadmissible. [Martin, B., referred to *Milward v. Hibbert* (3 Q. B. 120).] There the only question was as to the validity of a custom in a certain trade to stow goods on deck. In *Blackett v. The Royal Exchange Insurance Company* (2 C. & J. 244), which was an action on a policy, in the usual form, on ship, tackle, boat, &c., evidence of usage that the underwriters never pay for the loss of boats on the outside of the ship, slung upon the quarter, was held inadmissible. *Gould v. Oliver* (4 Bing. N. C. 134) is an [285] authority that there is nothing illegal in carrying goods on deck, provided they are not stowed in an improper manner. [Martin, B. What is there to prevent an underwriter from saying that he will not be responsible for the loss of cargo stowed in a particular manner?] By this policy, the underwriter has contracted to pay in respect of all jettison. The custom of general contribution, alleged in the second plea, is unreasonable and against the policy of the law. Even if it be good, the underwriter is bound to reimburse the plaintiff the amount he has paid. General contribution is in effect general average. The pleas being bad, it is not necessary to argue in support of the replications.

Mellish, for the defendant. The customs alleged in the pleas are reasonable and do not contradict the policy in the sense of the rule by which evidence is inadmissible to contradict a written document. The carrying a cargo on deck is dangerous and increases the probability of jettison. The legislature has prohibited the practice, between the 1st of September and the 1st of May, in trading from British North America and Honduras.^(a) *Ross v. Thwaite*, cited in Park on Insurance (1 Park on Ins. 23, 8th ed.), was an action on a policy of insurance of the captain's goods for six months certain. The loss was chiefly for goods lashed on deck, the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker that none of those things are within a general policy on goods, for the risk was greater as to goods lashed on deck than on other goods; and a policy on goods means only such goods as are merchantable and a part of the cargo. They also swore that when goods like the present are meant to be insured, they are always insured by name, and the premium is greater. Lord Mansfield said, he thought it consistent with reason, and understood the usage to be so; therefore [286] he advised the plaintiff to withdraw a juror, the premium having been paid into Court, to which he consented. The learned author then says, "And in a more modern case,^(a) Mr. Justice Chambre and a special jury decided that goods stowed on deck were not within a general policy on goods."^(b) These replications admit that the custom still exists at Liverpool. The insurance of timber on deck by the words "on and over all," shews that deck cargo would not be included in the policy without those words. Then, if by custom deck cargo may be excluded, by the same custom general average in respect of it may also be excluded. If an ordinary policy upon goods is not contradicted by shewing a custom that a cargo on deck is not included, a fortiori such a policy is not contradicted by shewing that jettison of deck cargo is not included in general average. The only difficulty arises from the case of *Blackett v. The Royal Exchange Insurance Company* There Lord Lyndhurst said:—"Usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain. The cases which are collected in 1 Phillipp's (pp. 553 to 559), and Starkie upon Evidence (pp. 1032 to 1038) clearly establish this position; and a reference is made to the same subject in the second volume of Mr. Phillipp's book (pp. 36, 37):—"If, however, those words are to be taken literally, many usages would be overthrown." The authorities on this subject were commented on in *Myers v. Sarl* (2 El. & El. 306). That was an action on an agreement under seal, by which the plaintiff contracted to build for the defendants a house and premises for a certain sum, and it was provided that "no alterations or additions should be admitted unless directed by the defendant's architect, by writing under his hand, and a weekly account of the work done thereunder [287] should be delivered to the architect every Monday next ensuing the performance of such work:" it was held that parol evidence was

(a)¹ 8 & 9 Vict. c. 93, ss. 24, 26.

(a)² *Backhouse v. Ripley*, sittings after Mich. T. 1802, in the Court of Common Pleas.

(b) 2 C. & J. 244.

admissible to shew that, by the usage of the building trade, "weekly accounts" meant accounts of the day work only, and did not extend to extra work capable of being measured.

The Court then called on Broun, who replied.

MARTIN, B. We are all of opinion that the pleas are good. The declaration is on a policy of insurance in the ordinary form on a ship and cargo, and no doubt in such case the underwriter is responsible for general average properly so called. The defendant by his plea says, "I admit that the underwriter is responsible for general average; but there is at Liverpool an usage and custom to the effect that, when a claim for general average arises by reason of jettison of deck cargo, the underwriter is not responsible; and the plaintiffs and defendants had notice of the usage at the time of making the policy, and made the policy with reference to it." No doubt, the rule of law is that an underwriter is responsible for general average, but here it is admitted by the demurrers that the policy was made on the express understanding which I have mentioned, and it is for Mr. Broun to shew that this understanding cannot take effect. He has failed to do so; and I think the real answer is that given by Mr. Mellish, viz., that the usage is in truth no contradiction of the policy in the sense of the rule that evidence is inadmissible to contradict a written contract, but merely explains it and shews the species of general average for which the underwriter is responsible. Where the words of a contract are not those ordinarily used, but such as are used in a particular trade, it is always competent to shew the sense in which they are used. There are a variety [288] of contracts with respect to which gross injustice would be done unless the parties were allowed to shew what the terms of them really meant. The case of *Blackett v. The Royal Exchange Insurance Company* (2 C. & J. 244) is supposed to be an authority for the plaintiffs, but Lord Lyndhurst, in his judgment, points out that the case of goods lashed upon deck is plainly distinguishable and stands upon a different principle, and that an underwriter may shew that he is not responsible for a cargo loaded on deck. The principle is this, that the term "shipped on board" means shipped in that part of the vessel usually appropriated to the stowage of goods, and consequently the underwriter is not liable for jettison unless the goods are shipped in the ordinary way. I agree with Mr. Mellish that from the use of the words "on and over all," in the replications, the parties well knew what they were doing; and that, for the purpose of making the underwriters responsible, those words must be inserted in the policy. For these reasons I am of opinion that the pleas are good.

CHANNELL, B. I am also of opinion that the pleas are good, and that they are not answered by the replications; therefore the defendant is entitled to judgment. The pleas do not deny that upon an ordinary policy the underwriter is liable for general average, and the question is whether a custom that he shall not be responsible for jettison in respect of a cargo shipped on deck contradicts the language of the policy. I am of opinion that it does not. The defendant is liable for general average by virtue of the policy, but the effect of this custom is to limit his liability in respect of a particular portion of the cargo. I have great difficulty in reconciling the decision in *Blackett v. The Royal Exchange Insurance Company* (2 C. & J. 244) with that of *Ross v. Thwaite* (1 Park on Ins. 23, 8th ed.), but I am of opinion that in this case there is no such contradiction of the policy as to exclude the custom. I am disposed to [289] adopt the view of my brother Blackburn in *Myers v. Sarl* (2 El. & El. 306), that the true test is whether the custom is applicable to the language used; and that where a custom is well known to exist, the parties must be taken to have contracted with reference to it. Here the words of the policy shew that the parties meant to include the custom. Of course each case must depend on its particular circumstances.

WILDE, B. I am also of opinion that the pleas are good. They shew that, although an underwriter is usually liable for general average, there is a custom at Liverpool, which the plaintiffs and defendant knew, that an underwriter is not responsible for general average in respect of a cargo loaded on deck, and the first question is whether that is a reasonable custom. I should have said it was reasonable if the matter had stopped there. An underwriter who receives a premium without knowing whether there will be a deck cargo, and who receives no more if a deck cargo is carried, may well say "I will not be exposed to loss by reason of a deck cargo." But the second plea discloses another matter which makes this more reason-

able, viz., that by custom the owners of under deck cargo are not liable to contribute. But the main objection is that the custom contradicts the terms of the contract. I think it does not. Where general words are used, evidence which shews that in a particular trade they have a more limited meaning is not contradictory. The words "general average" are in a certain sense terms of art, and capable of being explained by custom as having a peculiar meaning. It is not unreasonable to hold that custom good, which was well known to both parties and upon the faith of which they contracted.

Judgment for the defendant.

[290] SANTOS v. BRICE AND ANOTHER. Jan. 16, 1861.—A charter-party stipulated that the ship should load a cargo of coal at Cardiff and proceed to Pernambuco and there deliver the same, and afterwards receive a full cargo of sugar and other merchandise, and therewith proceed to a safe port in the United Kingdom, and deliver the same on being paid freight at the rate of 60s. per ton of 20 cwt. nett for sugar, and for other produce at a rate proportionate thereto, being in full for the round. "The freight to be paid in the following manner:—150l. on signing bills of lading at Cardiff, cash for disbursements abroad at the current rate of exchange, and the remainder on the delivery of the cargo. The master to sign bills for each cargo at any rate of freight that might be tendered. The owners to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain's draft on charterers, at usance, which they agreed to accept and pay on consignee at loading port agreeing amount." Held, that the two clauses were not inconsistent, their meaning being that if the bill of lading freight was less than the charter freight, the difference was to be paid at the port of loading by the captain's draft on the charterers, at usance, if the consignee settled the amount, otherwise at the port of delivery.

[S. C. 30 L. J. Ex. 108.]

Declaration. That by a charter-party of affreightment, dated the 10th day of December, 1859, and made between the plaintiff, master of the ship "St. Jargo d'Aviero 5/6 Veritas," of the one part, and the defendants, merchants and freighters, of the other part, it was, amongst other things, agreed that the said ship should with all convenient speed sail and proceed to Cardiff or Newport as ordered, and there load from the factors of the defendants a full and complete cargo of coal with which she should proceed to Pernambuco and there deliver the same, according to the custom of the port, to the agents of the defendants; and afterwards, in the customary manner, receive a full and complete cargo of sugar in bags, and other lawful merchandize, it being understood that no cargo was to be taken but that supplied by the agents of the charterers on their account, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions and furniture; and being so loaded should therewith proceed to Cork, Falmouth or Cowes for orders, which were to be given by return of post, or the lay days to count: to dis-[291]-charge at a safe port in the United Kingdom or on the Continent, as therein mentioned, and deliver the same in the usual manner on being paid freight at and after the rate of 60s. per ton of 20 cwt. nett for sugar in bags, with 10l. gratuity; and for other produce at a rate proportionate thereto, being in full for the round: the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever, during the said voyage, excepted. The freight to be paid in the following manner:—150l. on signing bills of lading at Cardiff, less interest for three months, and the costs of insurance; cash for disbursements abroad at the current rate of exchange, free of interest and commission, and the remainder on the delivery of the cargo, less discount for two months on half freight. The ship to be addressed to the charterers' agent abroad, paying one commission only of 3l. per cent. on the amount of freight, either at port of loading or discharge, at merchant's option. The master to sign bills for each cargo at any rate of freight that might be tendered, without prejudice to that charter-party. The owners to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading

by captain's draft on charterers, at usance, which they agree to accept and pay on consignee at loading port agreeing amount. It was also understood that if the outward cargo did not amount to the same gross quantity as the homeward one, a corresponding abatement was to be made in the freight. Sufficient coal for the ship's use to be taken, say to the extent of 11. per cent. of the outward cargo. Averments: that the said ship afterwards, in pursuance of the said agreement, did proceed to Newport as ordered, and did there load from the factors of the defendants a full and complete cargo of coal, and pro-[292]-ceeded therewith to Pernambuco, and did there deliver the same, according to the custom of the port, to the agents of the defendants; and afterwards, in the customary manner, did receive from them a full and complete cargo of sugar in bags, and other lawful merchandize, and did therewith proceed to Liverpool, being ordered by the defendants so to do, and there delivered the said cargo in the usual manner; that all conditions were performed and fulfilled, and all things happened and were done, and all times elapsed, necessary to entitle the plaintiff to the performance of the said agreement by the defendants. Breach: that the defendants did not pay to the plaintiff for the voyage round freight after the rate and in the manner in the said charter-party mentioned and agreed upon, with 10l. gratuity as aforesaid, and there is now due and owing from the defendants to the plaintiff, for and on account of the said freight and gratuity, a large sum of money, to wit, the sum of 156l. 14s. 4d., contrary to the terms, true interest and meaning of the said charter-party.

Plea. That the plaintiff, agreeably to the said charter-party, signed bills of lading for the homeward voyage at certain rates of freight in the said bills of lading specified, and that the plaintiff received divers sums of cash at Cardiff, and for disbursements abroad, pursuant to the terms of the said charter-party; and that they, the defendants, were always ready and willing to accept the captain's draft on them for the difference between the bill of lading freight on the homeward cargo and the amount remaining due to the plaintiff, but the consignee at the loading port did not agree as to the amount in manner required by the said charter-party, nor did the plaintiff draw upon or tender to the defendants, for their acceptance or payment, any draft for the amount agreeably to the terms of the said charter-party.

Demurrer and joinder therein.

[293] Archibald, in support of the demurrer. The plea is bad. The question turns on the meaning of two clauses in the charter-party, which are inconsistent, and can only be reconciled by construing them as giving to the owner an option. The first provides that the remainder of the freight is to be paid "on the delivery of the cargo, less discount for two months on half freight:" by the other, the "owners are to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain's draft, at usance, which they agreed to accept and pay on consignee at loading port agreeing amount." That clause was inserted for the benefit of the plaintiff. The ship might be loaded on her homeward voyage as a general ship, and, since the master was at liberty to sign bills of lading for each cargo at any rate of freight, there might be a difference between the bill of lading freight and the charter freight. If the bill of lading freight was less than the charter freight, it might be advantageous to the shipowner to have the option of payment of the difference at the port of loading by bills, which might be due and paid before the vessel arrived in England. On the other hand, he might choose to await the arrival of the ship in England, when he would be entitled to the charter freight. These considerations explain and reconcile the clauses. It could never have been intended that the agreement of the consignee abroad, who is a stranger to the contract, to the precise amount, should be a condition precedent to the recovery of the freight after it had been earned; otherwise this absurd result would follow, that the shipowner's right of action would depend on whether the consignees chose to settle the amount. The only way to give effect to these clauses is by construing [294] them as giving the shipowner an option; but, if they are repugnant, the earlier must prevail.

The Court then called on

Houyman, *contrâ*. It is, no doubt, difficult to reconcile these clauses; but the intention was that the difference between the bill of lading freight on the homeward cargo and the amount remaining due to the plaintiff after payment of disbursements abroad, should be ascertained by the consignee at the port of loading, and that the

master should draw bills on the defendants for the amount, the object being to prevent any dispute as to the proportional rate for sugar and other produce. Therefore the ascertaining the amount by the consignee, and drawing the bills by the master, are conditions precedent to the defendant's liability to pay the freight. If the two clauses cannot be reconciled, the former must be rejected: *Alsager v. The St. Katherine Dock Company* (14 M. & W. 794). [Martin, B. The whole may be reconciled. The shipowner is to be paid freight at the rate of 60s. per ton of 20 cwt. nett for sugar—150l. on signing bills of lading at Cardiff—cash for disbursements abroad—and the remainder on delivery of the cargo. But the defendants are at liberty to load other merchandise; and it is provided that the master shall "sign bills of lading for each cargo at any rate of freight that might be tendered." The master, therefore, was bound to take any goods that were offered to him, and to sign bills of lading for them. It might be, that the bill of lading freight exceeded the charter freight, and then the shipowner would have money coming to him which would be paid on delivery of the cargo; or it might happen, as it did occur, that the bill of lading freight was less than the charter freight, [295] and then the difference was "to be paid at the port of loading, by the captain's draft on charterers, at usance, on consignee at loading port agreeing amount." These latter words are to be read "upon the occasion or in the event" of the consignee settling the amount. This construction renders the whole consistent.]

Per Curiam.(a) There must be judgment for the plaintiff.

SCOTSON AND OTHERS v. PEGG. Jan. 28, 1861.—The performance of an act which a person has agreed with another to perform, is a good consideration to support a contract with a third person if the latter derives a benefit from the performance. —Therefore where a declaration stated that, in consideration that the plaintiff would deliver to the defendant a cargo of coals on board the plaintiff's ship, the defendant promised to discharge the same at the rate of forty-nine tons a day: Held, that a plea was no answer which stated that the plaintiffs had made a previous contract with other persons for the delivery of the coals to their order in the same way, and they ordered the delivery to the defendant.

[S. C. 30 L. J. Ex. 225; 9 W. R. 280; 3 L. T. 753.]

Declaration. For that in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant a certain cargo of coals, then on board a certain ship of the plaintiffs the defendant to take the same from and out of the said ship, the defendant promised the plaintiffs to unload and discharge the same at the rate of forty-nine tons of the said coals during each working day, after the said ship was ready to unload and discharge the same. And although the plaintiffs did afterwards deliver the said cargo to the defendant, and were always ready and willing to suffer and permit him to take the same from and out of the said ship as aforesaid, and although all things were done, and conditions precedent to be performed by the plaintiffs were performed by the plaintiffs, to entitle the plaintiffs to a performance of the [296] said promise by the defendant: Yet the defendant did not unload and discharge the said cargo at the rate aforesaid during each working day after the said ship was ready to unload and discharge the same, and the defendant wholly neglected and refused so to do for five days longer and more than he ought to have done according to his said promise; and the plaintiffs were put to expense in and about the maintaining and keeping the master and crew of the said ship &c.

Plea. That before the making of the said promise the plaintiffs, by another contract made by and between the plaintiffs and certain other persons, agreed with the said certain other persons, for certain freight therefore payable by the said other persons to the plaintiffs, to carry the said coals on a certain voyage in the said ship, and to deliver the said coals to the order of the said other persons, which contract was in full force thence, until and at the time of the making of the said promise and the delivery of the said coals. And the defendant says that before the making of the said promise, and after the making the said other contract, and while the last mentioned contract was in force, he bought the coals of the said other persons, who

(a) Pollock, C. B., Martin, B., and Wilde, B.

thereupon ordered the plaintiffs to deliver the same to the defendant, under and according to the said contract with the said other persons, of which the plaintiffs, before the making of the said promise, had notice. And the defendant says that the said order was in full force until and at the time of the making of the said promise, and thence until and at the delivery of the said coals, of which the plaintiffs always had notice. And the defendant says the then future delivery to the defendant of the said coals on the terms in the declaration mentioned, which was the consideration for the said promise, was the delivery of the said coals to the order of the said other persons, which the plaintiffs had by the said contract [297] with such other persons so agreed to make as aforesaid; and which before and at the time of the making of the said promise, until and at the time of the said delivery, the plaintiffs were, by, under and according to the said contract with the said other persons, bound to make as aforesaid. And the defendant says that there never was any consideration for his said promise other than the doing of that which by the said contract with the said other persons they the plaintiffs, before and at the time of the making of the said promise, and thence until the plaintiffs did it, were bound to do.

Demurrer and joinder therein.

Dowdeswell, in support of the demurrer. The plea is bad. It admits a promise by the defendant to unload the coal at the rate of forty-nine tons a day; and the delivery of the same by the plaintiffs is a sufficient consideration to support the promise. The defendant, having made an express promise, is not relieved from his obligation to perform it because the plaintiff has entered into a previous contract with another person to deliver to his order. The defence would be available under the general issue; but the plea was allowed on the authority of *Shadwell v. Shadwell* (9 C. B. (N. S.) 159). This is an attempt to question the decisions on this subject, which have been uniform from the time of *Jesson v. Solly* (4 Taunt. 52).

The Court then called on

C. Pollock, to support the plea. There is no consideration to support the promise. The plea shews that the consideration alleged in the declaration is the doing that which the plaintiffs, by their contract with other persons, were bound to do. The charter-party only specifies the time and mode in which the cargo is to be discharged, as between the charterer and shipowner. [Martin, B. You must establish [298] this, that if a person says to another, "The goods which I have in my ship are yours; but I will not deliver them unless you pay my lien for freight," which the latter agrees to do, the delivery of the goods is no consideration to support the promise to pay.] The cargo is the property of the defendant, and the agreement to deliver to him that which he was entitled to have was a nudum pactum. In Black. Com., vol. 2, p. 450, it is said:—"If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price, unless the property had been previously altered by a former sale." [Wilde, B. That is the case of a purchase of goods, the property in them being already in the purchaser; but here the plaintiffs will not deliver the cargo to the defendant, whereupon the defendant says, "If you will deliver it to me, I will discharge it in a certain manner."] The plaintiffs were under a prior legal obligation to deliver the cargo, and therefore the promise to the defendant to do the same thing was void. Where a plaintiff discharged one of two joint debtors, it was held that a promise by a third person to pay the debt, in order to obtain the discharge of the other debtor, was void for want of consideration: *Herring v. Dorell* (8 Dowl. P. C. 604). So, if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B., in consideration of B.'s releasing A. out of custody, is void: *Atkinson v. Settlee* (Willes, 482). [Wilde, B. In those cases there was a legal right to the performance of the very act which was bargained for: it is not so here. Martin, B. Suppose a man promised to marry on a certain day, and before that day arrived he refused, on the ground that his income was not sufficient, whereupon the father of the intended wife said to him: "If you will marry my daughter, I will allow you 1000l. a year." Could not that contract be enforced?] There [299] would be no consideration for such a promise, the party being already under an obligation to marry. A promise by a captain to pay his sailors increased wages for performing their duty during a storm is void for want of consideration. [Martin, B. That proceeds on the ground of public policy. Wilde, B. It often happens that when goods arrive in a ship, and there is a lien upon them, a merchant who wants to get possession of the goods promises to pay the lien if the master will

deliver them to him. A man may be bound by his contract to do a particular thing, but while it is doubtful whether or no he will do it, if a third person steps in and says, "I will pay you if you will do it," the performance is a valid consideration for the payment. Martin, B. If a builder was under a contract to finish a house on a particular day, and the owner promised to pay him a sum of money if he would do it, what is to prevent the builder from recovering the money? As the plaintiffs would be doing a wrong by not fulfilling their contract, it must be presumed that the prior legal obligation, and not the subsequent promise, was the motive for their delivery of the cargo.

MARTIN, B. I am of opinion that the plea is bad, both on principle and in law. It is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. Here the benefit is the delivery of the coals to the defendant. It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any [300] answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract? In my opinion it is not. We must deal with this case as if no prior contract had been entered into. Suppose the plaintiffs had no chance of getting their money from the other persons who might perhaps have become bankrupt. The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order.

WILDE, B. I am also of opinion that the plaintiffs are entitled to judgment. The plaintiffs say, that in consideration that they would deliver to the defendant a cargo of coals from their ship, the defendant promised to discharge the cargo in a certain way. The defendant, in answer, says, "You made a previous contract with other persons that they should discharge the cargo in the same way, and therefore there is no consideration for my promise." But why is there no consideration? It is said, because the plaintiffs, in delivering the coals are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that if [301] a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.

Judgment for the plaintiffs.(a)

DE COSSE BRISSAC v. RATHBONE AND ANOTHER. Jan. 23, 1861.—The judgment of a foreign Court, having jurisdiction over the parties and subject-matter of the suit, cannot be impeached on the ground that it is erroneous upon the merits.

[S. C. 30 L. J. Ex. 238. Applied, *Simpson v. Fogo*, 1863, 1 H. & M. 195; 1 N. R. 422; *Schibsy v. Westenholz*, 1871, L. R. 6 Q. B. 155.]

Declaration. That heretofore, in a certain suit then depending in the Courts of the new Empire of France, having competent jurisdiction to entertain and determine

(a) Pollock, C. B., and Channell, B., were absent.

the said suit, and duly holden, in all matters relating to or connected with the said suit, within their jurisdiction, at the commencement of which said suit, the plaintiff and her husband then being alive, were in the same parties, along with others, as plaintiffs, and the defendants in this action were in the same parties, along with others, as defendants, such proceedings were duly, and according to the then laws of France aforesaid, had and maintained; that a final judgment in the said suit was, before the commencement of this action, duly, and according to the then laws of France aforesaid, pronounced, under and by virtue of [302] which said judgment, among other things, it was adjudged that the plaintiff in this action, her said husband then being dead, was entitled, according to the then laws of France aforesaid, alone and by herself, to have and claim, of and from the defendants in this action, and to be paid by them, to wit, in France aforesaid, a certain large sum of money, to wit, three hundred thousand francs, the same being equivalent in English money to, to wit, 12,000l.; and the defendants were ordered to pay the same to the plaintiff: which said judgment was, in all respects, valid and binding, and duly had, according to the then laws of France aforesaid, and was duly pronounced and made according to the said laws, and was the judgment of a Court having competent jurisdiction over the subject-matter of the said suit, and over the defendants in respect thereof, and acting in all respects within its jurisdiction. And the plaintiff says that, by virtue of the said judgment, the defendants, at the commencement of this suit, were, and still are, justly indebted to her in the said sum of 12,000l.; and the plaintiff says that, before and at the time of the commencement of this suit, all conditions precedent had been performed, and all things had happened and existed necessary, and all times had elapsed necessary to entitle the plaintiff to have and claim in England, of and from the defendants in this action, and to be paid by them, the said sum of money; but the defendants have not paid the same or any part thereof.

Third plea. That the defendants are native born subjects of her Majesty the Queen, and were not, at the commencement of the suit in which the judgments hereinafter-mentioned were pronounced, or at the time of making or pronouncing of the said judgments respectively, domiciled, or resident, or present, in France, nor were they at any time domiciled or resident in France, but were always [303] domiciled and resident in England. And the defendants further say that the said judgments were pronounced against them and one Richard Hall, as defendants in the said suit; and that they did not sue as plaintiffs in the suit in which the same were pronounced. And the defendants further say that judgment might have been signed against them in the said suit by default if they did not appear to the said suit, and that, at the time of the commencement of the said suit, they were possessed of property in France, which was, according to the law of France, liable to seizure in case they did not appear to the said suit, and in case judgment by default was signed against them. And the defendants further say that, in order to prevent their said property from being seized, they authorized an agent to appear for them as defendants to the said suit in France; and the defendants did thereupon appear, by such agent, and plead to the said suit in which the said judgments were afterwards pronounced, and the said judgments in the said suit were so obtained against the defendants and the said Richard Hall. And the defendants further say that the said judgment in the declaration mentioned is a judgment founded upon a former judgment of one of the said Courts of France, and is a judgment given in the same suit for the purpose of carrying out the said first mentioned judgment, and fixing the amount of damages for which the defendants were liable on the said first mentioned judgment. And the defendants further say, that the said first mentioned judgment and the said second mentioned judgment, so far as it is founded upon the first mentioned judgment, are erroneous, in fact and in law, upon the merits, and that such judgments ought to have been made and pronounced in favour of the defendants in this action and the said Richard Hall, and that such error does appear on the face of the said judgments respectively.

[304] The fourth plea only differed from the third in concluding with the allegation "that such error does not appear on the face of the said judgments."

The fifth plea, after stating, as in the third plea, that the defendants appeared, by their agent, and pleaded to the suit, proceeded thus:—And the defendants further say that the enforcement of the said judgment in England is contrary to natural justice on the following grounds:—That since the hearing of the said suit in which the said judgment was pronounced, and after the pronouncing of the said judgment,

the defendants have discovered fresh evidence which was not known to them, or either of them, before the pronouncing of the said judgment, and which, with reasonable diligence, they could not have discovered before the pronouncing of the said judgment, and which said evidence shews and proves that the said judgment is erroneous, in fact and law, on the merits.

The sixth plea, after a similar statement that the defendants appeared and pleaded to the suit, proceeded thus:—And the defendants further say that the enforcement of the said judgment in England is contrary to natural justice on the following ground:—That the Court in which the said judgment was pronounced admitted, as evidence against the defendants, documents and letters made and passed between other parties, and to which the defendants were not parties or privies, nor was any or either of them party or privy, and which they did not, nor did any or either of them, authorize, acknowledge or sanction, and of which they had not, nor had either of them, any notice or knowledge, and that such documents and letters would not have been admissible as evidence against the defendants in England in a suit between the same parties; and that, if such documents and letters had not been admitted, the said judgment would have been pronounced in favour of the defendants.

Demurrers and joinders therein.

[305] Bovill (Holland with him), in support of the demurrers. The third plea alleges that the judgment is erroneous in fact and in law upon the merits; but a foreign judgment is not examinable upon the merits. The plea shews that both parties appeared before the French Court, and it is not denied that the Court had jurisdiction over the subject-matter of the suit. [Channell, B. The plea does not shew of what the alleged error consists, or that the judgment is contrary to natural justice.] The plea merely says that the judgment is erroneous on the merits, but the tribunal which heard and decided the cause must determine the merits. Besides, does the plea mean that the judgment is erroneous according to the law of France or of England? If the former, how can this Court determine that question? If the latter it should have been shewn how the law of England applied to the subject-matter of the suit. *The Bank of Australasia v. Nias* (16 Q. B. 717) is a conclusive authority against such a plea. That case established this principle, that although in an action on a foreign or colonial judgment the judgment is examinable to a certain extent, as for the purpose of shewing want of jurisdiction, or that the defendant was not summoned, or that the judgment was fraudulently obtained, yet such judgment is not examinable upon the merits, as for the purpose of shewing that the contract sued upon was not made, or was procured by fraud, or that the judgment was erroneous. The same objections apply to the fourth plea, which is also bad on the ground that a foreign judgment cannot be impeached for error not apparent on the face of it. The fifth plea alleges that since the judgment was pronounced the defendants have discovered fresh evidence, which they could not have discovered before; but, the French Court having pronounced judgment upon the evidence before them, their decision is final. In *Marriot* [306] v. *Hampton* (7 T. R. 269), Lord Kenyon said, "After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person." The sixth plea alleges that the French Court admitted as evidence against the defendants certain documents which would not have been admissible in England; but the reception or rejection of evidence must be governed by the *lex fori*.

Hannen (Quain with him), in support of the pleas. The question whether a foreign judgment can be impeached upon the merits is still a moot point: 2 Smith's Lead. Cas. 636. It is submitted that where an action is brought in this country on a foreign judgment against a party who is neither a native of nor domiciled or resident in the country in which the judgment is pronounced, that judgment is examinable upon the merits. These pleas state that the defendants were British subjects, and were not domiciled or resident in France, and that they merely appeared to the suit in order to prevent their property being seized. [Wilde, B., referred to *Imrie v. Castrigue* (8 C. B. N. S. 405).] *The Bank of Australasia v. Nias* (16 Q. B. 717) was an action on a colonial judgment, and the ground of that decision was that the judgment, if erroneous, might be examined and reversed on appeal to the Privy Council. The Court carefully abstained from expressing any opinion as to how far a defendant might impeach the competency or integrity of a foreign Court from which there was no appeal. [Martin, B., referred to *The Bank of Australasia v. Harding* (9 C. B. 661).] The point there decided was, that members of a colonial Company are not discharged

from liability, on judgments obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, and having received no notice of the proceed-[307]-ings. There also the defendant might have appealed to the Privy Council. [Wilde, B. *Ricardo v. Garcias* (12 Cl. & F. 368) is an authority that the judgment of a foreign Court of competent jurisdiction cannot be impeached upon the merits.] A defendant sued in a foreign Court is in a different position from a plaintiff. A plaintiff chooses his tribunal, and if he is defeated he cannot question the merits in the Courts of this country, But a defendant is compelled to appear in the foreign Court in order to prevent his property being seized. This distinction is adverted to in the judgment in *The General Steam Navigation Company v. Guillon* (11 M. & W. 877, 894). In *Walker v. Witter* (Dougl. 1), Lord Mansfield said, "Foreign judgments are a ground of action everywhere, but they are examinable." In Scotland a judgment of a foreign Court may be impeached on the ground that it has been irregularly or unduly obtained: *Sinclair v. Fraser* (20 How. Sta. Tr. 468). In *Galbraith v. Neville* (Dougl. 6, note), Buller, J., said, "The doctrine which was laid down in *Sinclair v. Fraser* has always been considered as the true line ever since; namely, that the foreign judgment shall be *prima facie* evidence of the debt, and conclusive until it be impeached by the other party." [Channell, B., referred to *Cowan v. Braidwood* (1 Man. & G. 882).] That was an action on a Scotch decree, and the defence was that the defendant was not within the jurisdiction of the Court, and had no notice of the proceedings; but the plea was held bad for want of allegations shewing that the decree was not binding on him. In *Phillips v. Hunter* (2 H. Black. 403, 411), Eyre, C. J., speaking of a foreign judgment, said, "We examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, whether the judgment is warranted by that [308] law." He also referred to *Tarleton v. Tarleton* (4 M. & Sel. 20) and 2 Smith's Lead. Cas. 638.

MARTIN, B. We are all of opinion that this question is so concluded by the authorities that it is impossible for us to decide contrary to them, and the case must go to a Court of error. I may observe that the question does not come before me for the first time: for many years past I have had occasion to consider it.

CHANNELL, B., concurred.

WILDE, B. There is no book of pleading in which such pleas can be found. Judgment for the plaintiff.

GEORGE HAYWARD v. ISABELLA RAW AND BATES. GEORGE HAYWARD v. CRUDEN. Jan. 23, 1861.—A lord of a manor cannot recover a fine not certain, unless it is reasonable, and assessed and demanded.—A surrenderee of copyhold premises has a right to have in his admittance a description of the premises corresponding with that in the surrender.—An entry by a steward of a manor in his book of the admission of a surrenderee of copyhold premises is a mere memorandum, and not such an admittance as will entitle the lord to claim a fine.

[S. C. 30 L. J. Ex. 178; 4 L. T. 519. Referred to, *Fraser v. Mason*, 1883, 11 Q. B. D. 580. Principle applied, *Blackmore v. White*, [1899] 1 Q. B. 302.]

In the first mentioned case, the writ issued on the 4th of August, 1859, and was specially indorsed as follows:—

"The following are the particulars of the plaintiff's claim. The amount of fines due from the defendants to the plaintiff as lord of the manor of Rishangles, with its members, in the county of Suffolk, the full particulars of which have been already delivered. } £122 0 0"

The plaintiff declared for money payable by the defendants to the plaintiff as lord of the manor of Rishangles, in the [309] county of Suffolk, for fines due and of right payable by the defendants in respect of the surrender of certain copyhold tenements. Plea: Never indebted.

The cause came on for trial before Pollock, C. B., at the London Sittings after Michaelmas Term, 1859, when a verdict was, by consent, entered for the plaintiff for 60l., subject to the opinion of the Court on the following case:—

The plaintiff has been, since the 16th October, 1856, and still is, lord of the manor

of Rishangles, in the county of Suffolk, and Frederick Hayward has been since that time, and still is, his steward.

The defendant Isabella Raw, Eliza the wife of the defendant Thomas Bates, and Sarah the wife of Thomas Conway, were the three daughters of Joseph Raw, who was the elder brother of Mary Raw, afterwards Mary Spooner, widow. The said Sarah died in the lifetime of her father, Joseph Raw; and Joseph Raw died in the lifetime of his sister, Mary Spooner.

Mary Spooner (formerly Mary Raw, spinster), a copyhold tenant of the said manor, died intestate as to the copyhold tenements mentioned in the declaration, to which she was admitted at a Court held for the said manor on the 4th January, 1822, upon the absolute surrender of one Charles Keen; and the defendant Isabella, the said Eliza, and Thomas Conway the younger, an infant, and the eldest son of the said Thomas Conway and Sarah his wife, are the co-heiresses and heir of the said Mary Spooner.

By a contract, dated the 31st October, 1825, and made between Mary Spooner (then Mary Raw, spinster), of the one part, and John Raw, deceased, of the other part, and the last will and testament of John Raw, the defendant Isabella, the said Eliza, and Thomas Conway the infant, became trustees of the said copyhold tenements for Thomas Raw, his heirs and assigns.

[310] William Watson, by an order of the Court of Chancery, made the 2nd December, 1856, was, on the petition of Thomas Raw, appointed in the place of Thomas Conway the younger, to convey his interest in the said copyhold tenements to Thomas Raw.

Thomas Raw directed the surrender hereinafter mentioned of the said copyhold tenements to be made to the use of Alexander Cruden, his heirs and assigns for ever, at the will of the lord and according to the custom of the said manor, upon trust for the said Thomas Raw, his heirs and assigns.

On the 16th December, 1856, P. Long, the solicitor for the surrenderors, and for Thomas Raw, sent a letter to F. Hayward, the steward of the said lord, containing the following passage:—"Manor of Rishangles. I presume I or my agent may take a surrender as your deputy in this manor, to Mr. Thomas Raw."

On the 17th December, 1856, the said steward sent the following answer:—"In reply to your letter received this morning, I beg to inform you that you or your agent may take surrender in this manor as deputy steward on payment of fine and deputation fees."

On the 30th December, 1856, the said P. Long sent to the steward the following letter in answer:—

"I propose to take the surrender for Miss Isabella Raw, Mrs. Bates and her husband, and Mr. Watson (appointed by the Court to convey and surrender for the minor Thomas Conway), as co-heirs of Mary Raw, deceased, to a trustee for Mr. Thomas Raw.

"They will pay a fine on such surrender, and the usual fees on surrender only, admittance being unnecessary. Mr. Raw's trustee, it is proposed, shall be admitted, and most probably he will enfranchise. Be kind enough to let me know what fine you will require on the surrender by the co-heirs."

[311] On the 14th March, 1857, the said P. Long sent the following letter to the steward:—

"I send your surrenders herein; please return me copy with your receipt for the original. I have indorsed it, so that you have only to sign it. The surrender sets out all the facts of the case, and will be in itself instructions for the admission of Mr. Cruden. I shall be glad to have your views as to the account of fines, as also the enfranchisement."

The surrender, dated the 13th February, 1857, was duly made and executed by the defendants, Isabella Raw and Thomas Bates and Eliza the wife of the defendant Thomas Bates, the said William Watson as trustee, and the said Thomas Raw, and was sent with P. Long's letter of the 14th March, 1857, to and received by the said steward.(a)

(a) A copy of the surrender was set out in an appendix to the case, and was as follows:—

"The Manor of Rishangles, with its Members.

"Whereas, Mary Spooner, widow, formerly Mary Raw, spinster, a copyhold tenant

[312] On the 23rd April, 1857, the steward sent a letter to the [313] said P. Long

of the said manor, lately died intestate as to the hereditaments, copyhold of the said manor, to which she stood admitted at the time of her decease and hereinafter expressed to be surrendered. And whereas Isabella Raw of &c., and Eliza the wife of Thomas Bates of &c., formerly Eliza Raw, spinster, two of the daughters of Joseph Raw formerly of &c., the elder brother of the said Mary Spooner, and who died in her lifetime, and Thomas Conway the younger, an infant of the age of fifteen years, and the eldest son of Thomas Conway of &c. and Sarah his wife, who was also a daughter of the said Joseph Raw, deceased, and died in his lifetime, are the co-heiresses and heir of the said Mary Spooner, deceased. And whereas, under and by virtue of a certain contract or agreement, bearing date on or about the 31st day of October, 1825, and made between the said Mary Spooner (then Mary Raw, spinster), of the one part, and John Raw therein described of the other part, and of the last will and testament of the said John Raw, the said Isabella Raw, Eliza Bates and Thomas Conway the younger have become trustees of the said copyhold hereditaments for Thomas Raw of &c., his heirs and assigns. And whereas by an order of the High Court of Chancery made on or about the 2nd day of December last past, in the matter of the estate of Mary Spooner, deceased, and in the matter of 'The Trustee Act, 1850,' it was on the petition of the said Thomas Raw ordered that William Watson of &c., in the petition named, be appointed in the place of the said infant, Thomas Conway the younger, to convey all such share as was then vested in the said infant, Thomas Conway the younger of and in the freehold and copyhold hereditaments and premises comprised in the said contract of the 31st day of October, 1825, and in the devise to the said petitioner, Thomas Raw, contained in the will of the aforesaid John Raw, to the petitioner Thomas Raw, or as he should direct, for all the estate and interest of the said infant, Thomas Conway, therein. Now be it remembered, that on the several days expressed in the captions at foot hereof, the said Isabella Raw, the said Thomas Bates and Eliza his wife and the said William Watson came before the several persons whose signatures are written to the said respective captions, and whose names, residences and descriptions are written at foot hereof, and being respectively deputy stewards, for the purposes hereinafter expressed, of Frederick Hayward, chief steward of the said manor; and she the said Eliza Bates having been by the deputy steward in that behalf expressed, first examined separate and apart from her said husband, touching and concerning her free and voluntary consent to the making and passing the surrender hereinafter expressed, and freely and voluntarily consenting thereto as by law required, and having satisfied to the lord his fine, did out of Court in pursuance of the premises and by the direction of the said Thomas Raw (testified by his signature at the foot hereof) and in consideration of the sum of 300l., the apportioned part of the consideration money or sum of 600l. to the said Mary Spooner, deceased, paid as in the aforesaid contract mentioned, and the residue whereof is apportioned as the consideration money in respect of certain freehold hereditaments, as mentioned in a conveyance thereof, bearing even date herewith, &c.; and also in consideration of 10s. to each and every of them the said Isabella Raw &c. paid by the said Alexander Cruden at or before the passing the surrender hereinafter expressed, the receipt of which sum is hereby acknowledged, and as to the said William Watson in pursuance of and obedience to the said order, surrender out of their and each and every of their hands into the hands of the lord of the said manor by the hands and acceptance of me the said steward, by the rod, according to the custom of the said manor, one messuage or cottage with four and a half acres of land of the tenement Millard, with a certain way, called Ingham Way on the part of the East; and one acre of land formerly built of the tenement Bases; and three acres of land, with a certain piece of pasture, containing half an acre, lying together between lands of the Rectory of Rishangles on the part of the East, and lands called Bases on the part of the West, one head whereof abutteth upon the common highway towards the South, and the other head upon a meadow of the lord, called Ingham Meadow, in part and upon a wood of the lord towards the North; and one messuage formerly built, and three acres of the tenement Bases, lying in Rishangles between lands of the lord of this manor, sometime since in the tenure of Henry Mithall in right of his wife, called Shortland, on the part of the West, and abutting upon the highway towards the South, and upon the customary lands formerly in the tenure of Richard Chittoke, afterwards of Thomas Hasell, towards the North,

inclosing the lords claim for fines (a)¹ and his own for fees. To these fines and fees P. Long, on behalf [314] of Thomas Raw, objected on the grounds stated in a letter (a)² of the 16th May, 1857.

According to the custom of the manor, a fine is due and payable to the lord on admission of the heir, and the amount of such fine is arbitrary.

In copy of Court rolls of the said manor the following entry appears:—

[315] “4th May, 1792. John Butt as nephew and heir of Timothy Butt surrenders, without admission to Lady Harland. Fine paid on surrender by John Butt the nephew, without admission £22 6 3
Fine for Lady Harland 22 6 9”

In the months of June and September 1857, the said steward had several conferences with P. Long upon the subject of the fine due and payable in respect of the said copyhold tenements, surrendered by the defendants and others (an account of which

which premises are holden by copy of Court roll of the said manor, and which Charles Keen took up to him and his heirs with other hereditaments at a Court held for the said manor on the 1st day of August, 1812, and the said Mary Spooner, deceased (by her then name of Mary Raw), took up to her and her heirs at a Court held on the 4th day of January, 1822; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof; and also all the estate, right, title, interest, inheritance, use, trust, property, possession, power, claim and demand whatsoever both at law and in equity or otherwise howsoever of them the said Isabella Raw, Thomas Bates and Eliza his wife, and William Watson, and also of the said Thomas Conway the younger, the infant, of, in, to, or out of the said hereditaments and premises hereby surrendered, or expressed or intended so to be with the appurtenances: To the use and behoof of the said Alexander Cruden, his heirs and assigns for ever, at the will of the lord and according to the custom of the said manor, Upon trust, nevertheless for the said Thomas Raw, his heirs and assigns.

“ISABELLA RAW. “ELIZA BATES.

“THOS. BATES. “WILLIAM WATSON.”

(The respective captions of the parties were duly stated.)

(a)¹ The account inclosed was as follows:—

“1857, Feby. “Manor of Rishangles.

“Fine on surrender of Isabella Raw and two others (trustees of Mary Spooner, deceased,) to Mr. Cruden, of two messuages and outbuildings and several pieces of land, containing by old survey 16 a. 0 r. 26 p.

“1st life	£70 0 0
2nd life	35 0 0
3rd life	17 10 0
Fine on Mr. Cruden's admission	70 0 0
	£192 10 0
Reliefs	0 8 0
	£192 18 0
Fees	22 1 9
	£214 19 9”

(a)² This letter was as follows:—

“Rishangles.

“I have the following objections and observations to make as to these fines and fees. First, as to the fines,—With respect to the $\frac{1}{2}$ and $\frac{1}{4}$ fine for the second and third life, there is not the least shadow of right to the claim. The fine payable on acceptance of the surrender, is on a surrender from co-heirs who take in co-parcenary, and between whom there is no survivorship. The $\frac{1}{2}$ and $\frac{1}{4}$ fine would only be due in

had been delivered to him); but the quantum of the fine was not then agreed upon between them, the quantity of land in respect of which the fine was payable being disputed.

On the 27th July, 1858, a notice by the lord of the manor, demanding immediate payment of 122l. for the fine payable on surrender, was served on the defendants.

After some further negotiation, an offer was made by S. Smith (who acted on behalf of the defendants and A. Cruden) to pay 120l. for the fines and 15l. for the steward's fees, in respect of the surrender and the admission of the said A. Cruden, which offer the plaintiff accepted.

On the 14th July, 1859, S. Smith wrote to the steward a letter containing the following passages: "I must be excused for not remitting the amount of fine and fees until I see that the admission is in accordance with the entries on the Court rolls and with the last surrender (i.e.) that it is limited to the 12 acres of copyhold. I hold the receipt at your disposal until, by your sending up the admission as above, I am enabled to complete the business."

The said S. Smith, on the 25th July, 1859, called on the steward's agents and handed to their clerk a draft for 135l. in exchange for a stamped copy of A. Cruden's admission, which the said S. Smith inspected and declined to take in [316] the form in which it had been prepared, on the ground that it did not follow the surrender and contained an inaccurate description of the property, and that it ought not to have contained any reference to the alleged survey of 1724; and the said clerk at his request returned him the draft for 135l.

The draft for 135l. was for the following sums:—

For fine on surrender by the defendants	£60
For fine on A. Cruden's admission	60
For steward's fees	15
	<u>£135</u>

The description of the copyhold tenements in the surrender is a very ancient one, and such copyhold tenements have in all admissions and acts of Court for the last 200 years and upwards (where a particular and not a general description is given)

respect of joint tenants, who have a survivorship. Had the co-heiresses been admitted the lord could only have claimed a fine from each in respect of her share.

"Next, as to the amount of fine. The general plan is to calculate a death fine at $1\frac{3}{4}$ year's value. A fine on surrender, as in Mr. Cruden's case, at $1\frac{1}{2}$ years' value.

"Now there are only 12 acres of copyhold instead of 16 acres as charged by you, and I find the rent of the whole 15 acres, freehold and copyhold, of which the farm consists is within a fraction of 25s. per acre.

"Take therefore 12 acres of copyhold at 25s. per acre £15 0 0
3 tenements, actual rents 11 10 0

£26 10 0

Deduct land tax £1 6 10
Quit rent 0 13 10
Repairs—say per annum at least 3 14 4

5 15 0

£20 15 0

The fine therefore on the surrender £36 6 3
Do. on the admission 31 2 6

Total £67 8 9

"That amount I have no objection to recommend Mr. Raw to pay.

"As to the fees," &c. (here follow the observations as to amount of fees, &c., which is unnecessary to set out).—"Yours faithfully,

"PETER LONG.

"F. Hayward, Esq."

been known and described by the same ancient description without any variance as to quantity, names or tenancy.

It has been agreed between the parties, that if the plaintiff recover any fine in this action the amount of the same shall be 60l.

The question for the opinion of the Court, upon such of the facts herein stated and documents referred to as shall be deemed admissible in evidence, is whether the plaintiff is entitled to recover from the defendants the said sum of 60l. If yea, the verdict which has been entered for the plaintiff is to stand for that sum. If nay, a verdict is to be entered for the defendants.

The Court to be at liberty to draw any inferences of fact.

[317] *GEORGE HAYWARD v. CRUDEN.* 1861.

In this action the writ was issued on the 4th August, 1859, and was specially indorsed as follows:

"The following are the particulars of the plaintiff's claim.—The amount of fine due from the defendant to the plaintiff as lord of the manor of Rishangles, with its members, in the county of Suffolk, the full particulars of which have already been delivered, £70."

The plaintiff declared for money payable by the defendant to the plaintiff as lord of the manor of Rishangles, in the county of Suffolk, for fines due and of right payable in respect of the admission of the defendant to certain copyhold tenements. Plea: Never indebted.

The cause came on for trial before Pollock, C. B., at the London Sittings after Michaelmas Term, 1859, when a verdict was, by consent, entered for the plaintiff for 60l., subject to the opinion of the Court on the following case. (The case stated the facts mentioned in the case of *Hayward v. Raw*, with the following additional facts.)

Frederick Hayward, being duly sworn and examined as a witness on the trial of this cause, stated that he in pursuance of the instruction for the admission contained in P. Long's letter of the 14th March, 1857, admitted the defendant as copyhold tenant, and that such admission was made out of Court by the rod, according to the custom of the said manor. That he nominated John Hayward, in the absence of the defendant, to receive admission by the rod, according to the custom of the said manor, and admitted him for the defendant.

On cross-examination, the said Frederick Hayward stated that John Hayward was his clerk and son. That he gave no express notice of the nomination of John Hayward to [318] the defendant. That by the custom of the manor, the steward delivers the rod to the person who represents the surrenderee, as he did in this case to John Hayward for the defendant.

That the minutes marked B. in the appendix (a) were the original entries made

(a) Minutes marked B. in the appendix.

"The Manor of Rishangles, with its Members.—The 22nd day of April, 1857.

"Whereas, on the 13th day of February, 1857, Isabella Raw, Thomas Bates and Eliza his wife, and William Watson, appointed by the Court of Chancery for Thomas Conway, the younger, an infant, the eldest son of Thomas Conway and Sarah his wife, and which said Isabella Raw, Eliza Bates, and Sarah Conway were the three daughters and co-heiresses of Joseph Raw, who was the eldest brother of Mary Spooner (late Mary Raw), a copyhold tenant of the said manor who died intestate, out of Court, surrendered.

"One messuage or cottage with $4\frac{1}{2}$ acres of land of the tenement Millard," &c. [The copyhold tenements were here described in precisely the same manner as in the surrender (ante, p. 311).]

"(To which premises it is recited the said Mary Spooner (then Mary Raw) was admitted at a Court held the 4th January, 1822.)

"To the use of Alexander Cruden, of &c., his heirs and assigns; Upon trust nevertheless for Thomas Raw, his heirs and assigns.

"Now be it remembered, that on the day and year first above written the said Alexander Cruden (by John Hayward his attorney) comes before me, Frederick Hayward, gentleman, steward of the said manor, at my office situate in Needham

by him as steward, and also signed by the said John Hayward at the time of the said admission.

That the draft admission marked C. in the appendix (b) [319] was made up and taken from the said entries, and a copy thereof was made on a proper stamp for the defendant before [320] this action was brought, but the entry thereof in the Court books was not made till after action brought.

That, according to the custom of the manor, the steward at the time of taking the admission of a copyhold tenant, makes an entry or minute of such admission from which the Court rolls are afterwards made up.

No express notice of the nomination of John Hayward to receive admission for the defendant was ever given to the defendant, or any one on his behalf; nor had the

Market in the county of Suffolk, and prays to be admitted tenant to the premises so surrendered to him as aforesaid. And the said Alexander Cruden is (by his said attorney) admitted tenant thereto accordingly: To hold to him the said Alexander Cruden, his heirs and assigns; Upon trust nevertheless for the said Thomas Raw, his heirs and assigns, according to the form and effect of the said surrender of the lord, at his will and according to the custom of the manor; and he pays to the lord a fine, &c. And his fealty is respited," &c.

"JOHN HAYWARD,

"Attorney for the said Alexr. Cruden."

(b) Draft admission marked C. in the appendix.

"The Manor of Rishangles, with its Members.—The 22nd day of April, 1857.

"Whereas it is certified to Frederick Hayward, gentleman, steward of the said manor, that an absolute surrender was made and passed by the several persons and at the several times and in manner in the said surrender mentioned, of the messuages, lands, and hereditaments hereinafter described and holden by copy of Court roll of the said manor, which surrender is in the words following:—

"The Manor of Rishangles," &c. [Here follows an exact copy of the surrender (ante, p. 311) with all the signatures and attestations.]

"Now be it remembered, that on the day and year first above written the said Alexander Cruden, by his attorney, came before the said Frederick Hayward, steward of the said manor, out of Court, and prayed the favour of the lord of this manor to admit him tenant to all and singular the said messuages, lands, and hereditaments so surrendered to him as aforesaid (which said messuages, lands, and hereditaments), according to a survey and admeasurement made and taken thereof in the year 1724, are described as follows, namely,—One messuage with the yards, orchards, and garden; and one pigtle of pasture with a way called Ingham's Way; and three inclosures of land, meadow and pasture, estimated together at 9 acres, lying in Rishangles, as between the copy lands of Michael Marner, called Shortland, on the part of the North, and the lands of the Rectory of Rishangles, on the part of the South, abutting upon the highway, alias Church Green, towards the West, and upon the piece next mentioned in part, and the lord's meadow called Ingham's in part, towards the East; containing together by measure 11 a. 2 r. 18 p. And also one inclosure of arable land, estimated at 3 acres, lying in Rishangles between the copylands of Mr. Little on the part of the North, and Ingham's Meadow aforesaid on the part of the South, abutting upon Rishangles Wood towards the East and upon the lands last abutted towards the West; containing by measure 3 a. 2 r. 8 p.; which said parcels of land before mentioned are held by the several rents amounting in the whole to 11s. 10d. per annum: To which said Alexander Cruden the lord of this manor by the said steward did grant and deliver seisen thereof by the rod: To hold the same messuages, lands, and hereditaments, with their appurtenances, unto the said Alexander Cruden, his heirs and assigns, for ever, according to the form and effect of the said surrender of the lord of this manor, at the will of the lord and according to the custom of this manor, by the rents and services therefore due and of right accustomed: Upon trust nevertheless for the said Thomas Raw, his heirs and assigns. And the said Alexander Cruden giveth the lord a fine, and is by his attorney admitted tenant thereto, saving the right of every one &c., but his fealty is respited until," &c.

"FREDK. HAYWARD,
"Steward."

defendant, or any one on his behalf, any express notice that the said minutes of the said alleged admission, or the said draft admission, had been made before the trial of this cause, save as appears by the case and correspondence.

According to the custom of the manor, a fine is due and payable to the lord on the admission of the copyhold tenant, and the amount of such fine is arbitrary.

(The question for the opinion of the Court was the same as that in *Hayward v. Raw* (ante, p. 316), and the Court was at liberty to draw inferences of fact.)

Baylis, for the plaintiff. The plaintiff, as lord of the manor, is entitled to maintain his verdict for the fine in respect of the surrender of Mary Spooner. First, the fine was due to the lord upon surrender, without admittance. In *Scriven on Copyholds*, vol. 1, p. 290, 4th ed., it is said, "The customary heir of a copyholder, being a complete tenant before admittance against all persons but the lord, may enter and take the profits, and maintain trespass and bring ejectment without having been admitted, and even surrender on payment of the lord's fine." In *Brown's case* (4 Rep. 21 a.) it was resolved "that, where the customary estate of inheritance descends to the heir before admittance, he may enter and take the profits." The difference between [321] admittance, on surrender and admittance on descent is thus pointed out in *Coke's Complete Copyholder*, sect. 41, p. 111: "In admittances upon surrender nothing is vested in the grantee before admittance, no more than in the voluntary admittances; but in admittances upon descents the heir is tenant by copy immediately upon the death of his ancestor; not to all intents and purposes, for peradventure he cannot be sworn of the homage before, neither can he maintain a plaint in the nature of an assise in the lord's court before, because till then he is not complete tenant to the lord, no further forth than the lord pleaseth to allow him for his tenant. And therefore if there be grandfather, father and son, and the grandfather is admitted and dieth, and the father entreth and dieth before admittance, the son shall have a plaint in the nature of a writ of Ayel, and not an assise of mort d'auncestor. So that to all intents and purposes the heir, till admittance, is not complete tenant; yet to most intents, especially as to strangers, the law taketh notice of his as a perfect tenant of the land instantly upon the death of his ancestor; for he may enter into the land before admittance, take the profits, punish any trespass done upon the ground, surrender into the hands of the lord to whose use he pleaseth, satisfying the lord for his fine due upon the descent." That doctrine was recognised and adopted in *Regina v. Dullingham* (8 A. & E. 858), which is an authority that a fine is payable by the heir on descent, before admittance. The lord has no power to compel the surrenderee to be admitted, for he is a perfect stranger; and as the surrenderee has no interest before admittance he is not capable of forfeiting the copyhold by committing felony, but upon his death it descends to the heir of the surrenderor: *Roe d. Jeffereys v. Hicks* (2 Wils. 13). Secondly, the entries and minutes made by the steward in his book, and signed by the person [322] appointed to receive admissions for the surrenderee, were a sufficient admittance to entitle the lord to his fine. A surrender and presentment may be proved by a draft of an entry produced from the muniments of the manor, and the parol testimony of the foreman of the homage who made such presentment, although no entry thereof appears on the Court rolls: *Doe d. Priestley v. Calloway* (6 B. & C. 484). There Lord Tenterden referred to several cases for the purpose of shewing that the entry on the roll is not conclusive on the parties, and he observed that "in another case words were added to the roll to pass other lands." [Martin, B. These entries were nothing more than a memorandum made by the steward in his book.] A draft admission was afterwards made up from them, and a stamped copy delivered to the solicitor of the surrenderee. [Martin, B. The surrenderee applies to be admitted to the copyhold premises by the description used for years, and thereupon the steward alters the document and admits him by a new description: that is no admission.] In *Scriven on Copyholds*, vol. 1, p. 283, 4th ed., it is said, "Where the right of alienation is established by the custom of the manor, the admittance is more of form than of essence, and the surrender is deemed to be the substantial part of the conveyance." Again, p. 291, "The admittance is merely as between the lord and tenant; if therefore the customary heir should die before admission his heir might enter." In *Coke's Complete Copyholder*, sect. 40, p. 105, it is said, If the surrender be conditional and the presentment be absolute, both the surrender, presentment and admittance thereupon are wholly void. But if the conditional surrender be presented, and the steward, in entering it, omitteth the condition, yet, upon sufficient proof made in Court, the

surrender shall not be avoided, but the roll amended; and this shall be no conclusion to [323] the party to plead or give in evidence the truth of the matter. *Towers v. Moor* (2 Vern. 97) is also an authority that parol evidence is admissible to explain a surrender of copyhold land, and shew a mistake either in the land or uses. A steward of a manor is not bound to accept a general surrender of tenements, although the proposed surrender refers to a previous surrender, in which there was a description of the tenements: *Regina v. Bishop's Stoke* (8 Dowl. P. C. 608). Thirdly, as to the reasonableness of the fines. Where a fine arbitrary is imposed, it is due to the lord of common right, and it is for the tenant to shew that it is unreasonable: *Doe d. Twining v. Muscott* (12 M. & W. 832), *Denny v. Lemman* (Hob. 135). The reasonableness of the fine, if the lord and tenant cannot agree, must be determined on action brought: *Willowe's case* (13 Rep. 1). He also referred to *Long v. Collier* (4 Russ. 267).

Manisty (Hannen with him), for the defendants. There is no contract upon which the lord can succeed either in the action for a fine upon surrender, or in the action for a fine upon admittance. No fine was payable upon the surrender: a fine would only become payable on admittance; but there never was any. The defendant, Cruden, never gave any authority, either express or implied, to J. Hayward to receive admission for him, and the act of the steward, in making admission by proxy, is of no avail until adopted. In *Scriven on Copyholds*, vol. 1, p. 292, it is said:—"It is usual to admit the heir or surrenderee or devisee by attorney, and not to put the party to the expense of appointing one by deed, if admittance be the only object, as the Court may name any person present to act for him, and [324] to receive seizin on his behalf; but his assent must be shewn by payment of the fine assessed by the lord, or other act." Gilbert, C. B., in his *Law of Tenures* (page 252), says:—"It is said to be resolved, that a copyholder cannot surrender by attorney without deed: *Praet. Reg.* 136, but that he may be admitted by attorney without deed. *Quære of this.*" Where, indeed, the heir was abroad and a neighbour came and was admitted in his name, and the heir returned and consented to the admittance by bringing an action against another, it was held to be a good admittance: *Blunt v. Clark* (2 Sid. 61). Here there has been no consent to the admittance. [Martin, B. The steward has never done that which he ought.] He has performed only a portion of the entire transaction: there could be no admittance until he made a memorandum, containing a description of the property corresponding with that in the surrender; and no fine is payable until the admission is entered on the Court rolls. [Wilde, B. Suppose the roll is never made up.] A person is not tenant by copy of Court roll until his name is on the roll. A tenant has a right to have the evidence of the Court rolls, or a certified copy. [Wilde, B. In olden time, a copyhold tenant paid his fine when he went to be admitted, and the roll was the evidence of his admission.] But, even assuming that there was an admission, the lord cannot recover the fine. There was no contract by the defendants to pay the amounts claimed. The lord is only entitled to a reasonable fine. It must be assessed, and a time and place must be appointed for payment, otherwise he cannot recover it or proceed for a forfeiture: 1 *Scriven on Copyholds*, p. 354, 4th ed. The only fines assessed were 122l. and 70l., which are unreasonable fines. The jury having found that the lord is not entitled to the [325] sums claimed, he cannot retain the verdict for the sums actually due, but must make a new assessment: *Lord Northwick v. Stanway* (3 Bos. & P. 346).

The Court then called on

Baylis, who replied.

MARTIN, B. We are all of opinion that the defendants are entitled to judgment. For my part, I think they are entitled to it on both points. The last is more a matter of form, the first is matter of substance; and Mr. Manisty has satisfied me upon both. The facts are these:—Mary Spooner, a widow, was the owner of certain copyhold premises in the manor of Rishangles. She died intestate, and the copyhold premises descended to two co-heiresses and an heir who was a minor. They were in fact trustees for one Thomas Raw, and he desired that these copyhold premises should become vested in one Cruden as trustee for him. A correspondence took place between the solicitor for the surrenderors and Thomas Raw, and the steward of the manor, as to taking the surrender. On the 14th March, 1857, the solicitor wrote to the steward as follows. (His lordship read the letter, ante, p. 311.) The document sent with this letter was the surrender, a copy of which is set out in the appendix of the case (ante, p. 311, note), and which was duly executed by all parties. The

surrender states at length what was its object; and that the parties, having satisfied the lord his fine, by the direction of Thomas Raw and in consideration of 300l., did surrender the copyhold premises into the hands of the lord, according to the custom of the manor, to the use of Cruden, his heirs and assigns, for ever, in trust for Thomas Raw. The object of the surrender was that Cruden should be admitted tenant of the [326] copyhold premises; and all that took place was only a mode of arriving at that final conclusion. The next step was, that the steward nominated John Hayward, his clerk in the absence of Cruden, to receive admission for him, by the rod, according to the custom of the manor. At the time that took place certain minutes or entries were made by the steward in his book and signed by John Hayward, and a draft admission was made up from those entries, together with a copy for the defendant on a proper stamp. Now, if this document had been correctly drawn up and had been inserted on the Court rolls, there would have been a complete admission of the surrenderee, which would have entitled the lord to his fine. It was argued by Mr. Baylis that where, by the custom of the manor, a fine is due on descent, in the event of the heir coming in and surrendering, the lord is entitled to his fine before admission. But here it is not pretended that the surrenderee was liable to pay the fine except upon the transaction being effected which it was proposed to carry out. I agree with my brother Wilde, that if the entry in the book of the steward had been a complete document, the right of the lord would have attached upon the entry of that document; but I require to be satisfied that a document entered by a steward in his book and signed by a person nominated by him, and of which nomination the surrenderee has had no notice, is anything more than a private memorandum, or that it will impose upon the surrenderee any obligation to pay a fine. The surrenderee was entitled to an admission in accordance with the surrender, but instead of that the document relied upon as giving a title is a different document, describing premises of which the copyhold tenant never had the benefit; and I think that the surrenderee acted rightly in refusing an admission in that form. Therefore, upon the merits, I am of opinion that, before the lord had any right to a fine, [327] the person acting for him ought to have delivered to the surrenderee an admission which he was bound to accept, and, not having done so, the lord has no right to a fine. I further think that the document cannot be considered as a copy of Court roll. Littleton (sect. 75, p. 60 a.), says:—"And these tenants are called tenants by copy of Court roll; because they have no other evidence concerning their tenements, but only the copies of Court rolls." From which it appears (and there is no better authority on the subject) that a copyholder ought to have his copy of Court roll, and that the surrenderee is entitled to a correct copy before he is liable to pay any fine. Therefore, in my judgment, upon the substance of the case the plaintiff fails.

I am also of opinion that the plaintiff fails on the other part of the case, because the right of the lord to a fine arises upon assessment, and that must be of a sum legally payable. Whatever right the lord may have upon the fine being properly assessed, he must fail upon a quantum meruit. A fine is a certain, fixed and legal sum assessed. Here the lord has not assessed any sum which is legal.

CHANNELL, B. I am also of opinion that the defendants are entitled to judgment. I come to that conclusion because I concur in the last observation of my brother Martin. It is clear from the case of *Grant v. Astle* (2 Doug. 722), that, to entitle the lord to a fine, not certain, it must be reasonable and assessed and demanded. Whatever alteration there may be in the language of pleading, it can have no effect in altering the law; and if the form of pleading as found in the old books be referred to, it will be found that the declaration is for a "reasonable fine duly assessed, and due and payable." If that be the correct view of the law, the plaintiff is not entitled to recover. The case might be different if [328] I could see that a sum exceeding 60l. would be a reasonable fine, but we are at liberty to draw inferences of fact, and on consideration of all the circumstances stated in the case I have come to the conclusion that 122l. and 70l. are unreasonable fines. It is said that the defendants are bound to shew that the fines are unreasonable, and that the onus of proof is on them. I am not prepared to adopt that argument. Although the objection may assume somewhat of a technical character, I have the less hesitation in dealing with it, because the lord never declared his intention to rely on the entries or memorandum made by the steward in his book, and which it is now said is an admittance, but only on the draft admission, a copy of which was sent to the attorney of the surrenderee and objected to as insufficient.

Another point was raised, viz., assuming that the fines were properly assessed and demanded, whether they were payable. Upon that point I do not propose to give any opinion, because the other is sufficient for the decision of the case; and I should not have adverted to it except for the purpose of observing that the entry by the steward in his book might possibly have the effect of an admittance as regards third parties, and until the roll was perfected. Upon that point however it is not necessary to express an opinion, because here no question arises with respect to third parties.

WILDE, B. I am also of opinion that the defendants are entitled to judgment. A fine not certain, in order to be recoverable, must be reasonable and assessed, and demanded; and the conclusion which I have come to from the facts stated in these cases is, that the fines claimed are unreasonable. There was a distinct assessment of two fines, one of 122l., the other of 70l.; a correspondence took place on the subject, and at length the lord was willing [329] to accept two fines of 60l. each. The lord then brings these actions, and in his particulars of demand he claims the fines of 122l. and 70l., but since he cannot establish his right to those sums he fails altogether.

With respect to the other point, I concur in the observations of my brother Martin, though upon the question whether, if the entry in the steward's book had been a complete document, there would have been a legal admittance of the surrenderee, I give no conclusive opinion. The lord is asked for a copy of the admittance in respect of which he claims the fine, and he sends a copy of that which alone can be an admittance, and it is rejected on the ground that it does not correspond with the surrender. The lord then sets up, as an admittance, an entry in the steward's book corresponding with the tenant's right, but of which he never had any notice. Upon these facts stated in the case, I think that the lord is not entitled to recover the fines.

Judgment for the defendants.

MACCARTHY v. YOUNG. Jan. 31, 1861.—A gratuitous lender of an article is not liable for injury resulting to the borrower or his servant while using it, from its defective state, if the lender was not aware of it.—The defendant, a builder, had purchased a house which he pulled down with the exception of a party wall. For his own use he erected a scaffold. P. asked him for the job in pulling down the party wall, and a written agreement was entered into by which P. agreed to do it for 17l. No mention was made in the agreement or otherwise of the use of the scaffold, but the plaintiff was aware that it was afterwards used by P. P. employed the plaintiff to pull down the party wall, and whilst doing so one of the putlogs, which was rotten, broke, and the plaintiff was thrown to the ground and seriously injured. The defendant was not aware of the defect in the putlog. Held, that the defendant was not liable.

[S. C. 30 L. J. Ex. 227; 9 W. R. 439; 3 L. T. 785. Referred to, *Indermaur v. Dames*, 1866, L. R. 1 C. P. 286. Approved, *Coughlin v. Gillison*, [1899] 1 Q. B. 145.]

Declaration. For that the defendant having undertaken to duly erect and construct a builder's scaffold for the purpose of facilitating the demolition of certain buildings, yet he the defendant so carelessly and negligently erected and constructed such scaffold that the plain-[330]-tiff, who was lawfully working thereon, was exposed to unreasonable risk, the scaffold broke and gave way, and the plaintiff was suddenly precipitated and thrown therefrom to the ground, whereby the plaintiff fell from a height of thirty feet, and had not only his arm broken in divers places but also divers of his ribs broken, &c.

Pleas. First: not guilty. Secondly: that the defendant never undertook to erect or construct the supposed scaffold as alleged. Issues thereon.

At the trial, before Wilde, B., at the Middlesex Sittings in last Trinity Term, the following facts appeared. The defendant, who was a builder, had purchased a house in Rood Lane in the city of London, which, being in a dilapidated condition, he had pulled down, with the exception of a party wall on the south side. This party wall was afterwards found to be defective, and the district surveyor required the defendant to take it down. As a scaffold would be necessary in building a new party wall, the defendant determined to erect one in the first instance, in order that his men might have the benefit of it in pulling down the party wall. The defendant had nearly erected the scaffold, when one Portlock, who had worked for him, applied for the job

in pulling down the party wall. The defendant consented, and the following agreement was entered into:—

"I, the undersigned, do agree to pull down the party wall of house, Rood Lane, level to street, the remainder of party wall to be left standing.

"To dig out and cart away the ground, 25 feet long, 4 feet wide and 3 feet deep from the cellar floor.

"To clean away and stack on the premises all good bricks and cart away the rubbish

"The whole to be done for the sum of 17l. cash.

"JOHN PORTLOCK,

"24 Octr. 1859.

"23 Johnson Street, Shadwell."

[331] "The wall to be pulled down to the foundation 25 feet from the front, and the ground excavated 3 feet below the line of the cellar floor, and 4 feet wide.

"JOHN PORTLOCK.

"To Mr. Young."

On the following day Portlock employed the plaintiff, who was a labourer, to pull down the party wall. Portlock said to the plaintiff "there is a scaffold rigged for you to go to work." The plaintiff commenced pulling down the party wall, and whilst he was on the scaffold one of the putlogs, which was rotten, gave way, and the plaintiff was thrown to the ground, by which he sustained the injuries complained of. There was no understanding between the defendant and Portlock that he was to have the use of the scaffold, but the defendant was aware of his using it. It did not appear that the defendant knew of the defect in the putlog. On the part of the defendant, evidence was adduced to shew that the accident was caused by the negligence of the plaintiff.

The defendant's counsel submitted that these facts did not sustain the declaration or issues; and that there was no evidence for the jury of the defendant's liability.

The learned Judge left it to the jury to say, first, whether the negligence of the plaintiff contributed to the accident; secondly, whether the negligence of the defendant in erecting the scaffold caused the accident. The jury found the defendant guilty of negligence in the original construction of the scaffold, by reason of the defective putlog, and a verdict was entered for the plaintiff on the first issue, with 50l. damages, and for the defendant on the second issue; leave being reserved to the defendant to move to enter the verdict for him: the pleadings to be amended, if necessary.

T. Jones, in the same term (June 2), obtained a rule [332] nisi to enter a nonsuit or a verdict for the defendant, or to arrest the judgment; against which

Montagu Chambers and Tapping shewed cause in last Trinity Vacation (June 22). The plaintiff, being a stranger to the defendant, and engaged in his lawful business for the benefit of the defendant, is entitled to maintain this action for the injury he has sustained through the defendant's negligence. The case is distinguishable from that of a servant who is injured by the negligence of a fellow servant in the course of their common employment. [Pollock, C. B. Suppose the owner of a mine, which has the usual apparatus for taking people up and down, lets or sells the mine, believing the apparatus to be in sound condition, and the purchaser employs a workman who sustains an injury in consequence of a defect in the apparatus, could the latter maintain an action against the seller of the mine?] Here the scaffold was used with the knowledge of the defendant. The liability does not depend on contract: it is a common law liability arising from the relation of the parties. The case resembles that of the owner of a shop who is bound to keep it reasonably secure, so that persons who lawfully enter it may not sustain any injury through his negligence. In *Southcote v. Stanley* (1 H. & N. 247), Alderson, B., pointed out that "there is a distinction between persons who come on business and those who come by invitation." And Bramwell, B., said, "If a person invites another into his house, and the latter can only enter through a particular door, is it not the duty of the former to take care that the door is in a secure condition?" *Degg v. The Midland Railway Company* (1 H. & N. 773) was the case of a person who was killed whilst voluntarily assisting the servants of the defendants, and therefore in the same position as a servant. The principles enunciated [333] in the judgment in *Hutchinson v. The York, Newcastle*

and *Berwick Railway Company* (5 Exch. 343) are in favour of the plaintiff. *Knight v. Fox* (5 Exch. 721) proceeded on the ground that the injury was occasioned by the negligence of a subcontractor, not of a servant of the defendant, in which case it was conceded that he would have been liable. Here the defendant, by his servants, erected the scaffold. If the only mode of access to the scaffold had been up a ladder which was made of bad materials by the servants of the defendant, he would have been liable for injury occasioned thereby. *Bush v. Steinman* (1 Bos. & P. 404) is an authority that a person may be liable in respect of an act done for his benefit upon his premises by persons who are not his servants. [Pollock, C. B. In *Reedie v. The London and North Western Railway Company* (4 Exch. 244), Rolfe, B., in delivering the judgment of the Court, said that, "according to modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the Court proceeded."] The allegation in the declaration, that the defendant undertook to erect the scaffold, is immaterial, and may be struck out. Negligence in erecting the scaffold renders the defendant liable for injury to a stranger whilst lawfully working thereon: *Dalyell v. Tyrer* (E. B. & E. 899). They also referred to *Roberts v. Smith* (2 H. & N. 213).

T. Jones appeared in support of the rule, but was not called upon to argue.
Cur. adv. vult.

The judgment of the Court was now delivered by

WILDE, B. In this case the declaration charged the defendant with having undertaken to erect a scaffold, and [334] with having so negligently and carelessly done so, that the plaintiff, who was lawfully working upon it, was exposed to unreasonable risk and thrown to the ground and injured by the scaffold giving way.

The defendant pleaded, first, not guilty; secondly, that he did not undertake to erect the scaffold as alleged.

It was proved on the trial that the plaintiff was a labourer: that he was employed by one Portlock to pull down the party wall of a house belonging to the defendant: that Portlock said to him, "there is the scaffold for you to go to work."

The scaffold to which the remark applied was erected under the following circumstances:—

The defendant was a builder and had purchased a house which he was about to pull down; he erected the scaffold in question for his own use, and did use it in pulling down the front and back walls of the house; and on being called upon afterwards to pull down the party wall, he was about to do so when the said Portlock, who was his carpenter, asked for the job, and accordingly the defendant entered into a written contract with him to pull down the party wall for 17l. The written contract contained no provision for the use of the scaffold already erected, nor was it in any way understood at the time of making such contract that Portlock was to have the use of the scaffold. But the defendant was aware of its being so used when the wall came to be pulled down; and it may fairly be taken that he allowed Portlock the use of it gratuitously.

One of the putlogs, or cross supports on which the planks of the scaffold rested, turned out to be rotten. There was no evidence whatever that the defendant knew of this defect. The putlog gave way, and was the cause of the accident for which the action was brought. The plaintiff was thrown to the ground and seriously injured.

The jury found the defendant guilty of negligence in the [335] original construction of the scaffold by reason of the defective putlog, and that the plaintiff's injury was caused by such negligence.

A verdict was entered for the plaintiff for 50l., the defendant having leave to move to enter the verdict for him.

The question that has arisen for this Court is, whether under the foregoing circumstances the defendant is liable in any form of action to the plaintiff for what has occurred; and that the question might be fully raised it was very properly agreed that any necessary amendments in the pleadings might be made. The pleadings therefore become immaterial.

The Court however is of opinion that no such liability exists.

The result of the evidence appears to us to be, that the scaffold in question was lent by the defendant without reward to Portlock, as a ladder or any tool might have been, to assist him in completing the work he had undertaken to perform. And the plaintiff was the servant of Portlock, and nothing more.

So far as the relation of the parties is concerned, it is the case of a gratuitous lender for use, on the one hand, and the servant of the party to whom the article is lent on the other.

In this relation of parties, and in the absence of all proof of knowledge by the lender of the defect which created the mischief, what are the obligations of the lender towards those to whom the article is lent, or by whom it is afterwards used? When the case was argued, it appeared to the Court that the matter was of sufficient general interest and novelty to make it desirable that time should be taken to consider maturely the terms of the judgment they were prepared to give.

Upon consulting the authorities, however, we find that [336] the whole matter has been fully considered lately in the Court of Queen's Bench, and an elaborate judgment delivered in which we entirely concur.

This makes it unnecessary to do more than refer to that decision.

In *Blakemore v. The Bristol and Exeter Railway Company* (8 E. & B. 1035, 1050), which was an action for injury by an insufficient crane lent by the defendant, the Court laid down the rule of the lender's responsibility thus:—"It may be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured."

And again:—"The principle laid down in *Coggs v. Bernard*, and followed out by Lord Kenyon and Buller, J., and by Lord Tenterden, in the *Nisi prius* cases cited in the note 1 Lead. Cas. 162 (4th ed.), that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects, known to the lender, which may make the loan perilous or unprofitable to him."

It is obvious that, upon the above principle, the defendant would not have been liable even to Portlock, to whom [337] the scaffold was lent, if the accident had happened to him, inasmuch as the defendant was not aware of the defect in question; and, without deciding anything as to the position of the plaintiff, it is plain that he at any rate stands in no better position than Portlock would have done. The verdict must therefore be entered for the defendant.

Judgment for the defendant.

LYALL AND ANOTHER v. EDWARDS AND MATTHIE. Jan. 21, 1861.—Though a release is general in its terms, the Court will limit its operation to matters contemplated by the parties at the time of its execution.—Trover for indigo warrants. Plea: that the plaintiffs by deed released the defendants from the causes of action. Replication, on equitable grounds, setting out a deed for the liquidation of the affairs of the defendants under inspectorship, and by which the plaintiffs, who were creditors of the defendants, released them "from all and all manner of actions, cause of action and suit, bills, bonds, writings, obligations, debts, &c., claims and demands whatsoever both at law and in equity, or otherwise howsoever." Averments: that at the time the plaintiffs executed the release they did not know that they had any claim against the defendants in respect of the said warrants, and that the plaintiffs executed the deed intending thereby only to release the debt due from the defendants to them. Rejoinder: that the plaintiffs employed the defendants to purchase goods and obtain advances for them, and that there were cross-claims against each other constituting matters of account: that the defendants had authority from the plaintiffs to deposit, as a security for the repayment of advances, the warrants of goods purchased for them, to an amount sufficient to cover the liabilities of the defendants for the plaintiffs: that whilst the said warrants were so deposited, the defendants suspended payment and the parties who held the warrants sold the goods repre-

sented thereby : that at the time of the making of the said deed the state of accounts between the plaintiffs and defendants was not ascertained, and whether the defendants had exceeded their authority in depositing the warrants was wholly unknown to the defendants and the plaintiffs : that the release was given in consideration of the execution of the same by other creditors, the consideration for whose execution was the execution by the plaintiffs : that the other creditors supposed that the release was intended to include all claims which the plaintiffs, upon ascertaining the accounts, might have against the defendants. On demurrer to the rejoinder : Held, that the replication was good and the rejoinder bad.

[S. C. 30 L. J. Ex. 193. Referred to, *Moore v. Weston*, 1872, 25 L. T. 542.]

Declaration. That the defendants converted to their own use and wrongfully deprived the plaintiffs of the use and possession of certain of the plaintiffs' goods, that is to say, of twenty-two warrants for twenty-two chests of indigo and twenty-two chests of indigo.

Plea. That after the alleged causes of action accrued, and before this suit, the plaintiffs, by deed, released the defendants therefrom.

Replication on equitable grounds. That before and at the time of the execution by the plaintiffs of the said deed [338] of release, the defendants were indebted to the plaintiffs in a large sum of money, and, whilst they were so indebted, by an indenture made the 19th day of December, 1857, between the defendants of the first part, D. Chapman and W. Turquand of the second part, and the several persons who were respectively creditors of the defendants on account of their copartnership business (amongst whom were the plaintiffs) of the third part, the several persons who were respectively creditors of the defendant J. Edwards of the fourth part, the several persons who were respectively creditors of the defendant J. Matthie of the fifth part : After reciting that the defendants had carried on business in copartnership as East India and colonial brokers, and that they the defendants having suspended payment on the 18th day of November, 1857, a meeting of their creditors was held on the 26th day of November, 1857, at which a statement of the affairs of the defendants was made, and it was unanimously resolved, amongst other things : 1st. That it was the opinion of the meeting that the interests of the creditors would be consulted by the defendants devoting their services for the realization of the assets under the direction of inspectors. 3rd. That a dividend should be paid as soon as funds could be realized, and that in the meantime a proper deed of inspectorship and liquidation, containing all usual covenants, should be prepared under the approval of the inspectors, and executed by the creditors. 4th. That such deed should contain covenants by the partners to liquidate the affairs of the firm under the inspection, and to divide the proceeds among the creditors rateably, according to the rules of administration adopted in bankruptcy (and covenants by the creditors not to sue the partners for twelve months, and then that the deed should operate as a release of the partners from all claims, or sooner if the inspectors should require it) : It was wit-[339]-nessed that, in pursuance of the resolutions and agreement, and in consideration of the covenants thereafter contained on the part of the creditors of the defendants, the defendants did thereby separately covenant and agree with the said parties thereto of the second part in manner in the said deed mentioned, but not material to be here set forth. And it was by the said indenture further witnessed that, in consideration of the covenants of the defendants and of the agreements and provisoes thereinbefore contained, it was thereby agreed and declared, for and on behalf of all the creditors, parties thereto, or bound by those presents ; and, further, each of the several creditors executing those presents, did thereby covenant, promise and agree, with and to the defendants and each of them, that upon the expiration of twelve calendar months from the date thereof, unless the inspectors should previously, by writing under their hands, direct that the release of the debtors under those presents should be deferred for any period therein mentioned, and then, at the expiration of such period, unless the inspectors should previously, by writing under their hands, direct that the release of the debtors under those presents should be further deferred for any further period to be therein mentioned, and then, at the expiration of such further period, or immediately after the inspectors should, by writing, certify that the said liquidation had proceeded satisfactorily, then, and upon either of the said cases happening, unless those presents

should have previously become void under the provisions thereafter contained, the debtors, and each of them, and their and his heirs, &c., should thenceforth, and without the necessity of any further act or assent, by or on behalf of any of the creditors parties to or bound by those presents, be absolutely released and discharged from all and all manner of actions, cause of action and suit, bills, bonds, writings, obli-[340]gations, debts, duties, accounts, sum and sums of money, interest, judgments, extents, executions, trespasses, trusts, claims and demands whatsoever, both at law and in equity, or otherwise howsoever, which the said creditors, parties to or bound by those presents, or any of them, or the heirs, &c., of them, or any of them, then had, or thereafter should or might have, challenge, claim or demand against the debtors, or either of them, or their or his heirs, &c., or their or his estates or effects, for or by reason or on account of all and every or any of the debts or claims to or of them the said creditors, parties thereto, or any of them, then due and owing from or enforceable against the debtors, or either of them, or in respect of which any proof or claim to dividend might be made or sustained under or by virtue of those presents, or of any other matter, cause or thing whatsoever in respect of the said debts or claims, or any of them; and that, in either of the cases aforesaid, those presents might, without the execution of any further or other release, be pleaded and given in evidence against the said creditors, or any of them, as an actual release, and be so accepted and treated against the said creditors, or their representatives. Averments: that the plaintiffs executed the said deed as parties thereto of the third part, and the said covenant of release in the said indenture contained and hereinbefore set forth, is the release in the said plea mentioned: that, at the time of the execution of the said indenture by the plaintiffs, and without any default on the part of them, or either of them, they did not, nor did either of them, know that the defendants had committed the grievances in the declaration mentioned, or that the plaintiffs had any claim or cause of action against the defendants, or either of them, in respect of the goods of the plaintiffs in the declaration mentioned: that the defendants did then know that they had committed the said grievances, and [341] that the plaintiffs had a claim or cause of action against them in respect of the said goods, but did not inform the plaintiffs thereof before the execution of the said indenture, and the plaintiffs executed the said indenture intending that the execution thereof should, and believing that it did and would, and that it was intended by the defendants to relate only to the sum of money in which the defendants then were indebted to the plaintiffs, and intending thereby only to release the said debt, and not intending to release any other claim or cause of action whatsoever: that if the plaintiffs had known, at the time of the execution of the said indenture, of the existence of the claim in respect of which this action is brought, they would not, nor would either of them, have executed the said indenture.

Demurrer and joinder therein.

Rejoinder. The defendants, admitting for the purposes of the rejoinder that they were guilty of the grievances in the declaration complained of, say that they arose in the manner and under the circumstances following; that is to say, that before the making of the said deed and the suspension of payment by the defendants hereinafter mentioned, the plaintiffs and defendants were severally and respectively carrying on business in the city of London, the plaintiffs as merchants, and the defendants as East India and colonial brokers; and the plaintiffs from time to time employed the defendants, as their agents and brokers, to purchase goods for them, and the defendants did from time to time purchase goods for the plaintiffs, including the goods in the declaration mentioned; and the plaintiffs also, from time to time, employed the defendants to obtain for the plaintiffs advances of money, from certain bankers and others, by the discounting of bills of exchange, drawn by the plaintiffs upon and accepted by the defendants; and [342] also from time to time to repay such advances for the plaintiffs: that in the course of the said transactions the plaintiffs and defendants had divers cross claims against each other, forming and constituting large matters of account between them, consisting on one side and the other respectively of monies received by the defendants for the plaintiffs' use, and of monies paid by the defendants for the plaintiffs, and also of liabilities which the defendants had come under for the plaintiffs in obtaining advances for the plaintiffs as aforesaid, and also of monies paid by the plaintiffs to the defendants, and also of goods of the plaintiffs purchased for them by the defendants, and remaining in the defendants' hands to be accounted for to

the plaintiffs: that the defendants had authority from the plaintiffs to deposit from time to time, upon obtaining such advances for them as aforesaid, as collateral security for the repayment of the same, and to continue deposited as such security, upon the renewal of any such advances upon renewable bills, warrants and other documents representing goods of the plaintiffs purchased for the plaintiffs by the defendants as aforesaid, and from time to time remaining in the hands of the defendants, to such an amount in value as, but no further or greater amount than, would be sufficient to cover the amount for which at the time of making such deposit or continuing the same upon such renewal the defendants were under liabilities for the plaintiffs as aforesaid without having other funds of the plaintiffs in hand, or being indebted to the plaintiffs in a sufficient amount to cover the same, and to deposit the same as security for the repayment only of advances to the last mentioned amount: that whilst certain indigo warrants of the plaintiffs, which had been purchased for them by the defendants as aforesaid, and which had been deposited by the defendants with certain parties as collateral security for the repayment of certain advances obtained for the [343] plaintiffs as aforesaid, remained in the hands of the said parties, and whilst the said advances still remained unpaid, the defendants became unable to meet their liabilities, and suspended payment, and the said last mentioned advances not being duly repaid, the said parties who had made the same realized the said warrants and sold the said goods of the plaintiffs represented thereby: that at the time of the making of the said deed the true state of the said accounts between the plaintiffs and the defendants had not been finally taken or ascertained, and the extent and amount of the plaintiffs' and defendants' liabilities respectively to one another, at the time of the deposit of the said warrants so sold as aforesaid, was not known to the plaintiffs or the defendants, and whether the defendants had exceeded their authority in depositing or continuing so deposited as security as aforesaid the said warrants so realized as aforesaid, or any part thereof, was wholly unknown to the defendants and the plaintiffs: that the conversion and grievance in the declaration complained of is the deposit and continuing deposited as such security as aforesaid the said warrants, and their subsequent realization, and the sale of the plaintiffs' said goods: that the said deed and release was made and given by the plaintiffs for, amongst others, the divers considerations following to the plaintiffs, which have been duly executed and performed, namely, in consideration of the defendants giving up their property for the benefit of their creditors, and of the defendants devoting their services for the realization of the assets and also of a dividend to be paid, and also the execution of the same by other creditors of the defendants, the consideration for which other creditors executing the same was also, amongst other things, the execution of the same by the plaintiffs: that the said other creditors, at the time of the entering into the said arrangement by the said deed supposed that the [344] said release was intended by the plaintiffs, as in fact it was intended by the defendants, to include all claims and rights, if any, that the plaintiffs might be found, upon the taking and ascertaining of the accounts between them, to have had against the defendants at the date of the said suspension of payment in respect of the said transactions and advances, and the forfeiture of any such warrants and securities by such default in payment of the same.

Demurrer, and joinder therein.

J. Dickinson, for the plaintiffs. First, the replication is good. The question is, whether the defendant is in equity entitled to say that the release extends to claims not in the contemplation of the parties at the time it was executed. The indenture is an ordinary deed for winding up the affairs of a trading copartnership under the direction of inspectors, and if it had contained a schedule, with the amount of the respective debts set opposite the names of the creditors, there could have been no question as to its limit. A Court of equity would not be bound by the general language of the deed, but would admit collateral evidence that the release was not intended to apply to the cause of action mentioned in the declaration. In *Cholmondeley v. Clinton* (2 Meriv. 171) Sir W. Grant, M. R., refers to an unreported case of *Farewell v. Coker* (2 Meriv. 353), decided by Lord King, C., and afterwards affirmed by the House of Lords. There a tenant for life, with remainder to his son in tail, with remainder to himself in fee, devised all his estate to his daughters. The surviving daughter executed a general release to her brother, the tenant in tail, in words sufficient to pass the reversion in fee. She afterwards filed a bill for the purpose of setting aside the release, on the ground that she only meant by it to discharge her

brother's estate of a portion to which she was [345] entitled under some antecedent settlement. On the other hand it was alleged that the release was given for the purpose of conveying her reversion, in order to save her brother the necessity of suffering a common recovery. Lord King, C., at first decreed in favour of the daughter, but on a rehearing directed issues to try, first, whether, at the time of the execution of the release, she knew, or was apprised of her title under the will to the reversion. Secondly, whether she intended by the release to pass that reversion. In *Cole v. Gibson* (1 Ves. sen. 503, 506) Lord Hardwicke, C., said, "It was common in equity to restrain a general release to what was under consideration at the time of giving it." Thirdly, the rejoinder is bad. The question whether the defendants have converted the dock warrants depends on whether, upon a balance of accounts, it appears that the defendants have exceeded their authority in depositing the warrants as a security. But the rejoinder does not allege that any account was stated at the time the release was executed, and therefore the cause of action in the declaration could not be included in it. The facts stated in the replication are not varied by the rejoinder. The replication shews a release of those claims only which were known to the plaintiffs; the rejoinder seeks to include in the release a claim of which the plaintiffs had no knowledge at the time they executed it.

Montague Smith (Watkin Williams with him), for the defendants. There is nothing to shew that it was not the intention of the parties to include this cause of action in the release; and it would be a fraud on the other creditors to exclude it. The recital shews that the object of the deed was to release the defendants, not only from all debts, but from all claims which the plaintiffs had against him, and the other creditors have been induced to execute it upon the faith [346] that such claims would be released. The substance of the replication is, that at the time the plaintiffs executed the release they did not know that they had any claim against the defendants in respect of the dock warrants; but this is not a mere question between the plaintiffs and defendants, but one in which third parties are concerned. No doubt, where an instrument is so general in terms as to release the rights of a party to property to which he was wholly ignorant that he had any title, and which was not within the contemplation of the bargain at the time it was made, a Court of equity will restrain the instrument to the purposes of the bargain, and confine the release to the right intended to be extinguished: *Story on Equity Jurisprudence*, sec. 145, p. 171. But the ground of relief is not the mistake or ignorance of material facts alone; but the unconscientious advantage taken of the party by the concealment of them. For if the parties act fairly, and it is not a case where one is bound to communicate the facts to the other upon the ground of confidence, or otherwise, there the Court will not interfere: sec. 147, p. 173. "And it is essential, in order to set aside such a transaction, not only that an advantage should be taken, but it must arise from some obligation in the party to make the discovery; not from an obligation in point of morals only, but of legal duty:" sect. 148, p. 173. Here there was no duty on the part of the defendant to communicate to the plaintiff that he had a claim in respect of these dock warrants.

Secondly, the rejoinder is good. It discloses facts which would disentitle the plaintiffs to relief in a Court of equity. [Martin. B. The rejoinder alleges that the defendants were authorized to pledge the warrants under a certain state of circumstances, but it does not state that they pledged them under those circumstances; therefore the rejoinder, upon the face of it, shews a conversion.] The rejoinder [347] states that the defendants were authorized to pledge the warrants to such an amount as the defendants were under liabilities to the plaintiffs, and that the state of accounts was unknown to either party, or that the defendants had exceeded their authority in depositing the warrants.

POLLOCK, C. B. We are all of opinion that the replication is good and the rejoinder bad. It is a principle long sanctioned in Courts of equity, that a release cannot apply, or be intended to apply to circumstances of which a party had no knowledge at the time he executed it, and that if it is so general in its terms as to include matters never contemplated, the party will be entitled to relief. Here the replication sets out sufficient to shew that the plaintiffs are not bound by the release quoad the circumstances mentioned; and the defendants fail to establish any answer by the rejoinder. There will therefore be judgment for the plaintiffs.

MARTIN, B. I am also of opinion that the replication is good and the rejoinder

bad. The replication is founded on the equitable doctrine that if a release is given for a particular purpose, and it is understood by the parties that its operation is to be limited to that purpose, but it turns out that the terms of the release are more extensive than was intended, a Court of equity will interfere and confine it to that which was in the contemplation of the parties at the time it was executed. The case of *Farewell v. Cocker* (2 Meriv. 171), which has been referred to, is an authority for that position. Here we are required to call in aid the rule in equity. The substance of the replication is, that the act of conversion committed by the defendants was not within the meaning of the release. The replication is framed so as to shew that [348] state of things, and it is for the defendants to answer it. Then how do they do that? The rejoinder begins by stating that the plaintiffs employed the defendants to obtain advances for them and that there were matters of account between them, and that the defendants had authority from the plaintiffs to deposit warrants to an amount sufficient to cover the liabilities they were under for the plaintiffs. The rejoinder then states whilst certain warrants were deposited with certain parties the defendants suspended payment, and the parties realized the warrants: but it does not say that the defendants had any right to deposit the warrants. The rejoinder goes on to say that when the release was executed the accounts between the plaintiffs and defendants were unsettled, and it was unknown whether the balance would be on the one side or the other. What answer does that afford to the replication, or what tendency has it to shew that this cause of action is a matter within the release? If this rejoinder is good, it would be a matter for the jury to find whether in point of fact this cause of action was included in the release. It seems to me that the facts stated in the replication shew that the release was only intended to apply to such claims as ordinary debts, and not to a cause of action for a conversion.

WILDE, B. I am of the same opinion. The doctrine of a Court of equity is, that a release shall not be construed as applying to something of which the party executing it was ignorant, and we have now to act on that doctrine in a Court of law. I think it will be found that a Court of law would correct a mistake of fact; but it is not necessary to decide that point. However that may be, the replication is good.

With respect to the rejoinder, it is studiously drawn so as to avoid saying that the defendants were authorized to [349] deposit the warrants. The authority to deposit is set out, and one would expect to find a statement that the warrants were deposited under that authority, but the defendants carefully omit to state anything of the kind. The rejoinder does not answer the allegation in the replication that the plaintiffs were ignorant of the deposit of the warrants. The replication shews that the release was given for the purpose of releasing a debt, and that a claim arising out of a wrongful deposit of the warrants is not within it. For these reasons I think the replication is good and the rejoinder bad.

Judgment for the plaintiffs.

HOLMES v. CLARKE. Jan. 12, 1861.—Where machinery is required by statute to be fenced, and a servant enters into the employment of the owner whilst it is protected, and continues in the service after the protection is removed by decay or otherwise, but complains of the danger and is promised, that the protection shall be restored, the master is liable for injury to the servant arising from the want of such protection.

[S. C. 30 L. J. Ex. 135; 7 Jur. (N. S.) 397; 9 W. R. 419; 3 L. T. 675: affirmed 1862, 7 H. & N. 937.]

Declaration. That after the passing and coming into operation of the act of parliament passed in the year 1844, intituled "An Act to amend the laws relating to labour in factories," and of "The Factory Act, 1856," and before and at the time of the committing of the grievances and the sustaining by the plaintiff of the injury hereinafter mentioned, the defendant was the occupier of a building situate in Great Britain, to wit, in the city of Manchester, wherein the defendant carried on the business of a cotton-spinner, and wherein in carrying on, and for the purposes of the said business, a steam-engine producing steam-power was used to move and work machinery employed in preparing and manufacturing cotton, and in the process incident to the manufacture of cotton, the said building being a factory within the

meaning of the said statutes; and in part of the said building a certain mill-gearing, being mill-gearing within the meaning of the said statutes, was before [350] and at the said time of the said grievances and injury worked and put in motion, and was in motion, by the steam-engine and the power thereof for the purpose of the said manufacture and process; the said part of the said building not being a part or place which, by the 73rd section of the first mentioned Act, or otherwise, is declared to be a part of the factory or place to which the enactment of the said 73rd section, or the definition of the word "factory" is not to extend. And before and at the said time the said building, mill-gearing and steam-engine and power were under the care, management and direction of the defendant; and the said mill-gearing was such as ought, according to the said statutes, to be securely fenced at the said time; and the same was mill-gearing with which children and young persons, within the meaning of the said Act, and women, were liable, within the meaning of the said Act, to come in contact. And the plaintiff before and at the said time was lawfully in the said part of the said factory with the consent of the defendant; Yet the defendant, after the 1st day of June, A.D. 1856, and before this suit, disregarded his duty and the said statutes, and did not securely fence the said mill-gearing, nor was the same securely fenced, contrary to the said statutes, whereby, after the said last mentioned day and before this suit, the clothes of the plaintiff were caught by certain parts of the said mill-gearing so in motion for the purpose aforesaid, and the plaintiff was drawn in and to the same and dragged about, and one of his arms was broken and torn off, and he received other great injuries and was put to very great suffering, and sustained great cost in and about getting medical and other attendance and necessities.

Pleas. First: Not guilty.

Secondly: That before and at the time of the committing of the alleged grievances and of the sustaining by the plaintiff of the injury in the declaration mentioned, the plaintiff [351] was a servant of the defendant, employed by the defendant as such to work for the defendant in his said business in the said factory, for reward to the plaintiff in that behalf; and the plaintiff was upwards of twenty-one years of age, and well knew that the said mill-gearing was not securely fenced as aforesaid; and the said clothes of the plaintiff were caught by the said parts of the said mill-gearing, and the plaintiff was drawn in and to the same and dragged about, and he was injured as in the declaration alleged, by and through the plaintiff's own negligence and carelessness and want of due and proper caution in that behalf; and by ordinary care, he could and might and ought to have avoided and prevented the same; and the plaintiff caused and was himself the author of the said injuries so sustained by him. Issue thereon.

At the trial, before Wilde, B., at the Liverpool Summer Assizes, 1860, the following facts appeared:—The defendant was a cotton-spinner at Manchester, and the plaintiff was employed by him in his factory as "under over looker," at weekly wages. It was the plaintiff's duty to oil the machinery whenever it was required, which was several times a-day. This machinery was worked by steam-power, the motion being communicated to wheels through the medium of shafts. On the 5th of July, 1857, the plaintiff was engaged in oiling a "scutching machine" (for cleaning and tearing the cotton), and in order to reach the spot where the oil was poured into the machinery through small holes, he placed his left arm on the machine near the wheels to support himself, and with his right hand he held the vessel containing the oil, which he poured into the machinery. His left arm was drawn into the machine and torn off. When the plaintiff first entered the service the machine was fenced with an iron guard, but it was broken by accident, and the machine remained unfenced for above a year. The plain-[352]-tiff had frequently complained to the superintendent of the danger, and he promised that the guard should be mended. On one occasion the defendant had looked at the machine and said that the guard should be mended. In some factories it was the practice to stop the machines whilst they were being oiled, but not in the defendant's, the superintendent having directed the plaintiff, when he was first employed, not to do so. There were two other scutching machines and six other machines (three "breaks" and three "finishing" machines) in the same room, and several women worked in it feeding the scutching machines with cotton. There was a passage between the machines, but none of the workmen had any business to pass the spot where the plaintiff met with

the accident, although there was nothing to prevent them, and many were accustomed to do so.

It was submitted, on behalf of the defendant: first, that this machinery was not "mill-gearing" which was required to be fenced by the 7 & 8 Vict. c. 15. Secondly, that the plaintiff had caused the injury by his own negligence. Thirdly, that the defendant was not liable, inasmuch as the plaintiff was the servant of the defendant and did the work voluntarily and of his own accord, and with full knowledge of the danger. The learned Judge reserved the points, the pleadings to be amended, if necessary, and his lordship left it to the jury to say, first, whether the injury was caused by the want of proper caution on the part of the defendant; secondly, whether the plaintiff was guilty of negligence, either in the manner in which he oiled the machinery, or in continuing in the defendant's service after the fencing was removed. The jury found the first question in the affirmative, and the second in the negative; and they gave a verdict for the plaintiff, with 200l. damages.

T. Jones, in last Michaelmas Term, obtained a rule nisi to enter a nonsuit, or for a new trial; against which

[353] Bliss and Aspland shewed cause. (a) First, this machinery was "mill-gearing" within the meaning of the Factory Acts, 7 & 8 Vict. c. 15, and the 19 & 20 Vict. c. 38. The 21st section of the 7 & 8 Vict. c. 15 enacts, "That every fly-wheel directly connected with the steam-engine, or water-wheel, or other mechanical power, whether in the engine-house or not, &c., and all parts of the mill-gearing in a factory, shall be securely fenced." The word "gearing" is not found in Johnson's Dictionary, but the word "gear" is defined as "apparatus." In Webster's Dictionary the word "gearing" is defined as "a train of toothed wheels for transmitting motion in machinery." Therefore this case is within the 21st section of the 7 & 8 Vict. c. 15, unless it is excluded by the interpretation clause (sect. 73), which declares that "mill-gearing shall be taken to comprehend every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to the manufacturing process." That clause does not restrict but extends the meaning of the term. The 20th section shews that "mill-gearing" means anything which is in motion for the purpose of propelling any part of the manufacturing machinery. Any other construction would render that section nugatory. The other side would restrain the meaning of the term to that part of the machine by which the motive power is first created; but it comprehends the whole apparatus by which motion is communicated to the machine. There is a distinction between "mill-gearing" the machinery which communicates motion, and the machine which produces manufacture: the latter could not be fenced or it would be inaccessible to the persons at work. Moreover this question is not raised by [354] the pleadings, for there is no traverse of the allegation in the declaration that the injury was caused by mill-gearing.

Secondly, this case is entirely different from that class of cases beginning with *Priestley v. Fowler* (3 M. & W. 1), which decides that a servant cannot recover for injury sustained while in his master's service, for in all those cases the duty of the master depended on contract. Here the duty is imposed by statute, which requires that the master shall fence his machinery, and he is therefore liable for injury sustained by his servant in consequence of a neglect of that duty. *Couch v. Steel* (3 E. & B. 402) is an authority in point. That was an action by a sailor against a shipowner, and the declaration contained two counts, one on a breach of duty arising from contract, the other on a breach of the duty imposed upon shipowners by the 7 & 8 Vict. c. 112, s. 18, to keep on board the vessel a proper supply of medicines. The first count was held bad; but with respect to the second it was held that, as the plaintiff had sustained an injury from the breach of a statutable duty, the defendant was liable. [Pollock, C. B. There the plaintiff had no means of knowing whether there was a proper supply of medicines on board; here the danger was apparent. If a servant was about to do some work in which his safety depended on the strength of a rope, and he expressed a doubt whether it was sufficiently strong, upon which his master assured him that it was, but it turned out that it was not, and the servant was injured, I can well understand that he would have a right of action. But if a servant for whose protection a statute was passed, knowing that his master has disregarded its

(a) In last Michaelmas term (Nov. 23) and in the present term (Jan. 11).

provisions, nevertheless chooses to go on with the work, and is injured, can he maintain an action against his master.] Wherever a statutory duty is imposed on the master he is liable for a breach of it. [355] [Wilde, B. The statute applies to children, and a child of twelve years old can scarcely be considered as contemplating the danger of passing unfenced machinery.] The statute was intended for the protection of all persons working in factories: *Caswell v. Worth* (5 E. & B. 849). If the servant has used due care the master is not excused merely because the servant knew that some danger existed through the master's neglect, and voluntarily incurred such danger: *Clayards v. Delhick* (12 Q. B. 439). The cases on this subject were reviewed in *The Bartonshill Coal Company v. Reid* (3 Macqueen, 266), where Lord Cranworth, C., observed that many cases have established this principle, "that where a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition so as to protect the servant against unnecessary risk." *Patterson v. Wallace* (1 Macqueen, 748) is an authority to the same effect. In *Senior v. Ward* (1 E. & E. 385) the servant had by his own negligence materially contributed to the accident. Here the jury have found that the plaintiff was not guilty of negligence.

T. Jones, in support of the rule. First, according to the true construction of the 21st and 73rd section of the 7 & 8 Vict. c. 15, the machinery required to be fenced is that which first communicates the moving power. By the 43rd section, the inspectors may require any other machinery of a dangerous kind to be fenced. The 59th section imposes a penalty for not fencing machinery required by the Act to be fenced. The 60th section imposes a penalty for not fencing machinery required by the inspectors to be fenced. [Pollock, C. B. All but the operative machinery requires fencing. The only question is whether a servant may not be [356] said to consent to accept the risk when, with knowledge that the statute is broken, he continues to work.] It is clear that, independently of the statute, there is no ground of action. The question then is, whether the circumstance of the defendant being under an obligation to fence the machinery, and liable to a penalty for omitting to do it, gives a right of action to the plaintiff who voluntarily incurs the danger and is paid for incurring it. The statute does not say that the master shall not only be liable to a penalty, but also to an action at the suit of the party injured. [Pollock, C. B. In *Caswell v. Worth* (5 E. & B. 849) Coleridge, J., and Crompton, J., were of opinion that the imposition of a penalty did not deprive the party injured of his right to sue for damages.] *Senior v. Ward* (1 E. & E. 385) is an authority that the master is not liable, if the servant, by his own negligence in knowing and disregarding the danger, has materially contributed to the accident. [Wilde, B. Here the jury found that the plaintiff was not guilty of negligence in continuing in the service.] The plaintiff, being aware that the defendant was guilty of an infraction of the law, was in one sense an abettor of it. [Pollock, C. B. The neglect of the master to fence machinery is not such an offence as to render the servant an accomplice.] If the plaintiff is entitled to recover, every master will be liable who permits a servant to enter upon and pursue an occupation which the servant knows to be hazardous. The plaintiff, who was a weekly servant, should have left the service: having chosen to continue, it was at his own risk: *Skipp v. The Eastern Counties Railway Company* (9 Exch. 223), *Assop v. Yates* (2 H. & N. 768), *Dynen v. Leach* (26 L. J. Exch. 221), *Priestley v. Fowler* (3 M. & W. 1). [Pollock, C. B. The doctrine on this subject has arisen since Lord Abinger took his seat in this Court: [357] before that time there is no instance of such an action. In subsequent cases the doctrine has been somewhat qualified. If the master is aware of some defect in his machinery, or that a rope or a scaffold is not safe, and he directs his servant to use it, he is responsible. It must not be assumed that in no case can a servant maintain an action against his master in respect of injury caused by a fellow servant. It would be quite consistent with the authorities if we were to hold that a footman might recover against his master for injury arising from the neglect of the coachman or groom, the services being different.(a) Wilde, B. The whole doctrine is thoroughly elaborated in *Senior v. Ward* (1 E. & E. 385).] He also referred to *Hutchinson v. The York, Newcastle and Berwick Railway Company* (5 Exch. 343), and *Wigmore v. Jay* (5 Exch. 354).

POLLOCK, C. B., now said :—This was an action for an injury sustained by the

(a) See *Abraham v. Reynolds*, 5 H. & N. 143.

plaintiff while in the service of the defendant, who was a cotton spinner, and whose machinery ought to have been protected, but was not, in consequence of which the plaintiff sustained the injury.

The facts of the case are shortly these:—When the plaintiff entered into the defendant's service, the machinery was protected by an iron guard; but, after he had been some months in the service, the guard was broken either by accident or decay, and the machine remained unprotected. The plaintiff complained of it more than once, and was told that the guard should be restored. This was not done; and whilst the plaintiff, in the course of his duty, was oiling the machinery, he sustained the injury for which the action was brought.

At the trial, before my brother Wilde, a verdict was found [358] for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit on the grounds submitted by his counsel. Two points were made: one a matter of fact, the other of law. First, it was said that the plaintiff had caused the injury by his own negligence; but the jury expressly found that the plaintiff was not guilty of negligence either in the manner in which he oiled the machinery or in remaining in the defendant's service after the protection was removed from it. Therefore the rule on that ground fails. The point of law was, that the plaintiff having undertaken a dangerous service, with knowledge of the danger, could not recover damages in consequence of an injury which ensued from the risk which he had voluntarily undertaken; and the case of *Priestley v. Fowler* (3 M. & W. 1) was relied on, which was certainly a case of the first impression, and has given rise to what may almost be called a new branch of the law. We are also of opinion that on this point the rule ought to be discharged. Where machinery is required by act of parliament to be protected, so as to guard against danger to persons working it, if a servant enters into the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous in consequence of the protection being decayed or withdrawn, but complains of the want of protection, and the master promises to restore it, but fails to do so, we think he is guilty of negligence, and that if any accident occurs to the servant he is responsible. Many cases might be put in which a servant might reasonably incur the risk instead of abandoning the service; and if, during a period when the danger of the service is increased by the machinery becoming unprotected, either by accident or from other cause, the servant complains and the master promises that the protection shall be restored, it [359] must be considered that the master takes upon himself the responsibility of any accident that may occur during that period.

For these reasons we are of opinion that the plaintiff is entitled to recover in this action, and the rule to enter a nonsuit or grant a new trial must be discharged.

Rule discharged.

SEYMOUR v. GREENWOOD. Jan. 20, 1861.—The plaintiff, a passenger by an omnibus, while being forcibly removed from it by the guard in charge, was thrown on the ground and seriously injured. The proprietor of the omnibus, on being applied to for compensation, stated that the plaintiff was drunk and had refused to pay his fare. On cross-examination the plaintiff did not deny that he had been drinking. Held, that if the guard intended to put the plaintiff safely out of the omnibus, there was evidence that in so doing he was executing the commands of the proprietor his master; and that if the injury was caused by the guard acting without due care in executing such command the proprietor was responsible.

[S. C. 30 L. J. Ex. 189; 9 W. R. 518: affirmed 1862, 7 H. & N. 355.]

Declaration. That the plaintiff was a passenger for reward in and upon a certain carriage of the defendant, used for the conveyance of passengers in a certain public street in the city of Manchester, to wit Chester Road, and being and while he was such passenger, the defendant and his servants so negligently and improperly conducted themselves in and about the driving, managing and conducting of the said carriage, that the plaintiff was thereby cast from the said carriage to the ground with great violence, and his skull was fractured and his legs crushed and bruised, and he suffered great personal injuries, &c.

Pleas. First: Not guilty. Secondly, that the plaintiff was not a passenger.

At the trial, before Blackburn, J., at the last Liverpool Spring Assizes, it appeared

that the action was brought against the defendant, the proprietor of an omnibus, by the plaintiff, who had been forcibly removed from the omnibus by the guard in charge of it, whereby the plaintiff's skull was fractured. The plaintiff's witnesses [360] proved that the plaintiff pulled the wire and the bell rung. The guard then went into the omnibus and seized the plaintiff by the collar. The plaintiff offering no resistance, the guard backed himself out of the omnibus, drawing the plaintiff after him, and threw the plaintiff upon the road. The plaintiff fell to the ground, and a cab, coming up, went over him. The guard did not fall. This was in August, 1859. In December the plaintiff's attorney wrote to the defendant as follows:—

"Sir,—I have been requested by Mr. Seymour to write to you in reference to the serious injuries he sustained at the hands of your servants on the 22nd of August last.

"I may state that he was a passenger on that day in your omnibus, &c. He signalled the guard to stop and let him alight. By the negligence and improper conduct of the guard, Mr. Seymour was cast with great violence upon the roadway. One of your Hansom cabs, which was following the omnibus, immediately came into contact with Mr. Seymour's head. I shall be glad to receive any communication from you upon the subject, &c.—I am, Sir,

"R. W. STEAD.

"Mr. John Greenwood."

In consequence of that letter a person named Baxter called on the plaintiff's attorney. He said that Mr. Seymour was mistaken in signalling the guard to stop; that he was drunk, and had refused to pay his fare; that he had created a disturbance in the omnibus lower down the road; that he had first assaulted the guard, and that there had been a scuffle, and that in the scuffle they had both rolled out into the road.

On cross-examination, the plaintiff said his memory was much affected by the accident, but he believed he was not drunk at the time, but he admitted that he had been drinking.

[361] At the conclusion of the plaintiff's case, the defendant's counsel submitted that there was no evidence to charge the defendant with the assault committed by his servant, which was not any negligence in the performance of his duty, but an unwarrantable assault; and a verdict was entered for the plaintiff with leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence on which the jury might reasonably find that the act of the servant was one for which the defendant was answerable.

T. Jones having obtained a rule "to shew cause why the verdict found for the plaintiff on the trial of this cause, &c., should not be set aside, and a nonsuit entered on the ground agreed upon, that there was no evidence to go to the jury,"

Monk and Wheeler now shewed cause. The question is, whether, at the time when the act complained of was committed, the guard was acting as the servant of the defendant. In *Rex v. Gutch* (M. & M. 433), Lord Tenterden ruled that the proprietor of a newspaper, who intrusts the conduct of the publication to one whom he selects, is criminally answerable for a libel published in such newspaper, though it is not shewn that he was individually concerned in the particular publication. One of the tests whether the maxim "respondet superior" applies is, whether the party was enabled to do the wrongful act by reason of his employment. Here there was evidence that the plaintiff was drunk, and it may well have been the duty of the guard to remove him in a careful manner. The removal of the plaintiff from the omnibus was then an act done by the guard with the defendant's authority, and, in the ordinary course of the employment entrusted to him; and it was, therefore, an act for which the defendant is responsible: [362] *Patten v. Rea* (2 C. B. N. S. 606). The defendant does not suggest that the act of the guard was malicious. [Pollock, C. B. In removing the plaintiff from the omnibus, the guard seems to have acted so carelessly as to injure the plaintiff. Martin, B. The only question is whether there was evidence for the jury.

T. Jones, in support of the rule. It may be conceded that the question is whether there was any evidence for the jury. It is submitted that the guard was a trespasser, and that the defendant is not liable for his act. A master is not liable for the trespass of his servant. [Martin, B. If a servant drives his master's carriage against another, the servant is liable in trespass, the master in case.] Was the act one which the relation between the guard and the defendant warranted him in doing? A master

is not liable except for acts of omission on the part of the servant—not for acts of commission. Here what is complained of is a trespass—an act committed—not an act of omission, such as negligence in driving or managing the omnibus. By the concurrent testimony of all the witnesses, without provocation the guard dragged the plaintiff out of the omnibus, and threw him on the ground. [Channell, B. Suppose the plaintiff, being a passenger, had grossly misconducted himself, the guard would have been justified in removing him without unnecessary violence. Therefore, if the representation of Baxter is well founded, it may shew that the guard had the authority of the defendant to remove the plaintiff, and, in so doing, was engaged in the business of his master: *Mitchell v. Crassweller* (13 C. B. 237).] *M'Manus v. Crickett* (1 East, 106) shews that a master is not liable in trespass for the wilful act of his servant, as by driving his master's car-[363]-riage against another done without the direction or assent of the master. [Pollock, C. B. Suppose a servant driving along a road in order to avoid supposed danger intentionally drove against the carriage of another, would not the master be responsible?] Not if the servant transgressed the line of his duty. In *M'Manus v. Crickett*, Lord Kenyon cites Bro. Ab., tit. "Trespass," pl. 435, where it is said:—"If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished." And 2 Roll. Ab., 553, "If my servant, without my notice, put my beasts into another's land, my servant is the trespasser, and not I." In *Savignac v. Roome* (6 T. R. 125) it was held that an action on the case, stating that the defendant's servant wilfully drove against the plaintiff's carriage, whereby it was damaged, could not be supported, and the Court arrested the judgment on that ground. In *Roe v. The Birkenhead, Lancashire and Cheshire Junction Railway Company* (b) a railway servant, who had charge of a train, on receiving the plaintiff's ticket, told him he had come by the wrong train, and that he must pay 2s. 6d. more. This the plaintiff refused to pay, and he was thereupon taken into custody by a railway servant, under the direction of the superintendent. The Court held that the plaintiff was bound to shew that the person by whom he was arrested was not only the servant of the Company, but also that he had their authority to arrest him. [Martin, B. That case goes further than any other on this subject. Channell, B. Would it not have been negligence if the guard took the plaintiff out of the omnibus and left him in the middle of a street in a crowded thoroughfare, when he was too drunk to walk?] If a servant is guilty of anything which is not mere want of skill or want of care, the master is not responsible: *Sharrod v. The London and [364] North Western Railway Company* (4 Exch. 580), *Gregory v. Piper* (9 B. & C. 591), *Timothy v. Simpson* (6 C. & P. 499).

POLLOCK, C. B. We are all of opinion that the rule to enter a nonsuit must be discharged. I agree with my brother Martin that since the case of *Roe v. The Birkenhead, Lancashire and Cheshire Railway Company* the Courts have been desirous to give full effect to the rule by which a master is made responsible for want of care on the part of his servants in executing his commands. As a Judge, in determining what is evidence, and as a jurymen in giving effect to it, I should have decided that the defendant's servant was ejecting a troublesome passenger from the omnibus—not with violence and brutality, for I do not believe that he intended to do more than put the plaintiff safely out of the omnibus, and that his act in so doing produced the mischief which occurred. I think then that there was evidence that the defendant's servant was executing his master's command, but with a want of care and consideration. I adopt the definition under which Mr. Jones admits that his client would be liable. The law on this subject has undergone much discussion of late years. At the time of the decisions of *Scott v. Shepherd* (2 W. Black. 892) and *M'Manus v. Crickett* the subject had not been so thoroughly considered as it has since been. For these reasons, I think that the rule must be discharged, and my brother Channell, who has left the Court, is of the same opinion.

MARTIN, B. The question is, whether there was evidence from which a jury might find that the act was one for which the defendant was responsible. There was evidence that the plaintiff was drunk, and had refused to pay his fare; he [365] had assaulted the guard, and a scuffle took place, in which the plaintiff was thrown to the ground and injured. If the guard used unnecessary violence, the defendant, his master,

(b) 7 Exch. 36. See also *The Eastern Counties Railway Company v. Broom*, 6 Exch. 314.

is responsible. There are many cases, of which *Roe v. The Birkenhead, Lancashire and Cheshire Railway Company* is one, in which the liability of the master is put as resting upon the relation of principal and agent; but in reality it depends upon the relation of master and servant. If the act is one within the scope of the servant's employment, and is done in the master's service, an action lies against the master, and the master is liable, even though he has directed the servant to do nothing wrong. In the present case the act was one which was properly within the scope of the servant's employment. *M'Manus v. Crickell* is ordinarily cited as shewing that the master is not liable for the malicious act of his servant. Of course we do not say that a master is responsible for everything which a servant does in the course of his employment. A great deal has been said as to the act being one which was purely a trespass; but it was nothing more than the guard of an omnibus putting a person out who had misconducted himself. The case of *Roe v. The Birkenhead, Lancashire and Cheshire Railway Company* was much considered in this Court in the cases of *Wilson v. The Lancashire and Yorkshire Railway Company* and *Farren v. The Lancashire and Yorkshire Railway Company*. (a)

Rule discharged. (b)

[366] BEHRENS v. THE GREAT NORTHERN RAILWAY COMPANY. Jan. 30, 1861.—

Where a carrier receives goods of the description mentioned in the 11 Geo. 4 and 1 Wm. 4, c. 68, and the person delivering the same has declared their value and nature, he is not bound to tender, but the carrier must demand, the increased charge mentioned on the notice affixed in his office, warehouse or receiving house, whether the goods are there delivered, or to a servant sent to fetch them; and if no such demand is made the carrier is liable for the loss of or injury to the goods, although the increased charge has not been paid.

[S. C. 30 L. J. Ex. 153; 9 W. R. 338; 3 L. T. 863: affirmed 1862, 7 H. & N. 950.]

The first count of the declaration stated that the defendants were common carriers of goods, for hire, from London to Newcastle-on-Tyne, and the plaintiff delivered to the defendants, as such carriers, and the defendants, as such carriers, received, of and from the plaintiff, certain goods of the plaintiff, that is to say, a case containing pictures, to be by the defendant safely and securely carried from London to Newcastle-on-Tyne aforesaid, and to be there delivered for the plaintiff for reward to the defendants. And although all conditions precedent were performed, and all things were done and happened to entitle the plaintiff to have the said goods carried and delivered as aforesaid, yet the defendants so negligently and carelessly carried the said goods that by the means of the negligence, carelessness and improper conduct of the defendants the said pictures were broken, damaged, torn and spoiled &c. Second count. For that the plaintiff delivered to the defendants, and the defendants received of and from the plaintiff certain goods of the plaintiff, to wit, a case of pictures exceeding in value 10l., and then declared to the defendants to be such case of pictures and to be of the value of 110l. and upwards, to be by the defendants carried from Coventry Street, in the county of Middlesex to Newcastle-on-Tyne, and to be there delivered for the plaintiff, for certain reward to the defendants for the said carriage thereof, together with a certain increased rate of charge over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance thereof; an engagement to pay which said increased charge was then accepted by the [367] plaintiff. And although the plaintiff performed all conditions precedent, and all things were done and happened to entitle the plaintiff to have the said case of pictures carried and delivered as aforesaid: Yet the defendants so negligently carried the same that by means of the negligence, carelessness and improper conduct of the defendants the said pictures were torn, broken and damaged.

Pleas. First: Not guilty.

Second: to the first count. That the plaintiff did not deliver to the defendants, nor did they receive the goods in that count mentioned on the terms therein alleged.

Third: to the first count. That the said pictures were articles and property of

(a) Not reported. A short note of these cases may be seen in 27 Law Times, 204.

(b) See *Goff v. The Great Northern Railway Company*, Q. B. Hil. Vac. Feb. 13, 1861.

the description mentioned in the first section of the statute passed in the first year of the reign of King William the Fourth, for the more effectual protection of common carriers for hire, and were contained in a package which, with the said pictures therein contained, was delivered by the plaintiff to the defendants as and being common carriers by land for hire, for the purpose of being by them as such carriers carried for hire, as in the declaration mentioned, in a public conveyance; and the value of the said goods then exceeded the sum of 10l., and at the time of the delivery of the said goods by the plaintiff to the defendants as aforesaid, there was affixed in legible characters, in a public and conspicuous part of the office or receiving house of the defendants, being an office or receiving house where such goods and parcels were then received by the defendants for the purpose of conveyance, a notice within the meaning of the said statute, whereby the defendants notified that an increased rate of charge in the said notice mentioned was required to be paid to them over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of [368] articles and property of the description in the first section of the said statute mentioned; and at the time of the delivery of the said parcel and goods to the defendants as aforesaid, for the purpose aforesaid, the value and nature of the said goods were not declared by the person sending or delivering the same, and neither such increased charge as aforesaid, nor any engagement to pay the same, was accepted by the person receiving the said parcel and goods.

Fourth: to the second count. That the plaintiff did not, when he delivered the said goods to the defendants, declare the same to be a case of pictures of the value of 110l. or upwards; nor were the said goods to be carried by the defendants and delivered for the plaintiff for certain reward to the defendants for the carriage thereof, together with a certain increased rate of charge over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance thereof; nor was any engagement to pay any increased charge accepted by the defendants.

The plaintiff joined issue on the several pleas.

At the trial, before Bramwell, B., at the Middlesex Sittings after last Michaelmas Term, the following facts appeared. The defendants were common carriers, by railway, from London to Newcastle, and had an office or receiving-house in the Regent Circus, London, where goods such as those sent by the plaintiff were received for conveyance. There was affixed in legible characters, in a public and conspicuous part of such office, a notice (so far as material) as follows:—

“GREAT NORTHERN RAILWAY.

“In pursuance of an Act of Parliament passed in the first year of the reign of his Majesty King William 4th, cap. 68, intituled &c.” (setting out the title):

[369] “For any parcel or package containing paintings, engravings, pictures, glass or china, or any of them, to a greater amount in value than 10l., the increased charge, over and above the common and ordinary charges for carriage is at the rate of 15l. for every 100l. sterling in value.

“The Great Northern Company will not be liable for the loss of or injury to any parcel or package containing the above mentioned, or any other article or articles or property above the value of 10l., unless the value and nature thereof be declared to them at the time of the delivery thereof, and unless such increased charge as hereinbefore mentioned be paid to them in respect thereof.”

The defendants were in the habit not only of receiving goods for carriage at such office, but, if so requested to do by a consignor of goods, of sending a carman and van to the house or shop of the consignor to receive them and cart them to the London station. If a consignor on such an occasion wished to insure goods, the course of the carman in the defendants' employ was to refer such consignor to the defendants' office in Regent Circus.

On the 28th May, 1860, the plaintiff, who was a picture dealer, sent to the office of the defendants a message requesting that they would send to the plaintiff's shop in Coventry Street, Haymarket, a van to receive some goods for carriage. In accordance with this request, the defendants, on the 29th of May, sent to the plaintiff's shop a van in charge of a carman, and the plaintiff then delivered to the carman, for the purpose of being carried to Newcastle, the picture and case in the declaration

mentioned; and the plaintiff, at the same time, produced a book containing the following entry, which he then read to the carman:—

“May 29th /60. Received of J. B. Behrens 1 case, [370] containing 2 large valuable oil paintings, directed, with great care, to

“MR. L. STOVER,

“Turk’s Head Hotel,

“Grey Street, Newcastle-upon-Tyne.

“Pr. Great Northern Railway, declared over the value of 110l.”

The plaintiff then asked the carman to sign the entry, and he, after having read it over, did so. The carman then took away the pictures and case. Beyond this nothing passed between the plaintiff and the carman. The picture, on its transit from London to Newcastle, and whilst in the possession of the defendants, was injured.

It was submitted, on behalf of the plaintiff, that he had sufficiently complied with the Carriers Act, and had disproved the third plea, and proved the second count. For the defendants it was contended that the plaintiff had neither paid for, nor engaged to pay the increased charge for insurance, and therefore was not entitled to recover on either count.

The learned Judge left it to the jury to find whether there was any engagement by the plaintiff to pay an increased rate of charge for insurance, and also what amount of damage (if any) the plaintiff was entitled to recover. The jury found that there was no such engagement by the plaintiff, and assessed the damages at 35l. The learned Judge then directed a verdict to be entered for the defendants on the second count, and for the plaintiff on the first count, reserving leave to the defendant to move to enter the verdict for them on the third plea; the plaintiff to be at liberty, if a rule should be granted, to rely on the second count as he should think fit.

Hawkins, in the present term, obtained a rule nisi to enter the verdict for the defendant on the third plea, on the ground that the plea was proved by the evidence, and [371] that, on the facts proved, the defendants were entitled to the verdict on that plea.

Edwin James, Keane and F. H. Lewis shewed cause. The question depends on the construction of the Carriers Act, 11 Geo. 4 and 1 Wm. 4, c. 68. That statute restricts the common law liability of carriers for the loss of or injury to certain valuable articles, but they are only entitled to protection when a notice of the increased rate of charge has been affixed in their office, and the value of the article has not been declared by the person sending it. If the notice is affixed and the value declared, the carrier has the option of demanding the increased rate in conformity with the notice. The object of the statute was the protection of carriers where the value of certain articles has not been declared. The statute is intituled “An Act for the more effectual protection of mail contractors, stage coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof.” Then the preamble recites the frequent omission by persons sending parcels containing articles of great value to notify the value and nature of their contents, and also the difficulty of fixing parties with knowledge of notices published by carriers. The first section provides that no carrier shall be liable for the loss of or injury to any article of the descriptions enumerated, when the value of such article shall exceed 10l., unless at the time of the delivery thereof at the office, warehouse or receiving house of the carrier, or to his servant, the value and nature of such article shall have been declared by the person sending or delivering the same, and such increased charge as thereafter mentioned, or an engagement to pay the same, be accepted by the [372] person receiving such parcel. “Such increased charge” does not mean simply the charge notified, but the charge notified and demanded. By the second section, when the value and contents of any parcel have been declared, the carrier may demand and receive an increased rate of charge, to be notified by some notice affixed, in legible characters, in a public and conspicuous part of his office, warehouse or receiving house where the parcels are received. Therefore, to make the increased rate payable, it must first be notified; secondly, demanded. By the third section, when the value shall have been so declared and the increased rate of charge

paid, or an engagement to pay the same accepted, the person receiving the increased rate of charge or accepting such agreement shall, if required, sign a receipt for the parcel; and, if such receipt shall not be given when required, or such notice shall not be affixed, the carrier shall be liable as at common law. That shews that there may be a demand of payment, although no notification of an increased rate of charge, and that the legislature contemplated a notification of charge as distinct from a demand of it. Like the ordinary case of turnpike toll, there is no obligation to pay unless the charge is demanded. In *Baxendale v. Hart* (6 Exch. 769, 788), Maule, J., said:—"The meaning of the statute is, that when the value of the parcel has been declared the carrier may demand an increased rate, in conformity with the notice affixed in his office. The notice is not in restriction of the carrier's liability, but a mere notice of tariff. If there is no tariff, the carrier has no right to charge the increased rate. But if a notice is affixed, and an increased rate demanded, the owner of the goods may refuse to pay it, and require the carrier to carry the goods on the terms of not being responsible for their loss." And Erle, J., added, "The carrier has the option of making an [373] increased charge when the value of the goods has been declared." By the fifth section, every office, warehouse or receiving house, used by the carrier for receiving parcels, shall be deemed his receiving house. The statute having provided that the declaration of value may be made to a servant of the carrier, he is bound to make the demand. Moreover, in this case there has been no notice of an increased rate of charge. The defendants having sent a carman with a cart to receive the plaintiff's goods, the cart was, for the purposes of the Act, the office of the defendants, in which the notice should have been affixed.

The Court then called on

Hawkins and C. Pollock to support the rule. There is no obligation on a carrier in all cases to demand the increased rate of charge. The first section exempts the carrier from liability unless the value and nature of the article has been declared, and the increased charge paid or engaged to be paid. That is one indivisible allegation, and, where there is a failure in the performance of either of these requisites, the carrier is exempt from liability. [Wilde, B. The first section says unless "such increased charge as hereinafter mentioned" is paid; that is, the increased charge which the second section authorizes the carrier to demand.] That section does not vary the interpretation of the first, so as to require it to be read, "such increased charge, which the carrier shall demand," but only empowers him to make charges which he could not make at common law. If the legislature had intended that the carrier should be liable, not only in the event of his refusing to give a receipt, but also of his omitting to make a demand, stronger language would have been used. "Such increased" charge has reference to the charge notified. In *Hart v. Baxendale* (6 Exch. 769) there was no declaration of the value of the goods, [374] and the only question was whether the omission of the carrier to affix the required notice in his office rendered him liable. There Patteson, J., after observing that the Act requires the person who sends the goods to take the first step by making the declaration of value, proceeds to say:—"Such declaration, when made, will lead to these consequences, that if the extra charge be paid and the goods lost the carrier will be liable; or, on the other hand, if he refuse to give a receipt, he will lose the benefit of the statute." The dictum of Maule, J., in that case only explains the order of events, and is no authority that a demand must be made. Besides, the notice in the office is equivalent to a demand. It is not a mere notification of an increased rate of charge, but a distinct notice that the defendants will not be liable unless the value and nature of the articles is declared and the increased charge paid. The object of the notice is to intimate that an increased charge is required to be paid, and the sender of the goods is bound to prove that he has paid it. When the plaintiff made the declaration he must have intended to pay the increased charge, and his conduct was a waiver of any demand. If the goods had been delivered at the office where the notice was affixed, no demand would have been necessary. They also argued that the statute only requires a notice to be affixed in the office, warehouse or receiving house of the carrier, and that where a cart was sent to fetch the goods, it was not necessary for the carman to carry a notice about with him.

BRAMWELL, B. We are all of opinion that the rule ought to be discharged. The question is clearly open upon the pleadings, and is whether, when an article delivered to a carrier is declared to be of the value and nature described in the 11 Geo. 4 and

1 Wm. 4, c. 68, it is necessary that the carrier should demand the increased rate of [375] charge before there is any obligation on the person sending the goods to pay it. The Act is for the more effectual protection of common carriers "against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof;" and it recites the frequent practice of bankers and others of sending by public conveyances parcels and packages containing articles of great value in small compass, without notifying the value and contents thereof, so as to enable carriers to protect themselves against losses. The object of the first section was to compel persons who sent by carriers valuable parcels to declare their value and contents; and it provides that carriers shall not be liable for the loss of or injury to articles of the description mentioned, where their value shall exceed 10l., unless at the time of their delivery the value and nature shall have been declared by the person sending the same. Now, if the section had stopped there, in my opinion it would have said all that was necessary; but it goes on to say, "and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." That cannot mean in every case, since it is clearly conditional, because if no notice is affixed in the carrier's office there is no obligation to pay the increased charge. It must, therefore, mean that the carrier shall not be liable if the value and nature of the article shall not have been declared, and, if an increased charge is to be paid, such increased charge has been demanded and not paid or agreed to be paid. That being so, it seems to me that the object of the first section was to compel a declaration of the value and nature of the article, and to exempt the carrier from liability for its loss or injury unless such declaration was made; and that the latter part of the section is needless, because it is condi-[376]-tional and must be construed with reference to the second section. That section provides "that when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10l., it shall be lawful for the carrier to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse or other receiving house where such parcels or packages are received." The first section having insured a declaration of the value and nature of the article, or a non-liability of the carrier, the second section enables him, if he thinks fit, to notify that he will require an increased rate of charge, and thereupon to demand it of the person sending the article. If he does not notify it he cannot demand it; if he does notify it, but does not demand it, he is not entitled to the protection of the Act. I should read the Act, not, as suggested by my brother Wilde, as if the two sections were inverted, but by inverting the latter part of the first section and reading it after the former part of the second, thus:—"When any parcel containing any of the articles specified shall be delivered, and its value and contents declared, and such value shall exceed 10l., it shall be lawful for the carrier to demand and receive an increased rate of charge, to be notified by some notice affixed in his office, and unless such increased charge be paid, or an engagement to pay the same be accepted, the carrier shall not be liable."

Then it is said that the plaintiff was bound by the notice affixed in the office. It seems to me that he was bound for all purposes for which it meant to bind him. Suppose, for instance, when he declared the value of the picture, the carrier had demanded the increased rate of charge, the plaintiff could not have said "I will not pay so much," [377] neither would he have been at liberty to say "I did not know of the notice," for he is as much bound by it as if he had seen it. Other portions of the Act are in conformity with that view. The third section requires a receipt to be given, when the value shall have been declared and the increased rate of charge paid or agreed to be paid, and unless such receipt is given or such notice affixed the carrier is not entitled to the benefit of the Act.

In the result, it seems to me that, according to the true interpretation of the Act, it has two objects in view: one, to compel a declaration of the value and nature of the article delivered; the other, to enable the carrier, by affixing a notice, to demand an extra sum for insurance. When he has given notice that an increased rate of charge is required, he is entitled to demand it, and in that way to get a compensation for the risk he runs in carrying valuable articles. If he does not think fit to put up a notice or demand the increased rate of charge, it must be assumed that he receives the goods

on the ordinary terms, and he is liable as a common carrier. Such being my view of the Act, it seems to me that when the value and nature of the article is declared the carrier is bound, though he has affixed the notice, to demand the increased rate of charge. There are obvious reasons why he should do so. For instance, suppose a carrier sends a man to receive a package, as he can know nothing about it the statute says that the sender of the package shall declare its value and nature. On the other hand, there is no reason why a person should know, when a cart is sent to fetch his goods, that there is any particular rate of charge for certain goods. Therefore it seems to me reasonable that the man who comes to fetch the goods should demand the increased rate of charge, not that the sender of the goods should tender a sum which he does not know is the proper charge. If that is the law when a [378] person comes to fetch the goods, it is equally the law when the sender takes the goods to the office.

It only remains to notice an argument of Mr. Pollock, who said that, assuming a declaration of value to be made, and that it is necessary in every case to make a demand, the conduct of the parties must be looked at to ascertain whether what took place was not equivalent to the sender saying "You need not trouble yourself to make a demand, I will be my own insurer." That is an ingenious argument, but it is not applicable to this case. Besides, the point was not taken at the trial, and if it had been I am disposed to think it would not avail.

On the whole, I think a demand by the carrier is a condition precedent to his right to the increased rate of charge; and the rule must therefore be discharged.

CHANNELL, B. I am also of opinion that the rule ought to be discharged. I agree with my brother Bramwell that the question is open on the pleadings. That question is whether, when the sender of articles of the description mentioned in the 11 Geo. 4 and 1 Wm. 4, c. 68, has declared their value and nature, it is necessary for the carrier to demand the increased rate of charge notified by the notice affixed in his office. I am of opinion that it is. In the present case we must assume that the value and nature of the article was declared by the plaintiff, and that no demand of the increased rate of charge was made by the defendants; and then the question arises whether they are entitled to the protection of the statute. It seems to me that the statute must be considered, not as an enactment obliging the sender of valuable articles to take every step necessary to effect an insurance of them, but as merely giving the carrier a right in certain events to impose a statutory restriction on his common law liability. In one [379] case he is clearly entitled to the protection of the statute, that is where he has affixed a notice in the proper place, and the sender of the goods has not declared their value and nature. So, where the value and nature of the goods has been declared and the increased rate of charge demanded, but the sender of the goods has refused to pay it. But the question now is, when the value and nature of the goods is declared, who is called upon to take the next step? *Baxendale v. Hart* (6 Exch. 769, 782) has an important bearing on this subject, though it is not an authority on this point so as to relieve us from construing the statute; yet in putting a construction upon it I cannot adopt any language which will better convey my meaning than a great part of the language there used. Therefore I refer to that case, not as affording a judicial authority which we are bound to follow, but as explaining in clear language the construction we ought to put upon the statute.

It is said that, assuming a demand to be necessary, there has been virtually a demand in this way—that a notice was affixed in the office and that was equivalent to a demand. I do not think the notice can so operate. In order to entitle the carrier to claim the increased rate of charge a notice must be affixed in the office, but when the sender of the goods has declared their value and nature the carrier must make a demand. The notice is not equivalent to a demand, but it restricts the amount to be demanded. I agree with the observations of Maule, J., in the course of the argument in *Baxendale v. Hart* (6 Exch. 769, 782, 788), that when the value of a parcel has been declared the carrier may demand an increased rate of charge, in conformity with the notice affixed in his office. If there is no notice, the carrier has no right to charge the increased rate, but if a notice is affixed, and the increased rate demanded, the carrier is not [380] responsible if the sender of the goods refuses to pay it. It therefore seems to me that, when the value has been declared, the onus is on the carrier to make the demand, and that the notice is not equivalent to a demand.

At first I was disposed to attach some weight to the view suggested on the argument, that a distinction might be taken between the case of a carman going to

fetch goods and the receipt of them at the carrier's office, because a notice must be affixed in the proper place, and the cart which the carrier sent round could not be considered as an office for that purpose. But I am prepared to decide on a broader ground, viz. that if the goods, instead of being delivered to a carman, had been delivered at the receiving house, it would have been incumbent on the carrier to make a demand. For these reasons I think that the rule ought to be discharged.

WILDE, B. I am also of opinion that the rule ought to be discharged. I can conceive that this may be a question of considerable importance, in consequence of the present practice of railway companies. In order to understand the statute, regard should be had to the state of the law before it passed. At that time a carrier was responsible for every article delivered to him to be carried, whether valuable or not. Moreover, he was bound to carry every article tendered to him, and to carry it at the ordinary rate. That being the state of the law, what did the statute do? Did it cast upon the sender of valuable goods the obligation to insure them? I think not. The common law afforded him that protection, for without any extra payment the carrier was liable for loss of or injury to the goods. Then what did the statute do? It relieved the carrier from responsibility, provided he demanded an increased rate of charge for certain valuable articles and the sender of them refused [381] to pay it. It gave the carrier, for the first time, the right to demand such an increased rate, and to relieve himself from damages unless the other party paid it. That seems to have been the object of the statute. Reading it in that view, it is obvious that the course which a transaction of this kind would take, and which the statute intended it should take, is this—that the customer should tender to the carrier the article to be carried and declare its value, for he alone could know it; and that the carrier, who acquires a right to an increased rate of charge for valuable articles by reason of being an insurer, should make that charge, and the customer should either pay it, and so be protected against loss, or refuse, and then the carrier, though bound to carry, would not be liable. That seems to me the plain and intelligible course of business between two men, one of whom has a right to send valuable articles to be carried, and the other to make an increased rate of charge on account of their value.

Then is the language of the statute at variance with that view of the subject? I think not. The second section expressly says that it shall be lawful for the carrier to demand and receive an increased rate of charge, "to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles." There is therefore no doubt that the carrier may make a demand of the increased rate of charge. But then it is said that, by the concluding words of the first section, the carrier is absolutely relieved from all responsibility unless the sender has done certain things, viz. declared the value and nature of the articles and paid or engaged to pay the increased charge. But that section must be read in connection with the second. The words of the first section are "such in-[382]-creased charge as hereinafter mentioned," that is, such increased charge as shall have been demanded under the second section. Reading the two sections in that way, the transaction is effected as it would be in the ordinary business of life, and such appears to me the simple and ordinary construction of the statute. Admitting that a demand was necessary, in this case there has been none, and on that ground the rule ought to be discharged.

It was also said that a notice ought to have been affixed at the place where the parcel was received. But by the first section the parcel may be delivered at the office of the carrier, or to his "bookkeeper, coachman or other servant." It is plain, therefore, that the statute contemplates the sending of parcels, not only delivered at the office, but given to some servant of the carrier. The language of the second section with respect to affixing the notice is not altogether applicable to the first. That seems to me an answer to the argument that the statute intended that a notice should be affixed at every place where the goods were delivered; for that could not be done, having regard to the alterations which modern modes of transit have introduced into the trade of carriers, and seeing that carts are sent round by railway Companies to collect parcels, a practice which did not exist at the time this statute passed. It may be that this is a *casus omissus*, and that if the trade was then carried on as it now is the legislature would have required a notice to be affixed on every cart that was sent to collect parcels. Railway Companies are better judges in matters relating to their business than we are, but it seems to me that it might be good policy,

either to affix a notice on the cart, or to direct the carman to refuse to take parcels, when their value was declared, unless the increased rate of charge was paid. That, however, is a [383] matter which has reference rather to the mode of carrying on business than the law on the subject. For these reasons, and concurring with those expressed by my learned Brothers, I am of opinion that the rule ought to be discharged.

Rule discharged.

BURRIDGE v. NICHOLETTS. Jan. 14, 1861.—A registrar of a County Court rented offices in which he carried on his business as a solicitor and also the County Court business, he being allowed by the Treasury an annual sum for the part of the offices used for County Court purposes. The treasurer of the County Court gave the registrar notice of his intention to audit the accounts on a Saturday, when, by a County Court Rule, the office closed at one o'clock. The treasurer went to the office after one o'clock, and finding it closed, broke the locks of an inner door and a cupboard in which the books were kept, and having taken away the books and audited them, returned them to the office. The registrar having brought an action of trespass against him: Held, that he was justified in so doing under the County Court Acts.—The defendant pleaded “not guilty by statute,” and in the margin of the plea referred to several statutes. In addition, he relied at the trial on a section of one of the statutes not referred to, but no objection was taken. Held, that the objection, that this section was not mentioned in the margin of the plea, was not available on the argument of a rule to enter a nonsuit in pursuance of leave reserved.

[S. C. 30 L. J. Ex. 145; 9 W. R. 345; 3 L. T. 703.]

The declaration stated that the defendant broke and entered the house and offices of the plaintiff, situate and being in the High Street, Wellington, in the county of Somerset, and abutting &c.; and unlawfully broke and forced open the doors thereof and damaged and injured the same; and opened and broke open and ransacked the drawers and cupboards thereof, and the books and papers therein, and carried away the same.

Plea. Not guilty (by statute 15 & 16 Vict. c. 54, s. 6; 9 & 10 Vict. c. 95, ss. 23, 41, 42, 55, 138, 24, 27, 78; 12 & 13 Vict. c. 101, s. 12; 19 & 20 Vict. c. 108, s. 32: all public Acts).

At the trial, before Keating, J., at the last Somersetshire Assizes, the following facts appeared. The plaintiff was a solicitor residing at Wellington in Somersetshire, and was also registrar of the Wellington County Court. The defendant was treasurer of that Court. The plaintiff before his appointment as registrar carried on his business as [384] solicitor at his dwelling house, but after his appointment he took offices in the High Street of Wellington for a term of ten years at a rent of 22l. a year, he paying all the rates and taxes. In this office he carried on both the County Court business and his private practice. He applied to the defendant, as treasurer, for some allowance in respect of the use of the offices for the County Court business, and the defendant allowed him 10l. a year. The plaintiff, being dissatisfied with this allowance, on the 8th May, 1857, presented to the Lords of the Treasury a memorial, which (after stating the above facts) concluded with the following prayer:—“That your lordships will be pleased to make an order on the said treasurer, either to find offices that are fit and convenient for the use of the registrar of the said Court and his clerks for the proper conduct and management of the usiness of the said Court, and also to defray the expense of cleaning, warming and lighting the same; or to allow to your memorialist such sums as he pays for the same, or such other sums as to your lordships shall seem reasonable and just.”

On the 29th May, 1857, the plaintiff received the following reply to his memorial.

“Treasury Chambers, 29th May, 1857.

“Sir,—I am commanded by the Lords Commissioners of her Majesty's Treasury to inform you, in reply to your letter of the 8th inst., that they are prepared to allow to you the sum of 16l. per annum for the use of that part of the premises alluded to in your letter as having been hired by you in the High Street of Wellington, and

which is required and used for County Court purposes; such allowance to commence from the 1st January, 1857, and to include the expenses of cleansing, lighting and warming that part of the premises so used. I am further commanded by their lordships to state to you, that were it necessary for [385] the Treasury to hire separate premises for the office business of the Wellington Court, sufficient accommodation for such business only would be engaged; in which case the private business of the registrar could not be permitted to be carried on therein.—I remain, Sir, your obedient Servant,

“JAMES WILSON.

“W. Burridge, Esq.,
“Registrar of County Court,
“Wellington, Somerset.”

The plaintiff accordingly received the sum of 16l., and he gave quarterly receipts for 4l. “for rent” of the County Court office. The books of the County Court were kept at the plaintiff’s office, and the office was closed on Saturday at one o’clock in the afternoon, in pursuance of a rule framed under the provisions of the 19 & 20 Vict. c. 108, s. 32. On the 3rd April the plaintiff received a letter from the defendant stating that he “proposed to audit the Wellington books, for the quarter ended the 31st December, 1859, on Saturday next the 7th instant.” The plaintiff wrote, in answer, that he had an engagement at Taunton on that day at twelve o’clock on public business, and that, as he should be absent from eleven till half past three or four, he would be glad if the defendant would attend on the Monday or Wednesday in the following week. The defendant wrote, in reply, that he had arranged to examine the accounts on Saturday, and that the plaintiff’s attendance would not be necessary. On the Saturday the plaintiff went to Taunton, having left instructions with his clerk to allow the defendant to inspect the County Court books, if he called, but directing that the office should be closed at one o’clock. The clerk accordingly closed the office at one o’clock. At three o’clock the defendant arrived at Wellington, and sent his clerk to the registrar’s office to bring the books to the inn to be audited as usual. The [386] office being locked, and the clerk being unable to obtain access to the books, the defendant went to the office with a locksmith, who, by the defendant’s directions, forced the lock of the inner door and the cupboard in which the books were kept, and removed them to the inn, where he audited them, and then returned them to the office and caused the door of it to be again fastened.

It was submitted, on the part of the defendant, that he was justified in what he had done, under the 18th section of the County Court Rules, and the 48th section of the 9 & 10 Vict. c. 95; and the other provisions of the County Court Acts referred to in the margin of the plea. Under the direction of the learned Judge the jury found a verdict for the plaintiff, and assessed the damages at 5l., leave being reserved to the defendant to move to enter the verdict for him, the decision of the Court above to be final.

Sir F. Slade, in the following term, obtained a rule nisi to enter a nonsuit or a verdict for the defendant, on the ground that he was justified by law, under the County Court Acts and the Rules of those Courts, in what he did.

Kinglake, Serjt., Dowdeswell and Coleridge shewed cause in the present term (Jan. 14). The question is, whether the plaintiff had such a possession of the premises as to entitle him to maintain trespass. The defendant contends that the premises were hired by and vested in him, as treasurer, under the 9 & 10 Vict. c. 95, s. 48. That section enacts “That the treasurer of any Court holden under this Act for which a court-house and offices &c. shall not have been already provided, or where such court-house and offices are inconvenient or insufficient, shall, as soon as conveniently may be, &c., build, purchase, hire or otherwise provide messuages and lands, with all necessary ap[387]-purtenances, fit for holding the Court therein, and for the offices necessary for carrying on the business of the said Court; or instead of providing separate buildings may contract with any person, being the owner of or having the control and management of any county or town hall or other buildings, for the use and occupation thereof, or of so much thereof as may be needed for the purposes of this Act, and subject to such annual rent &c. as may be agreed upon, &c.; and all lands, messuages and other real and personal estates and effects belonging to the Court shall vest in the treasurer for the time being, and in his successors in that office, in trust for the purposes of this Act.” That section only applies to cases where there has been

a demise of premises to the treasurer for the sole purpose of the County Court business. The arrangement between the Lords of the Treasury and the plaintiff created no estate in the defendant, as treasurer. The plaintiff was lessee and occupier of the offices, and responsible for the rent and taxes; and he permitted the County Court business to be carried on upon his premises. That was a mere license or easement, which, not being under seal, was revocable at any time: *Wood v. Leadbitter* (13 M. & W. 838). The case of *Regina v. Smith* (30 L. J. Mag. Cas. 74) is an authority in point. There the defendant rented a house, of which five of the principal rooms were occupied by the surveyor of taxes and the collector of Inland Revenue, under an agreement to let them for an annual sum, to include all expenses, viz. rent, rates, taxes, gas, wood, coals, and a servant to reside on the premises. Another room was occupied by the defendant as an office for vending stamps by him as distributor for the district. The question was, whether the defendant was liable to be rated as beneficial occupier of the whole house; and the Court, in giving judgment, said: "With reference [388] to the agreement, we think it must be construed, not as a demise of the five rooms, but as an agreement by which the appellant, retaining possession of these rooms and keeping his servant there, bound himself to supply the other party there with fire and gas and attendance. It is true the exclusive enjoyment of the rooms is to be given; but that is the case where a guest at an inn, or a lodger in a house, has a separate apartment, or where a passenger in a ship has a separate cabin, in which case it is clear that the possession remains in the innkeeper, lodging-house keeper or shipowner." [Channell, B. The 48th section of the 9 & 10 Vict. c. 95 enables the treasurer to contract for the use and occupation of a building, "or of so much thereof as may be needed for the purposes of the Act," and subject to an annual rent: then by the latter part of the section the premises vest in the treasurer.] That provision is qualified by the words "belonging to the Court:" the Court had no estate in the plaintiff's premises, but the mere use of a room. The question then is, whether the defendant had any right of entry because the books of the County Court were on the plaintiff's premises. It is conceded that if a person takes and places on his own premises the goods of another, the latter may enter and retake them: *Patrick v. Colerick* (3 M. & W. 483); but that does not apply here, because the books were in the lawful custody of the plaintiff. [Martin, B. In *Patrick v. Colerick*, Parke, B. pointed out that "the passage there cited from Blackstone (vol. 3, p. 4), as to the right of recaption, applies to the case where the goods are placed on the ground of a third party," and that "all the old authorities say, that where a party places the goods on his own close, he gives to the owner of them an implied license to enter for the purpose of recaption." It would be no answer to an indictment for forcible [389] entry that the defendant had a right of entry and came to take possession of his own property: the forcible assertion of such right constitutes the offence. [Pollock, C. B. The passage cited from Blackstone is under the head "Redress of private wrongs by act of parties," and it is there said: "If my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law."] Then with respect to the County Court Rules framed in pursuance of the 19 & 20 Vict. c. 108, s. 32. By Rule 6, "the registrar shall keep an office at each place where the Court of which he is registrar is holden, and such office shall be kept open every day from ten o'clock in the morning until four o'clock in the afternoon, except on Christmas Day &c., and except also on Saturdays, on which day the office may be closed at one o'clock in the afternoon." By Rule 18, "all the books of the Court, including the bankers' book and cash book, shall at all times be open to the inspection of the treasurer." That must mean at all times when the office is required by the 6th Rule to be kept open. Here the defendant went to the office at a time when he knew it was closed. Suppose a person deposited his title deeds with his solicitor, would he have a right to go to the solicitor's office after it was closed and break open an iron safe for the purpose of getting the deeds? Moreover, assuming that the 48th section of the 9 & 10 Vict. c. 95 is applicable to this case, the defendant cannot avail himself of it, because he has not inserted it in the margin of his plea, as required by the Reg. Gen., Trin. T. 1853, r. 21.

Sir F. Slade (with whom was Stock), in support of the [390] rule. The defendant

was justified in obtaining access to the books for the purpose of auditing them. The plaintiff's conduct led the defendant to suppose that he acquiesced in the propriety of an audit on the day appointed. The defendant's right, as regards the plaintiff, to take possession of the books is the same as it would be against a third person from whom a room was hired for the County Court business. Such third person could not object to an audit at any particular time because it did not suit his convenience, and the fact of the plaintiff being registrar of the Court makes no difference. Suppose there was some ground for suspecting dishonesty on the part of the registrar, it would be most important that the accounts should be privately examined. He was then stopped by the Court.

POLLOCK, C. B. This is an action by the registrar against the treasurer of a County Court, and it appears that the treasurer had made an appointment to audit the County Court books on a certain day, and that he went for that purpose to the plaintiff's premises at a time which certainly cannot be considered an improper period of the day. We are all of opinion that what the treasurer did was right, there being no breach of the peace. There is nothing in what has been urged before us at all interfering with the treasurer's perfect right to discharge a public duty. This case goes beyond the question of a right to a personal chattel, to which the owner wishes to get access: it is the case of a superior officer desiring to have access to books which it was the duty of an inferior officer to produce for his inspection. Under these circumstances, I am of opinion that the defendant was perfectly justified in doing what he did, and the rule must be absolute to enter a nonsuit.

[391] MARTIN, B. I am of the same opinion. I regret that we are called upon to give judgment in an action between persons holding offices of this description; they have, however, insisted on the judgment of the Court,^(a) and are entitled to have it. I am of opinion, upon the evidence, that there was nothing which vested the possession of the room in the defendant. For that purpose something more should have been done—rent should have been paid in respect of a demise of the particular room; and if the case had rested there I should have been of opinion that the plaintiff was entitled to retain the verdict. But I think that the defendant had a right to get possession of the books. It is clear, from the way in which the case was reserved, that we are at liberty to take into consideration the 48th section of the 9 & 10 Vict. c. 95. If the objection had been taken at the trial that the section was not mentioned in the margin of the plea, the learned Judge might have amended under the 222nd section of the Common Law Procedure Act, 1852. But the defendant's counsel referred to that section at the conclusion of the plaintiff's case, and no objection having been then made none can be made now. The 48th section of the 9 & 10 Vict. c. 95, says that all "personal estates and effects belonging to the Court shall vest in the treasurer for the time being." Therefore no one can doubt that these books, being the books of the Court, were the personal estate and effects of the treasurer. It was the duty of the treasurer to inspect the books, and he gave the plaintiff notice of his intention to do so. It is true that he came to the plaintiff's office after one o'clock on a Saturday, but the rule as to closing on that day applies to the public and not to the officers of the Court. The notice having been [392] given, it was the duty of the plaintiff to be at the office, or depute some person, to enable the defendant to inspect the books. The defendant went to the office at the appointed time, and found it closed. He did not break the outer door, but he picked the lock of an inner door, and there is no doubt that was a breaking and entering; indeed I am not aware of any distinction between the inner door of a house and a wall or fence of a close. The defendant then took away his chattels, and the case of *Patrick v. Colerick* (3 M. & W. 483), is an authority to shew that it was a lawful act. I regret that we are called upon to give any judgment, but, being of the opinion which I have expressed, I think the rule ought to be absolute to enter a nonsuit.

CHANNELL, B. I also regret that we are called upon to decide this matter, but as we are required to do so, I think that the rule to enter a nonsuit should be absolute. I agree with my brother Martin that there was no demise of the room; and if the question had arisen between the plaintiff and defendant as individuals, and not under the 48th section of the 9 & 10 Vict. c. 95, we could not have made the rule absolute.

(a) In the course of the argument the Court suggested that the parties should come to some arrangement.

Then, are we at liberty to refer to that section? I am of opinion that we are. At the close of the plaintiff's case the defendant's counsel asked for a nonsuit, and the application was founded on the 48th section. If any objection had been taken, no doubt it was competent to the learned Judge to amend by inserting a reference to that section in the margin of the plea. The learned Judge reserved the matter for the consideration of the Court, and again, when the case was concluded and a verdict found for the plaintiff with 5l. damages, he reserved leave to the defendant to move to enter a nonsuit, binding the parties to rest satisfied with the decision of this Court. [393] Under these circumstances I think that we are at liberty to consider the 48th section, the same as if a reference to that section had been inserted in the margin of the plea. Then how does the case stand with regard to that section? I do not say that, apart from it, the fact of the defendant's goods being in the plaintiff's house would give the defendant any right to go there; whether that is so or not it is unnecessary to determine; but taking into consideration that the 48th section vests the property in the books in the defendant, and also the fact that there was some contract, to which the plaintiff was a party, for the use and occupation of the room, and having also regard to the facts proved at the trial, I think the defendant has shewn a leave and license justifying the step he took.

WILDE, B. I entirely concur in the judgments delivered by my learned Brothers; and I cannot help adding that I am sorry that an action of this kind should be brought, because the plaintiff has sustained no injury whatever. It appears that the plaintiff left instructions with his clerk to allow the defendant to inspect the books; the clerk left the office at one o'clock, and when the defendant came he could not get in. He had a lock picked, and having taken the books and inspected them he returned them to the office, which he locked up again. In so doing he only did what he was entitled to do, and no outrage took place. In my opinion there was no reasonable ground for bringing the action, and that the rule ought to be absolute.

Rule absolute to enter a nonsuit.

[394] *THE COMPANY OF PROPRIETORS OF THE GRAND UNION CANAL v. ASHBY.* Jan. 12, 1861.—The 87th section of the 50 Geo. 3, c. cxxii., which incorporated certain persons for the purpose of making a canal, enacts that the lord of every manor through which the canal, collateral cut, and reservoirs shall be made, “shall have and be entitled to the right of fishery of and in so much of the said canal, cut and reservoirs as shall be made in, over, or through the common or waste lands within his manor, and over or through any other lands or grounds, in the waters whereof such lord now hath the right of fishery; and that the owner of any other lands through which the said canal and collateral cut shall be made, shall also have and be entitled to the like right of fishery of and in so much of the said canal or collateral cut as shall be made in, over, or through his lands.”—Held: First, that “commons or waste lands” meant commonable lands, the ownership of the soil of which was in the lord of the manor, and not open fields over which certain persons had rights in severalty.—Secondly, that the right of the lord, as owner of the land through which the canal was made, was limited to fishing in the canal and collateral cut, excluding the reservoir.

[S. C. 30 L. J. Ex. 203; 3 L. T. 673.]

This was an action of trespass for breaking and entering a close of the plaintiffs, called “Naseby,” in the county of Nottingham. By consent of the parties and order of the Court the following case was stated for the opinion of this Court:—

The plaintiffs are owners of the Grand Union Canal and the Naseby Reservoir, by an act of parliament made in the 50 Geo. 3 (c. cxxii.), intituled “An Act for making and maintaining a navigable canal from the Union Canal in the parish of Gumley in the county of Leicester, to join the Grand Junction Canal near Long Buckby in the county of Northampton, and for making a collateral cut from the said intended canal.” By the Act the plaintiffs were empowered to purchase land for making the canal and reservoir and using the same for that purpose. It contains the following clauses relative to the purchase of common or waste land.

Section 21. “And be it further enacted, that in all cases where there shall be occasion to cut through, take, or use part of any common or waste ground for the

purposes of this Act, the conveyance thereof by the lord or lady of the manor wherein the same shall be situate shall be a good and sufficient conveyance to the said Company of Proprietors, for the purpose of vesting in them the fee simple and [395] inheritance thereof, as fully and effectually as if every person having right of common upon such common or waste ground had joined in and executed such conveyance; and that the compensation to be paid for any right of common upon any such commons or waste ground as aforesaid shall be paid by the said Company of Proprietors to the churchwardens of the respective parishes wherein such commons or waste grounds shall lie, and shall be by such churchwardens received and applied for such general or public purposes within such parishes respectively as a vestry of every such parish, to be convened by such churchwardens for that purpose, shall direct; anything in this Act to the contrary thereof notwithstanding."

The Act also contains the following clause relative to the rights of fishery and shooting. Section 87: "Provided always and be it further enacted, That the lord and lords, lady and ladies of all and every the manor and manors through which the said canal, collateral cut, and reservoirs thereto belonging, or any of them, shall be made shall have and be entitled to the right of fishery of and in so much of the said canal, cut, and reservoirs as shall be made in, over, or through the common or waste lands within his, her, or their manors respectively, and over or through any other lands or grounds in the waters whereof such lord or lords, lady or ladies now hath or have, or is or are entitled to the right of fishery; and that the owner or owners of any other lands or grounds through which the said canal or collateral cut shall be made, shall also have and be entitled to the like right of fishery of and in so much of the said canal or collateral cut as shall be made in, over, or through his, her, or their lands or grounds respectively wherein he, she, or they had the right of fishery before the passing of this Act, so as that in the use or exercise of the said right of fishery the said canal and collateral cut and other works hereby authorized to be made shall not be damaged, prejudiced, [396] or obstructed, or any water drawn or taken from or out of the same, and so as the said Company of Proprietors, or their agents, servants, or workmen, or any of them, shall not be liable to any penalty, action, or prosecution, for or by reason of the taking or destroying of any fish in the said canal, collateral cut, or reservoirs, or any of them, which shall be taken, killed or destroyed through or by means of the letting off the water out of them respectively, on account of any repairs or works to be done in and about the same, or for any other purposes of the navigation of the said canal and cut, or either of them. And also that it shall be lawful to and for the said lord or lords of such manor or manors, or his or their gamekeeper or gamekeepers, and the owner or owners of such lands and grounds through which the said cut or canal shall be made (being qualified by law so to do) to take and kill game or wild fowl upon so much of the said cut or canal, reservoir or reservoirs, trenches, towing-paths, and other the lands and grounds to be set out for the use of the said navigation, as shall be made through their respective lands or grounds as aforesaid, in like manner as if the land or ground so to be set out as aforesaid had remained undisposed of by virtue of this Act."

Shortly after the passing of the plaintiffs' act of parliament the plaintiffs proceeded to purchase land for making their canal and reservoirs, and amongst other land the plaintiffs purchased land for the Naseby Reservoir in the Naseby Field. This land the plaintiffs purchased of a Lady Pocock and Mr. and Mrs. Maddick, who respectively conveyed it to the Company by deeds: that of Lady Pocock dated 30th December, 1812, and that of Mr. and Mrs. Maddick dated the 16th January, 1813.(a)

[397] The Naseby Field is in the parish and manor of Naseby, and at the time of the above purchases and conveyances it was all open and unenclosed, and the said Lady Pocock was lady of the manor of Naseby. After her, Mr. Fitzgerald became lord of the manor of Naseby, and to him succeeded Lord Clifden, who at the time of the committing the alleged trespasses by the defendant in Naseby was and still is lord of the manor of Naseby. The land purchased of Mr. and Mrs. Maddick was land of which the said Mrs. Maddick was, at the time of the purchase and conveyance, tenant for life under the will of the defendant's ancestor, George Ashby; and the

(a) It was agreed that these deeds, as also the Company's act of parliament, should form part of the special case. The deeds did not convey the land as common or waste land but as ordinary open fields.

land so purchased adjoined and still adjoins other land of which she was also tenant for life under the same will, and the last mentioned land on the death of the said Mrs. Maddick descended upon the defendant, who became of age in 1855, as tenant in tail in remainder under and by virtue of the same will.

The plaintiffs on completion took possession of the land so conveyed to them, and upon such land and upon lands purchased by them in Cold Ashby they proceeded to make the Naseby Reservoir, which was being formed when the Naseby Inclosure Act hereinafter mentioned was made, but was not completed till shortly afterwards. The reservoir contains about 160 acres. A brook which runs through the land divides the parishes of Naseby and Cold Ashby, and a brook called the Naseby Brook falls into the former brook.

The Company having formed the reservoir used it for the purposes of their canal, and did the requisite repairs to it, and remained in possession, subject to the lease hereinafter mentioned, from that time up to and until the commencement of this action.

In the year 1820, the Naseby Inclosure Act (1 Geo. 4) [398] was passed, and it is agreed that it shall form part of the case.(a)

The Commissioners made their award in 1823.

On the 3rd of September, 1822, the plaintiffs by lease under seal demised to Mr. Purcell, the brother-in-law of Mr. Fitzgerald, the then lord of the manor, and who then occupied the house and grounds now occupied by the defendant under Lord Clifden, the present lord of the manor, the right of fishery and fishing and fowling over the public reservoir and the herbage of so much of the land within the fences of the reservoir as was not then, or should not be thereafter during the lease, covered with water, and [399] which was computed to amount to forty-six acres; and also a piece of land in Cold Ashby containing an acre and thirty-two perches: To hold to the said C. Purcell for fourteen years at a certain rent therein particularly mentioned.

On the 21st January, 1854, the plaintiffs granted another lease for fourteen years to John Kightley of the right of fishery and fishing and fowling in the reservoir and the herbage of the land within the reservoir fences, which was not then and should not be during the said term covered with water, and the same piece of land with the cottage erected thereon in the said indenture mentioned, at a certain rent therein mentioned, which said last mentioned lease is still subsisting.

At the trial the plaintiffs proved that in September, 1858, the water of the reservoir being then low and covered with ice, the defendant, accompanied by his keeper, came about 150 yards across the soil of the reservoir, in the parish of Naseby, and then broke the ice, and killed and shot, and took the fish out of the reservoir and carried them away.

(a) Cap. 24. A Private Act. The case set out the preamble and 27th section of the Act as follows:—"Whereas the manor and parish of Naseby in the county of Northampton are extensive, and contain by estimation 3500 acres of land or thereabouts, part of which consists of old enclosures or old enclosed lands, and the residue and greater part of which consists of open and common fields, wastes and other commonable lands. And whereas Frances Fitzgerald, the wife of John Fitzgerald, Esq., or the said John Fitzgerald in her right, is seised during her life of the said manor of Naseby, and of several old enclosures and common field lands within the same. And whereas John Maddick, Esq., in right of his wife Hannah Maria Maddick, is impropiator of the impropriate rectory of Naseby aforesaid, and as such entitled to certain glebe lands and right of common appurtenant thereto and to all tithes, moduses, compositions and other payments in lieu of tithes arising from and payable within the said parish, and is also patron of the vicarage of Naseby aforesaid, and likewise proprietor of certain open fields and ancient enclosures within the said parish."

Sect. 27. "And be it further enacted, that inasmuch as the Company of Proprietors of the Grand Union Canal are possessed of certain pieces of land, late parts of certain open or common fields within the said parish of Naseby, which have been purchased for a reservoir and feeder and road therefrom for the purposes of the said canal, it shall and may be lawful to and for the said Commissioners, and they are hereby authorized and required to allot to the said Company of Proprietors the said pieces of land as the same have been enclosed or set out and ascertained by virtue of the act of parliament passed for making the said canal."

(The case then set out the evidence given at the trial from which the inference was that the Naseby Field was not common or waste land, the soil of which was in the lord of the manor, but open fields over which the occupiers of certain lands had rights in severalty, and which were grazed by them according to their stint.)

The question for the opinion of the Court is, whether upon the facts and evidence above stated the plaintiffs or defendant are entitled to the verdict. The Court to be at liberty to draw any inferences from the facts.

Hayes, Serjt. (with whom was Field), argued for the plaintiff in last Michaelmas Term (November 19). The question depends on the construction of the 50 Geo. 3, c. cxxii., which reserves to lords of manors certain rights. The 87th section provides that the lords of manors, through [400] which the canal, collateral cut and reservoirs thereto belonging shall be made, shall have the right of fishery in so much of the canal, cut and reservoirs as shall be made in, over or through "the common or waste lands" within his manor, and over or through any other lands or grounds, in the waters whereof such lords now have the right of fishery. The 21st section, which provides for the conveyance of land by lords of manors to the Company, also uses the words "common or waste land," thereby shewing that the legislature contemplated land the soil of which belonged to the lord, and over which other persons had rights in common for their cattle, levant and couchant. The locus in quo is not land of that description, but open fields over which certain persons have rights in severalty in respect of the ownership of certain land, and over which each person grazed according to his stint. The deeds by which it was conveyed to the Company do not describe it as common or waste land, but as open fields. The 23rd section of the 1 Geo. 4, c. 24, provides for an allotment to the lord or lady of the manor as compensation for their right and interest "in and to the soil of all the waste and unknown lands lying in the said common and open fields and other commonable lands and grounds hereby directed to be divided and enclosed." [Bramwell, B. By the 87th section of the 50 Geo. 3, c. cxxii., the lord of the manor is entitled to a right of fishery in the canal, cut and reservoir made in common or waste land within his manor, and any other lands or grounds in the waters whereof he is entitled to the right of fishery. This land is not "common or waste land" within the meaning of the first branch of the section; and the right as owner, under the second branch, is limited to fishing in the canal or collateral cut.] The expression "common or waste land" means land belonging to the lord of the manor, and over which other persons have incorporeal rights. The word "reservoir" has been purposely [401] omitted in the second branch of the section. He also argued that the plaintiffs were not precluded, by their demises of the 3rd of September, 1826, and 21st January, 1854, from maintaining this action, since there was no demise of the soil or water, but only of the right of fishery. On this point he cited *Holford v. Bailey* (13 Q. B. 426).

Mellor (Beasley with him), for the defendant. This is "common or waste land" within the meaning of the 87th section of the 50 Geo. 3, c. cxxii. The fact that it is enjoyed by some of the tenants in severalty is not inconsistent with its being commonable land. In *Gibson v. Smith* (2 Atk. 182) Lord Hardwicke, C., said:—"In several manors there are some part of the tenants only which have a right of commoning, and yet it does not follow but it may be waste, and belong to the lord as much as if it was a general common. . . . The being stinted does not at all prove that they are not waste, but only for the benefit of the tenants, and are not, for this reason, less the waste of the lord than before." The preamble of the 1 Geo. 4, c. 24, recites that part of the manor of Naseby consists of old inclosures, "and the residue of open and common fields, wastes, and other commonable lands." By the 27th section the Commissioners are required to allot to the Company certain pieces of land "late parts of certain open or common fields" which they purchased for a reservoir. [Bramwell, B. If the 87th section of the 50 Geo. 3, c. cxxii., had said "provided the lord of the manor is entitled to the common or waste lands," it could not have been contended that the statute meant to give him the right of fishery over common or waste lands of which he was not the owner.] The legislature never intended that the Company should have the right of fishing. The 50 Geo. 3, c. cxxii., enables [402] them to purchase lands "for the use of the navigation;" and *Bostock v. The North Staffordshire Railway Company* (4 E. & B. 798) is an express authority that a Company incorporated for a specific purpose has no power to use its lands for any other purpose. [Channell, B. May not a railway Company sell the grass which grows on an embankment of their line, or let

the ground under their arches?] They could not convert their land to a purpose not authorized by the legislature. It was ultra vires for the Company to demise a several fishery in a reservoir made for a canal. He also argued that the Company could not maintain trespass. On this point he cited *Cox v. Glue* (5 C. B. 533).

Hayes replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

BRAMWELL, B. We are of opinion the plaintiff is entitled to judgment. The defendant committed an act of trespass, for which he is liable unless he can shew a justification. His first answer is that he is entitled under the lord of the manor. We are of opinion the lord of the manor had no title such as the defendant sets up. The title is asserted under the 50 Geo. 3, c. exxii. s. 87, by which lords of manors, through which the canal, cut and reservoirs shall be made, shall have and be entitled to the right of fishery of and in so much of the canal, cut and reservoirs as shall be made in, over or through the common or waste lands within their manors, and over or through any other lands or grounds in the waters whereof such lords have the right of fishery. This obviously means to give them the right where the ownership of the soil was in them, where there was then no water, fish or fishery and to continue it in the lords where there [403] were already water and fish, and the fishery was in the lord. It is impossible to suppose that if (as in the present case) the soil of part of the land taken was not in the lord, he should have the right of fishery, and not the owner of the soil. It is a mistake to construe this Act as though it was a general Act relating to all England, and so to all manors and waters. It relates to certain definite places. We are not told that, in fact, there was any waste to be taken which was not owned by the lord of the manor in which it was. What might be the decision if such a case existed it is not necessary to say. But the remark is made to shew that it is not to be assumed that lords of manors were to have rights of fishery where they were not owners of the soil. The words "common or waste" land then are satisfied by giving them their natural meaning; and there is not only no reason to extend them to such land as that in question, but the contrary; and this meaning is shewn to be correct by other sections of the statute. This ground of defence fails therefore. (See sections 21, 97.)

But then the defendant makes a second claim under the latter part of the section, as owner of the land through or adjoining which the reservoir is made. But the rights of such owners are limited to fishing in the "canal and collateral" cut, omitting "reservoirs." This omission is obviously not accidental, for the word "reservoir" is sometimes inserted and sometimes omitted on many occasions, and correctly, on the supposition that lords of manors may fish in some reservoirs, but that adjoining owners, as such, may not. And indeed there may be a reason for not giving an adjoining owner a right of fishery over a larger extent of ground than has been taken from him. However, speculation on this is useless, as we think the words plain. The plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

[404] ADAMS v. THE GREAT WESTERN RAILWAY COMPANY. Jan. 11, 1861.—The Great Western Railway Company has its principal station at Paddington, where the directors meet, the secretary resides, general meetings are held, and whence orders emanate.—Held, that the Company "dwells" at Paddington within the meaning of that word in the 9 & 10 Vict. c. 95, s. 128; and consequently that, where a plaintiff in an action against the Company dwelt more than twenty miles from Paddington, the superior Court had concurrent jurisdiction.

[S. C. 30 L. J. Ex. 124; 9 W. R. 254; 3 L. T. 631. Applied, *Shiels v. Great Northern Railway*, 1861, 4 B. & S. 326. Referred to, *Cesena Sulphur Company v. Nicholson*, 1876, 1 Ex. D. 452.]

This was an action against the defendants, as carriers, to recover compensation for the non-delivery of two boxes, containing merchandize and a few articles of clothing.

At the trial before Blackburn, J., at the Surrey Summer Assizes, 1859, a verdict

found for the plaintiff, with 3l. damages. The learned Judge declined to certify for costs.

On application subsequently made at Chambers, Martin, B., ordered that the plaintiff should recover his costs.

From the affidavits on which the order was made, it appeared that the action was brought by the plaintiff, who at the time of its commencement dwelt and carried on his business at Redditch in the county of Worcester, to recover compensation for the non-delivery of goods contained in two boxes. The boxes, which contained a large quantity of merchandize and a few articles of clothing, were lost while being taken by the plaintiff as his personal luggage as a passenger on the defendants' line from Oswestry to Chester. The contract between the plaintiff and the defendants was made at Oswestry. The principal office of the defendants' railway, where the secretary resides, the directors meet, and at which general meetings are held, is at Paddington, in the county of Middlesex. Paddington, Oswestry, Chester, and the part of the line where the boxes must have been lost, are each more than twenty miles from Redditch. Redditch is, however, within twenty miles of the Birmingham station of the defendants' railway at which the defendants carry on business as a Railway Company and as common carriers. Birmingham is one of the principal [405] stations of the Company, and a plaint might and could have been served there. The cause of action did not arise without the jurisdiction of the Birmingham County Court. On being applied to for compensation, the superintendant wrote to say that any writ that the plaintiff's attorney "would send to the secretary of the Company at the Paddington terminus would meet with due attention."

Digby, in Michaelmas Term, had obtained a rule nisi to rescind the order of Martin, B.; against which

Pigott, Serjt., and Joseph Sharpe now shewed cause. The plaintiff "dwells more than twenty miles from the defendants;" therefore the case is one in which concurrent jurisdiction is given to the superior Courts by the 9 & 10 Vict. c. 95, s. 128, and the order was properly made by the learned Judge under the 15 & 16 Vict. c. 54, s. 4. The Company cannot be said to dwell at all their stations throughout the country. The principal office is at Paddington, where the secretary resides, where legal notices may be served, and where the central government of the Company is carried on: *Garton v. The Great Western Railway Company* (E. B. & E. 837). It is there that the Company "dwells." [Martin, B., referred to *Taylor v. The Crowland Gas Company* (11 Exch. 1), and *Corbett v. The General Steam Navigation Company* (4 H. & N. 482).] Merely carrying on business at a particular station is not dwelling there. In *Kerr v. Haynes* (29 L. J. Q. B. 70) it was held that a person, who carried on business as a law stationer in London, and occupied three houses there, passing three or four days of each week in London, occupying rooms in one of the houses, but always absenting himself when business permitted it, and residing with his family at Margate, where his wife, family and servants were [406] permanently established, dwelt at Margate, and not in London, his residence in town being entirely subservient to the purposes of his business, and to that alone. If a corporation cannot "dwell" anywhere it can have no domicile; but a corporation can have domicile. *The Dutch West India Company v. Moses* (1 Stra. 613), and *The National Bank of St. Charles v. De Bernales* (1 Car. & P. 569), shew that foreign corporations can sue here, and that the validity of their incorporation must be tested by the law of the place of their domicile. In the case of corporations the question where they dwell depends on their domicile. Assuming that the defendants dwell in two places, one within twenty miles of the plaintiff's residence, and the other beyond that distance, the superior Courts have concurrent jurisdiction under the 9 & 10 Vict. c. 95, s. 128. *Butler v. Ablewhite* (6 C. B. N. S. 740) is a decision to that effect by the Court of Common Pleas. In *Macdonald v. Paterson* (11 C. B. 755) that Court had previously expressed a similar opinion. Upon the same principle it has been held that where one of several defendants resides out of the jurisdiction of the County Court within which the cause of action arose, the superior Courts have concurrent jurisdiction: *Doyle v. Lawrence* (2 L. M. & P. 368). The defendants dwell and carry on business, within the meaning of the 128th section of the 9 & 10 Vict. c. 95, at Paddington only, and not elsewhere. [Wilde, B. The words appear to point to some one place at which the party dwells and carries on his business. In one sense a great carrier may be said to carry on his business all over the kingdom.] (They also argued that the learned Judge must be taken to have

decided, under the 15 & 16 Vict. c. 94, s. 4, that the action was properly brought in the superior Court.)

[407] Hawkins and Digby, in support of the rule. First, the plaintiff resides at Redditch, which is within twenty miles of a place where the defendants have a station and carry on business. A railway Company must be deemed to dwell where it carries on its business: *Taylor v. The Crowland Gas and Coke Company* (11 Exch. 1). It cannot be said that the defendants do not carry on their business at each of their stations. It is not necessary that they should carry on business exclusively at a particular station. That appears by analogy to the case of *Kerr v. Haynes* (20 L. J. Q. B. 70). [Wilde, B. The argument on the other side is that the Company must be deemed to reside at Paddington, either exclusively, or at least at Paddington as well as elsewhere; and that in either case the superior Courts have concurrent jurisdiction. *Kerr v. Haynes* (29 L. J. Q. B. 70) is a strong authority against the defendants on the latter point.] The word dwells, in the 128th section of the 9 & 10 Vict. c. 95, refers to the dwelling in the ordinary and popular sense. A man does not dwell at a particular place by merely taking his meals and occasionally sleeping there: *Kerr v. Haynes* (29 L. J. Q. B. 70), *Dunstan v. Paterson* (5 C. B. N. S. 267); nor by carrying on business at such place by an agent: *Sheils v. Rait* (7 C. B. 116). The defendants, a corporation, by carrying on business at Paddington, cannot be said to dwell there. The station is not their dwelling-house, in which a burglary could be committed: *Rea v. Martin* (Russ. & Ry. 108). (They also referred to *Bailey v. Bryant* (1 E. & E. 340).)

POLLOCK, C. B. This was an application to set aside an order of my brother Martin that the plaintiff should recover his costs in an action against the Great Western Railway Company, on the ground that he dwelt more than [408] twenty miles from the defendants, and therefore had a right to sue in the superior Court. It appears to me that the order was correct, and the rule must be discharged. For a considerable time, no doubt, this Court thought that they had a discretion in these cases, but the other Courts having come to a different conclusion we thought it right that uniformity of practice should prevail, and have since held that a plaintiff is entitled to his costs as a matter of right where there is concurrent jurisdiction. The decisions have established that this Company dwells at Paddington, and that being so the superior Courts have concurrent jurisdiction, and the plaintiff had a right to bring his action in this Court. Therefore the rule must be discharged.

MARTIN, B. I am of the same opinion. In the case of *Taylor v. The Crowland Gas Company* (11 Exch. 1), upon the construction of the 9 & 10 Vict. c. 95, s. 128, this Court decided that a corporation can "dwell" at the place where its business is carried on. In my judgment the word "dwell" in this section, when applied to a corporation, means something analogous to what it means when applied to an individual, viz., a dwelling at some fixed known place, not on the whole line of the railway, but where its principal business is carried on. The letter written by the defendants shews that the head office was the place where the officer competent to decide with respect to the question between the plaintiff and the defendants was to be found.

CHANNELL, B. I agree that the rule must be discharged. Assuming that the fact of a concurrent jurisdiction was established to the satisfaction of my brother Martin, he had no discretion on the subject, but was bound to make the order. I come to the conclusion that such jurisdiction [409] existed by reference to the first branch of the 128th section of the 9 & 10 Vict. c. 95, and it is quite unnecessary to advert to other parts of it. If *Taylor v. The Crowland Gas Company* (11 Exch. 1) is not a direct authority for the plaintiff, it goes a long way towards deciding the question now raised; and, adopting the reason given for the judgment in that case, I am of opinion that the defendants dwell at Paddington, and nowhere else.

WILDE, B. I am of the same opinion. The question is whether the superior Court had concurrent jurisdiction, and that depends upon whether the plaintiff dwells more than twenty miles from the defendants. The language of the 128th section of the 9 & 10 Vict. c. 95, is somewhat defective when applied to corporations. But it would be a misfortune if we were obliged to hold that it did not apply to corporations; and in fact in *Taylor v. The Crowland Gas Company* (11 Exch. 1) this Court decided that point. There the question was, where must a corporation be said to dwell? And it was held that it dwelt at the principal place where its business was carried on. I agree that we must assimilate the case to that of an individual. The "home" of a Company must be taken to be that place which is occupied as such,—where their profits come

home to them, whence orders emanate, and where the chief officers of the Company are to be found. The Great Western Railway appears to dwell at Paddington and at Paddington alone.

Rule discharged.

[410] THE WELLAND RAILWAY COMPANY v. BLAKE. Jan. 11, 1861.—To a declaration for calls by a railway Company incorporated by the Canadian legislature, setting out specifically and at length the Acts empowering the Company to sue, and the several facts shewing the liability of the defendant as a shareholder, the plea of “never indebted” may be pleaded; and the Court has no power to set aside such plea, on the ground that it tends to embarrass the plaintiff by putting him to unnecessary, needless and expensive proof.

[S. C. 30 L. J. Ex. 161; 7 Jur. (N. S.) 373; 9 W. R. 386; 3 L. T. 678.]

Declaration. That on the 23rd of May, 1853, a certain law, being an Act of the Canadian legislature, entitled “An Act to incorporate the Port Dalhousie and Thorold Railway Company,” was enacted in the province of Canada by the Queen’s most excellent Majesty, with the consent and advice of the legislative council and of the legislative assembly of the province of Canada, constituted and assembled by virtue of and under the authority of an act of parliament passed in the parliament of the United Kingdom of Great Britain and Ireland, entitled “An Act to reunite the provinces of Upper and Lower Canada, and for the government of Canada.” (The declaration then set out parts of the colonial Act, which incorporated the Company by the name of the Port Dalhousie and Thorold Railway Company, embodied in itself parts of the Canadian Railway Clauses Consolidation Act, empowered the Company to complete the railway, and enacted that the capital should be 75,000l. currency, to be divided into 3000 shares of 25l. each. The declaration also set out certain provisions as to general meetings, the appointment, qualification and powers of directors: also a provision that no call should exceed 10l. per cent. on the amount of the shares, &c.) That on the 16th of May, 1856, another Act of the Canadian legislature was enacted, &c. (The declaration set out parts of this Act which, after reciting that the Port Dalhousie and Thorold Railway Company had prayed for power to extend their railway to Port Colborne, empowered the Company to construct the line and to increase their capital to 100,000l. currency, to be divided into shares of 25l., &c.) That in [411] May, 1857, another Act of the Canadian legislature was enacted. (The declaration set out parts of this Act, which empowered the Company to increase their capital by 75,000l. currency, changed the name of the Company to the Welland Railway Company, and enabled them to appoint an agent, and keep transfer books in London.) That the Railway Clauses Consolidation Act so incorporated was an Act of the Canadian legislature. (The declaration set out the preamble and several sections of this Canadian Act, viz. section 7: the interpretation clause. Section 8: as to the effect of the incorporation of a Company. Section 15: as to the power to hold general meetings. Section 16, which contains several clauses as to the powers of boards of directors, &c., and calls, the 13th clause being as follows:—“In any action or suit to recover any money due upon any call, it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is the holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more, stating the number and amount of such calls, whereby an action hath accrued to the said Company by virtue of the special Act.”) That the plaintiffs are the Welland Railway Company, and are identical with the Port Dalhousie Company; that the said Acts are laws in and for the province of Canada; that the board of directors duly appointed, consisting of directors duly qualified according to the said Acts, on the 17th of June, 1857, in the province of Canada, made a call on the defendant, amongst other shareholders, in respect of the amount of capital owned by the said shareholders, being 10l. per cent. on the amount of their shares, and gave notice, &c. (The declaration then stated the making of four other calls, the last being in November, 1859.) That, after the passing of the said Acts, another Act [412] of the Canadian legislature, entitled “An Act to amend the Acts relating to the Welland Railway Company,” was passed. (The declaration set out parts of this Act

which made further provision for the appointment of directors, and the regulation and management of the Company, and proceeded to state the making of another call, under that Act, on the 11th of January, 1860.) That before and at the time of the making of these calls, the defendant was a shareholder, that is to say, a holder of stock to the amount of fifty shares of 20l. 11s. each, being the calls in respect of which the shares were made; that all times had elapsed and all things happened necessary to make the defendant liable to pay the calls and entitle the plaintiffs to sue the defendant for the same, and to render the defendant liable to pay interest at 6l. per cent., but that the calls, amounting to 573l., &c., were unpaid.

The defendant pleaded "Never indebted."

Bovill, in this term, had obtained a rule calling on the defendant to shew cause why this plea should not be struck out, or why he should not amend or alter the plea by confining it to a denial of some single allegation of a matter of fact, or in such other way as the Court should direct.

The rule was obtained on an affidavit stating, (*inter alia*) that the plea would cause great and unnecessary embarrassment and delay, as the evidence to prove the numerous matters which it put in issue would have to be procured in Canada; that the allegations were true, and that the defendant had no ground to suppose them untrue, and that the reason why they were all traversed was to delay the cause and embarrass the plaintiffs, and not because the allegations were supposed by the defendant to be untrue.

Montague Smith and C. G. Merewether shewed cause. (a) [413] This is a count in debt on simple contract, to which the plea of "never indebted" may properly be pleaded. By the Pleading Rules of Hilary Term, 4 Wm. 4, as to pleading in covenant and debt, rule 3, it was provided, that in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead "that he never was indebted in manner and form as in the declaration alleged," &c. [Channell, B. Is this "debt on simple contract?"] It is not debt on a specialty, or on a statute having force in this country. Therefore, before the Common Law Procedure Act, 1852, the plea would have been allowed. By the 76th section of that Act it is enacted, that "a defendant may traverse generally such of the facts contained in the declaration as might have been denied by one plea." It is not inconsistent with the practice of the Court in other cases to allow such a plea. The widest inquiries arose upon the common counts. [Wilde, B. The form, which is given in the Common Law Procedure Act, 1852, Sched. B., No. 36, is said to be "applicable to declarations like those numbered 1 to 14, which are indebitatus counts." The Pleading Rule of Trinity Term, 1853, No. 6, provides that "to causes of action to which the plea of 'never was indebted,' is applicable as provided in Sched. B. (36) of the Common Law Procedure Act, 1852, and to those of a like nature, the plea of non assumpsit shall be inadmissible; and the plea of never indebted will operate as a denial of these matters of fact from which the liability of the defendant arises."] The object of the rule was to enable the defendant to deny generally and in a compendious form the existence of the facts alleged as constituting his liability. The 79th section of the Act places the plaintiff in a similar position as to the defendant's pleadings. By rules 8 and 12, all matters in confession and avoidance are to be pleaded specially.

[414] Bovill, in support of the rule. The action is not debt on simple contract but on a legal liability arising out of the Acts of the Canadian legislature. By the Pleading Rules of Hilary Term, 4 Wm. 4, as to pleading in covenant and debt, the plea of nil debet is abolished; and after providing that, in actions of debt on simple contract, the defendant may plead "never indebted," it is provided, by rule 4, that "in other actions of debt in which the plea of nil debet has hitherto been allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance." The present case falls within the 4th rule, and, therefore, at the time of the passing of the Common Law Procedure Act, 1852, the defendant must have traversed the allegations in the declaration separately. The Pleading Rule of Trin. T. 1853, No. 6, applies merely to the indebitatus counts numbered 1 to 14 in Schedule B. to the Common Law Procedure Act, 1852, or to other counts

(a) In Michaelmas Term, Nov. 23. Before Bramwell, B., Channell, B. Wilde, B., left the Court during the course of the argument.

of a similar character. [Bramwell, B. The Pleading Rule of Trin. T. 1853, No. 7, which provides that, in actions upon bills of exchange and promissory notes, the plea of "non assumpsit" and of "never indebted" shall be inadmissible, omits the words "other actions" which are found in Rule No. 4 of the Pleading Rules of Hil. T. 1853.]

Cur. adv. vult.

The judgment of the Court was now delivered by

CHANNELL, B. This was an application to set aside a plea as embarrassing. The action is by a Canadian Railway Company, incorporated and empowered by the Canadian legislature, to recover calls on shares. The declaration sets forth the plaintiffs' case with particularity, and to it is pleaded the plea in question, "never indebted." No doubt [415] the plea is embarrassing in one sense, viz., it puts the plaintiffs to a large amount of difficult, expensive and needless proof. But if it is a lawful plea we have no power to set it aside,—the power to set aside embarrassing pleas being limited to such as are at once embarrassing and irregular, informal or tricky, and contrary to the rules and practice of pleading.

We think the plea is a lawful plea, and that the defendant has a right to plead it. By the Pleading Rules of Hilary Term, 1834, "nil debet" was abolished, and in actions of debt on simple contract, other than on bills and notes, "never indebted" might be pleaded. In other actions of debt other pleas were provided. Whether the Pleading Rules of Hilary Term, 1853, were meant as a substitute for those of 1834 is not certain. They say "nil debet" shall not be pleaded in any action. But they do not say what shall be, except in certain actions which do not include such an action as the present. It seems therefore the former rules in this respect subsist. Then, is this a debt on simple contract? We think it is. There appears to be no other definition of such a debt than that it is one which the defendant has contracted not under seal. This is such a case in our Courts. Whether an action for calls by a Company incorporated under the Companies Clauses Consolidation Act, 1845, would be a debt on simple contract is another question. (See *The Edinburgh, Leith and Newhaven Railway Company v. Hebblewhite*, 6 M. & W. 707.) In this case we think the plea is a lawful plea, and the rule must be discharged; and the defendant's costs of the rule must be his costs of the cause in any event.

Rule accordingly.

[416] THE WELLAND RAILWAY COMPANY v. BERRIE. Jan. 16, 1861.—An Act incorporating a railway Company provided that no call of money from the shareholders should exceed ten per cent. on the amount of their shares: also, that the directors might, from time to time make such calls as they should deem necessary: Provided that thirty days' notice be given of such call, and that no call exceed the prescribed amount, nor made at a less interval than two months from the previous call, or a greater amount be called in, in any one year, than the prescribed amount. In an action for a call, the defendant pleaded that the directors made more calls and to a greater amount than were prescribed by the Act, and that the said call was made in excess of the calls by the Act empowered to be made. Replication: That the calls in the plea mentioned, other than the call sued for, were not authorized by the Act, and were therefore void; and that the call sued for was not a call made in excess of the calls by the Act empowered to be made, if the void calls are not reckoned as calls by the Act empowered to be made: and that the defendant did not pay the void calls, or any part thereof. Held, on demurrer, that the replication was bad, since it did not shew that the directors had declared the calls void; and, consistently with it, they might have received the greater part of the money called for.

The declaration set out an Act of the Canadian legislature, passed the 23rd May, 1853, and intituled "An Act to incorporate the Port Dalhousie and Thorold Railway Company." By the 9th section of this Act, it was enacted "That no call of money from the shareholders shall exceed ten per cent. on the amount of their shares." The declaration then set out another Act of the Canadian legislature, passed the 16th May, 1856, intituled "An Act to extend the line of the Port Dalhousie and Thorold Railway Company." The declaration then set out another Act of the Canadian legislature, intituled "An Act to increase the capital stock of the Port Dalhousie and Thorold

Railway Company, and to change the name of the Company." By the 5th section of this Act, it was enacted that "The style and name of the Port Dalhousie and Thorold Extension Railway Company shall from and after the passing of this Act be the Welland Railway Company." By section 16 it was thus enacted:—"The directors may from time to time make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall deem necessary: Provided that thirty days' notice at the least be given of such call, and that no call exceed the prescribed amount to be determined therefor in the special Act, nor made at a less interval than two [417] months from the previous call, or a greater amount to be called in, in any one year, than the prescribed amount therefor in the special Act; and every shareholder shall be liable to pay the amount of the call so made in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the Company or the directors." Averments: "That the Board of directors of the said Company, duly appointed and constituted according to the said Acts and consisting of directors duly qualified according to the same Acts, on the 2nd November, 1859, in the Province of Canada, under and according to the said Acts, deeming the call hereinafter mentioned necessary, made a call of money on, amongst other shareholders, the defendant, who then was a shareholder in the said Company, in respect of the amount of capital owned by the said shareholders respectively, including the defendant, being a call of ten per cent. on the amount of their respective shares, and gave thirty days' notice of the said call to the defendant and the said other shareholders respectively, according to the said Acts: that no other call was made within two such months, as in the said Acts mentioned, next before the making of the said call, and that no greater amount was called in, in the year in which the said call was made, than the amount prescribed therefor in the said Acts; and the said directors duly, according to the said Acts, appointed persons, times and places, to and at which respectively the said call was to be paid." The declaration then proceeded to aver that at the time of making the call, the defendant was a shareholder; that the time for payment of the call had elapsed; that all things were done and happened necessary to make the defendant liable to pay the call, and to entitle the plaintiffs to sue him for it. Breach: Non-payment.

Plea (inter alia). That the said directors made more [418] calls for money, and to a greater amount, than were prescribed by the said Acts, and that the said call was a call made in excess of the calls by the said Acts empowered to be made, and not otherwise.

Replication. That the calls in the said plea mentioned respectively, other than the call sued for, were not authorized by the said Canadian Acts or any of them, or otherwise, and were therefore void; and that the call sued for in this action was not a call in excess of the calls by the said Acts empowered to be made, if the said void calls are not reckoned as calls by the said Acts empowered to be made; and the plaintiffs say that the defendant did not pay the said void calls respectively, or any part thereof, nor were the same or any part thereof paid on the shares, or any of them, in respect of which the defendant is sued in this action.

Demurrer and joinder therein.

Lush (C. W. Wood with him), in support of the demurrer. The replication is bad. The plea alleges that the call sued for was in excess of the calls by the Canadian Acts allowed to be made. The replication alleges that the previous calls were not authorized by those Acts, and if they are not reckoned as calls, this call is not in excess, and that the defendant has not paid the previous calls. [Wilde, B. It does not say that the other shareholders have not paid them.] The Company cannot treat the previous calls as void, since, for aught that appears, they may have enforced them against the other shareholders. [Pollock, C. B. The Company cannot object to their calls when the shareholders do not.] It does not appear that the Company abandoned the previous calls. The defendant may have purchased his shares after the previous calls, upon the faith that they had been made and without any knowledge that they were invalid. [Channell, B. It is consistent with the declaration [419] that the defendant may have purchased his shares between the time of the previous calls and the call now sued for.]

Bovill, contra. No presumption of payment arises from the facts that calls were made: if the other shareholders have paid the previous calls, or the Company have done any act to validate them, that should have been stated by way of rejoinder.

The circumstance that the Company have made some invalid calls cannot prevent them from making a valid call; neither is the defendant released from payment of a valid call because some previous invalid calls have been made. The demurrer admits that the calls were in excess, and therefore void. The effect of making an invalid call is that the Company cannot enforce it; and if a shareholder paid it without knowledge of its invalidity, he would be entitled to recover back his money, as paid under a mistake: but if he paid, knowing that the call was invalid, that would be payment of so much money, not as a call, but a voluntary payment. Whether the other shareholders pay invalid calls with or without knowledge of the circumstances, cannot affect the defendant or entitle him to resist a valid call: he has contracted to pay a portion of the capital which the Colonial legislature has authorized to be raised for the purposes of the Company. [Pollock, C. B. Why are the shareholders to judge whether a call is valid or void? The directors may declare it void, but so long as they allow it to remain, it is, as against them, a valid call.] A shareholder who has paid a void call would be entitled to set it off against a valid call, in the same way that money received under an invalid rate is applied in discharge of a valid one. [Martin, B. If the money could not be recovered back, it could not be set off.] The defendant has not paid the previous calls, neither does it appear that the directors have done anything under them. The principle on which the [420] Company would be precluded from enforcing this call is that of estoppel, which does not arise here.

POLLOCK, C. B. We are all of opinion that this is a bad replication. It does not state the matters necessary to give effect to the point which the pleader apparently intended to raise. Without going at length into the subject, it appears to me that the remarks of the Court in the course of the argument are well founded. For myself, I think that as against the Company, so long as a call remains on their proceedings and is not withdrawn or renounced, it is difficult to say that it is not a call. The course which may consistently with the record have been adopted, is not one in accordance with the proper conduct of the affairs of a Company. The directors make a void call, and then they make another call without giving any notice that the former call was void. It would be reasonable that they should get rid of the void call before they made another. That however, though a matter worthy of consideration, is not the ground of my decision. I think that the replication does not state enough to shew that the previous calls were void, and that on that ground it is bad.

MARTIN, B. I also think that the replication is bad. I protest against being supposed to express an opinion that, if a void call is made, the directors have no power to remedy that—my impression is otherwise. I regret that we are troubled with these points, which are mere matter of words; but, dealing with such a subject, it seems to me that this replication is bad. By one of the clauses set out in the declaration, the directors are authorized "from time to time to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall deem necessary: [421] provided that thirty days' notice at the least be given of such call, and that no call exceed the prescribed amount to be determined therefor in the special Act, nor made at a less interval than two months from the previous call." That is a power given to the directors, subject to a proviso. The defendant says, in answer to the declaration, "that the directors made more calls for money and to a greater amount than were prescribed by the said Acts, and that the said call was a call made in excess of the calls by the said Acts empowered to be made, and not otherwise." It would have been better to have pleaded "never indebted," but the pleader has not thought fit to adopt that course, and if the plaintiffs had traversed the allegation that the call was made in excess, the parties might have gone to trial on that issue. Instead of that, the plaintiffs reply matter which, under the old system of pleading, would have been bad as an argumentative traverse of the facts stated in the plea. If a party, instead of making a direct traverse, proceeds to traverse argumentatively and artfully, he must give a complete answer, so that if it were proved he would be entitled to the verdict. This replication is defective, inasmuch as it leaves a material point untouched. It says that the calls in the plea mentioned respectively, other than the call sued for, were not authorized by the said Canadian Acts or any of them, or otherwise, and were therefore void—that would be satisfied by proving that the call was made after twenty-nine instead of thirty days' notice. The replication proceeds, "and that the call sued for in this action was not a call made in excess of the

calls by the said Acts empowered to be made, if the said void calls are not reckoned as calls." The introduction of the word "if" into a pleading is certainly novel, and was unknown before the Common Law Procedure Act, 1852. A pleading should contain either affirmative or negative matter. It seems to [422] me that this replication would be proved by evidence that the call was made within two months of a previous call, or without thirty days' notice. All that the replication goes on to allege is, that the defendant did not pay the void calls, or any of them. For the purpose of enabling the Company to make the call now sued for, it was their duty to direct attention to the previous call, so as to prevent the incongruity of a shareholder paying two calls, one of which was invalid. That is the common sense mode of proceeding, and ought to be adopted by railway Companies, where a call has been made which cannot be enforced and it becomes necessary to make another valid call. My objection to this replication is of a technical nature: it seems to me that it does not contain enough to make a good argumentative traverse. If the plaintiffs had simply traversed the allegation in the plea that the call was made in excess, the real question might have been tried and decided upon that issue.

WILDE, B. I am also of opinion that the defendant is entitled to judgment; and upon this short ground, that the plaintiffs are empowered to call for a certain sum of money within the year, and no more. That is distinctly provided by the clause set out in the declaration. This call having been made, the defendant says, "You cannot make it, because you have already called for more than you are entitled to call for within the year." The plaintiffs answer, "That is very true, but those calls were void." The question then is, whether that is an answer as it stands, or whether the plaintiffs ought not to have shewn in some way that they were not calling for more money than could be lawfully demanded within the year. Now, though the previous calls might be void for want of some formality, the greater part of the money may have been paid, and, if so, [423] the plaintiffs would in fact be calling for more money than they were entitled to call for within the year. My objection to this replication is that it does not negative that state of things. I do not consider the objection to it as merely technical, and for this reason, that if we held the replication a good answer to the plea, and the issue went down to trial, the plaintiffs would succeed by shewing that the previous calls were invalid, although in fact they had received the greater part of the money called for, and would thus be enabled to obtain more money within the year than the statutes allowed them. Therefore it seems to me that this is not a mere formal objection; for the Company, by saying that the calls were void, without saying that they have not taken the benefit of them, would be in a position which the statutes never intended. I think that it is important that the replication should shew in some way that the Company have not had the benefit of the calls.

My brother Channell, who has left the Court, desired me to say that he is of the same opinion.

Judgment for the defendant.

READ, *Appellant v. STOREY, Respondent*. Jan. 12, 1861.—The 3 & 4 Vict. c. 61, s. 13, which imposes a penalty on persons selling beer by retail without a license, applies to persons selling beer at one penny halfpenny the quart.

[S. C. 30 L. J. M. C. 110; 7 Jur. (N. S.) 344; 9 W. R. 418; 3 L. T. 674.]

This was a special case stated by two justices pursuant to the 20 & 21 Vict. c. 43, s. 2.

At a petty session held at the Town Hall of Wincanton, on the 27th of August, 1860, a complaint was preferred by W. Storey, the respondent, a sergeant of police, against Richard Read, the appellant, under the 13th section of the 3 & 4 Vict. c. 61, charging that the appellant did, on the 25th of July, at Wincanton, sell beer by retail, without a [424] license; and the appellant was convicted and ordered to pay a fine of 1s.

At the hearing it was proved by the complainant that, on the 25th of July, he went to the appellant's house and called for a pint of beer, with which he was served, and that he paid three farthings for it; and further that the appellant had not

a license to sell beer, but that he had a board up with the inscription upon it "Table beer sold here."

The appellant did not deny that he sold beer of the denomination mentioned in the statute 42 Geo. 3, c. 38, s. 18, viz., beer at and after the rate of $1\frac{1}{2}$ d. a quart. The magistrates, being of opinion that a license was necessary for the sale of beer at $1\frac{1}{2}$ d. a quart, convicted the appellant.

The question submitted by the magistrates was whether, upon the true construction of the 42 Geo. 3, c. 38, s. 18, 3 & 4 Vict. c. 61, s. 13, 1 Wm. 4, c. 64, and 4 & 5 Wm. 4, c. 85, s. 17, a license was requisite for the sale of beer at a price not exceeding $1\frac{1}{2}$ d. a quart.

Theodore Thring, in support of the conviction.^(a) The 3 & 4 Vict. c. 61, s. 13, which imposes penalties on persons selling beer by retail without a license, applies to persons selling beer at $1\frac{1}{2}$ d. a quart. The argument on the other side is that the 42 Geo. 3, c. 38, s. 18, which prohibited any person from retailing beer at any higher price than $1\frac{1}{2}$ d. the quart, without obtaining a license as a common alehouse keeper, left persons at liberty to retail beer at $1\frac{1}{2}$ d., and that the 3 & 4 Vict. c. 61, applied only to persons to whom the earlier Act related. Until the passing of the 1 Wm. 4, c. 64, no person, except keepers of inns, alehouses and victualling houses, was license, to sell beer. [425] That Act, which is a new enactment not referring to the previous Acts relating to the sale of beer, empowered all householders (except those specially excepted) to take out licenses for the sale of beer, and, by the 7th section, it is enacted that, if any person, not duly licensed to sell beer as the keeper of a common alehouse or victualling house, shall sell any beer by retail without having an excise retail license, he shall forfeit 20l. That applies to all beer. No distinction, such as is to be found in the preceding Acts, is drawn between table beer and other beer, but in section 32 it is enacted that the word "beer" shall be deemed to include beer, ale and porter. The 29th section, which contains the exemption, does not contain any provision permitting unlicensed persons to continue to sell beer at $1\frac{1}{2}$ d. a quart. The 4 & 5 Wm. 4, c. 85, which empowered the Commissioners to grant licenses for the sale of beer not to be consumed on the premises, imposed further restrictions on the sale of beer by retail, by requiring persons applying for licenses to sell beer to be drunk on the premises to deposit, with the Commissioners of excise, certificates of good character. The policy of that Act was to restrict the sale of beer to be consumed on the premises unless under an alehouse license. The 17th section, which imposes the penalty, and the 19th section which defines what "is a selling of beer by retail," apply to the selling of beer of any kind without reference to price. The 3 & 4 Vict. c. 61, by section 1, provides that no one is to have a license unless he is the resident holder of the house in which he applies to be licensed. Section 11 empowers the officers of excise to enter any house licensed for the retail of beer, and to make search for wine and spirits and sweets. Then comes the 13th section, which enacts that if any person, not being duly licensed to sell beer, shall retail any beer, either to be consumed in or upon the premises or off the pre-[426]-mises where sold, without being duly licensed, he shall forfeit 5l. It is submitted that the exemption in the 42 Geo. 3, c. 38, s. 18, is impliedly repealed by the subsequent Acts. The 1 Wm. 4, c. 64, and the subsequent Acts, now regulate the sale of beer by retail by all persons except by innkeepers under excise licenses. The 9 Geo. 4, c. 61, consolidated into one Act the several previous Acts relating to the sale of beer by persons keeping inns, alehouses and victualling houses; and section 17 provides that no excise license for the sale of exciseable liquor by retail shall be granted, except to a person who shall have obtained from the justices a licence under that Act. It is impossible to say that the exemption in the 42 Geo. 3, c. 38, s. 18, is compatible with the language of the later Acts; and, that being so, the earlier enactment must be deemed to be repealed: *The Attorney General v. Newman* (1 Price, 438), *O'Flaherty v. McDowell* (6 H. L. C. 142). The 12th section of the 3 & 4 Vict. c. 61, must be deemed to be surplusage. But it is possible to suggest a reason for its enactment. Prior to the passing of the 3 & 4 Vict. c. 61, there were a number of houses at which beer was sold at $1\frac{1}{2}$ d. a quart, and an order of the board of excise had given the owners a virtual exemption from penalties, because, prior to the 3 & 4

(a) In Michaelmas Term, Nov. 21. Before Pollock, C. B., Bramwell, B., Channell, B., and Wilde, B.

Vict. c. 61, the officers of excise were the only persons who could initiate prosecutions for such offences.

Scotland, for the appellant. From the 5 & 6 Ed. 6 till the passing of the 42 Geo. 3, c. 38, no person not being the keeper of an inn, alehouse or victualling house, was entitled to sell beer by retail, except during the time of fairs, in booths at such fairs. Alehouse keepers were required, by the 5 & 6 Ed. 6, c. 25, to enter into recognizances against the using of unlawful games, and for the maintenance of good order in their houses. The 42 Geo. 3, c. 38, introduced an exception. The Act was passed mainly for the purpose of regulating the duties of brewers. Sections 9, 10 and 11 make provisions with respect to the casks in which table beer is to be kept, and for marking such casks. Section 17 provides that persons selling table beer in a larger quantity than one gallon at a time shall make an entry at the office of excise of the place for keeping, storing or selling such beer. The 18th section enacts that no person, not being a common brewer, shall be allowed to retail beer at any greater or higher price than 1½d. the quart, without first entering into a recognizance and obtaining a license as a common alehouse keeper. That gave a permission to persons to sell beer at 1½d. the quart or a less price. [Wilde, B. There was in existence a system that everybody who sold beer should have an alehouse license, which is quite distinct from the excise license under the 48 Geo. 3, c. 143.(a) The 18th section of the 42 Geo. 3, c. 38, seems to have imposed an additional penalty on any person selling strong beer without an alehouse license.] The statute is for the protection of the revenue; and the 18th section is that which would point out to the Commissioners the persons to whom licenses were to be granted. The 9 Geo. 4, c. 61, is simply a police Act. Down to the passing of the 1 Wm. 4, c. 64, every person selling beer required an alehouse license. If, at the time of the passing of the 1 Wm. 4, c. 64, persons might sell this small beer, the two Acts may well stand together. It would appear from the preamble that the object of the 1 Wm. 4, c. 64, was to extend to other persons the privileges previously possessed by keepers of inns, alehouses and victualling houses. It does not appear that it was intended to take away any existing right to sell beer, but [428] simply to throw open the beer trade. It was expected that the 1 Wm. 4, c. 64, would have received the Royal assent before the 1 Wm. 4, c. 51; and the last mentioned Act, by section 22, enacts that nothing in the 1 Wm. 4, c. 64, shall affect the licenses required by law to be taken out by brewers of and dealers in beer and persons keeping common inns, alehouses, &c. [Wilde, B. The meaning is obvious, viz., that the statute under which beerhouses were created was not to interfere with the licenses to be taken out by common brewers or persons keeping inns.] The 12th section of the 3 & 4 Vict. c. 61, seems to shew that the legislature recognized the existence of the privilege of selling beer at 1½d. the quart, without a license. The 11th section gives a power to enter licensed houses, and if no beer could be sold except by persons holding licenses, the 12th section would be wholly unnecessary. The words "beer, ale and porter," in the interpretation clause, s. 32, of the 1 Wm. 4, c. 64, do not necessarily include "table beer."

Thring, in reply. The 5 & 6 Ed. 6, c. 25, and the 26 Geo. 2, c. 31, regulated the sale of beer by retail at the time of passing of the 42 Geo. 3, c. 38. The effect of the 18th section is merely to impose an additional penalty on the sale of strong beer without an alehouse license, and does not create any exemption. The beer retailed at 1½d. the quart is described as "beer" in the 18th section of the 42 Geo. 3, c. 38, and not as "table beer," though that expression is found in the preceding section.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. In this case which was an appeal from the decision of a magistrate who had convicted the defendant [429] for selling beer without a license to sell, although the beer was at the price of 1½d. a quart, we are of opinion that the conviction should be affirmed. The case is clearly within the 13th section of the 3 & 4 Vict. c. 61, that is to say, the defendant has sold beer without a license for so doing. It is therefore for him to shew some exception from, or qualification of, the enactments in that section which will exempt him from its operation.

(a) Compare 44 Geo. 3, c. 98, Sched. A.

Now he relies on the preceding section which speaks of houses kept for the sale of beer at a penny half-penny or less the quart, and of the seizure of beer they are not entitled to sell. This, it is said, assumes there is some beer they are not entitled to sell, and as the previous section (11) applies to licensed beerhouses, section 12 must be taken to apply to unlicensed beerhouses, and so it appears such persons may sell some beer, which can only mean beer of the price at which the defendant sold. The section will not bear a critical examination, but probably is intended to apply to houses, not licensed at all, but kept for the sale of beer at the rate of $1\frac{1}{2}$ d. or less a quart, and no other, and to authorize the seizure of some quality of beer.

But, assuming that to be the case, we think it is not enough to control the express words of the next clause, which, in terms, comprehends all beer. There is no enactment like that in section 12 in the original statute of 1 W. 4, c. 64, and it is clear therefore that, before the 3 & 4 Vict. c. 61, persons selling beer at $1\frac{1}{2}$ d. or less a quart, and not licensed, would have been subject to a penalty under the 1 Wm. 4, c. 64, and the succeeding Sale of Beer Acts. The assumption therefore, in sect. 12 of the 3 & 4 Vict. c. 61, that there is beer which a person may be entitled to sell, though not licensed (if there is such an assumption), is erroneous, and the section certainly cannot be treated as an enactment that [430] such beer may be sold. Section 12 was probably introduced in relation to the then state of things, viz., that there were places not licensed at which beer was sold at the rate of $1\frac{1}{2}$ d. or less a quart, and it was as necessary to give a right to excise officers to enter and search there, as in licensed houses.

It was argued that the 42 Geo. 3, c. 38, s. 18, which prohibits every person, not being a common brewer nor licensed alehouse keeper, from selling beer "at any higher rate than $1\frac{1}{2}$ d. a quart," in effect legalized the sale of the cheap beer without any license. It is to be observed that all that that section does is, not to permit such sale without a license, but to except it from the additional penalty there mentioned. Even if legalized by the 42 Geo. 3, c. 38, it really may have been intended by the 1 Wm. 4, c. 64, and subsequent Acts, including the 3 & 4 Vict. c. 61, the Act in question, to apply their enactments to all beer, strong and weak, there being in their passing less need to facilitate the sale of cheap beer; and possibly it being thought right that the new class of beer sellers, paying a license, should be protected from the competition of the table beer sellers: but we need not speculate on the objects of the legislature. The enactment prohibiting the sale of beer without a license is plain, and no exception ought to be implied to it without strong reason, and we see none. We are therefore of opinion that the conviction was right.

Conviction affirmed.

[431] *JAURALDE v. PARKER*. Jan. 16, 1861.—A judgment creditor, who has taken his debtor in execution under a ca. sa., cannot attach his debts under the garnishment clauses of the Common Law Procedure Act, 1854.

[S. C. 30 L. J. Ex. 237; 9 W. R. 346; 3 L. T. 751.]

Declaration on a writ issued against a garnishee under the 64th section of the Common Law Procedure Act, 1854. The declaration set out the writ as follows:—Victoria, &c., to Benjamin Parker, greeting. We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you appear in our Court of Exchequer of Pleas, to shew cause why Nicassio Jauralde should not have execution against you for the sum of 200l., being the amount of a debt due from you to Lodovick Oltman, towards satisfying the sum of 1008l. 17s. 6d., which, on the 30th day of December, 1859, the said N. Jauralde, by a judgment of our Court of Exchequer of Pleas, recovered against the said Lodovick Oltman, and for costs of suit in this behalf; and take notice that in default of your so doing the said N. Jauralde may proceed to execution. Witness, &c. The declaration then set out the indorsements on the writ, and after stating that Benjamin Parker had appeared to the said suit, and that the debt due from him to Lodovick Oltman was for goods sold and delivered, &c., concluded:—And the said Nicassio Jauralde prays that execution may be adjudged to him accordingly for the said 200l., and for costs of suit in this behalf.

Plea. That before the issuing of the said writ the plaintiff sued out of the said Court upon the said judgment a writ of execution, called a *capias ad satisfaciendum*, to take the body of the defendant in the said action to satisfy the plaintiff the sum recovered by the said judgment and interest; and that the plaintiff has, before the issuing of the said writ of attachment, caused the defendant to be taken in [432] execution to satisfy him the sum recovered by the said judgment and interest; and that the defendant has since been, and still is, in execution at the suit of the plaintiff to satisfy him the sum recovered by the said judgment and interest.

Demurrer, and joinder therein.

Day, in support of the demurrer. The detention of a debtor under a writ of *ca. sa.* does not prevent the creditor from resorting to any other remedy for the recovery of his debt. It is true that, in *Beard v. M'Carthy* (9 Dowl. P. C. 136), Littledale, J., said:—"That taking the defendant in execution is the same as if the defendant had paid the debt and costs; and, consequently, that the defendant is not bound to allow his costs to be set off against the debt and costs recovered by the judgment." That position however was expressly overruled by the Court of Common Pleas in *Thompson v. Parish* (5 C. B. N. S. 685) which decided that interlocutory costs recovered by a defendant in the same suit might be set off against the judgment debt for which he was in execution. The ground of that decision was that the taking a debtor in execution does not extinguish the debt. *Taylor v. Waters* (5 M. & Sel. 103) is an authority to the same effect. [Pollock, C. B. Suppose a creditor, who had a lien on the goods of his debtor, took him in execution, would that destroy the lien?] It is submitted that it would not. By the 126th section of the Common Law Procedure Act, 1852, a written order under the hand of the attorney by whom a *ca. sa.* shall have been issued shall justify the sheriff or gaoler in discharging the party in custody under the writ, "but such discharge shall not be a satisfaction of the debt unless made by the authority of the creditor." If the mere taking a debtor in execution [433] were a satisfaction of the debt; that provision would not have been made. [Pollock, C. B. If a creditor takes the body of his debtor under a *ca. sa.*, he cannot afterwards seize the debtor's goods under a *fi. fa.*] It is conceded that at common law, the taking a judgment debtor in execution prevented the creditor from proceeding against his property or enforcing any other remedy: *Cohen v. Cunningham* (8 T. R. 123), *Burnoby's case* (1 Str. 653). But the 61st section of the Common Law Procedure Act, 1854, enables a Judge, upon the application of a judgment creditor, upon affidavit that the judgment is still unsatisfied, to order that all debts owing or accruing from any other person to the judgment debtor shall be attached to answer the judgment debt. The word "unsatisfied" must receive its ordinary legal acceptance, and therefore, unless this debt is satisfied, the plaintiff is entitled to proceed under that enactment. [Martin, B. In *Morgan v. Cubitt* (3 Exch. 612), Parke, B., said, "Execution by a *ca. sa.* is so far a satisfaction of the debt, that the creditor cannot avail himself of any other remedy, and if he allow the creditor to escape, the debt is satisfied."] That shews that the detention is not a satisfaction. [Wilde, B. The construction contended for would be at variance with the common law, whilst the Act might be construed so as to be consistent with it.] The object of the statute was to give creditors an additional remedy for the recovery of a judgment debt.

Gibbons, for the defendant, was not called upon to argue.

POLLOCK, C. B. The case appears to me very plain. It is conceded that if a judgment creditor takes his debtor in execution, under a *ca. sa.*, he cannot afterwards have execution against the debtor's property, and I am of opinion that [434] the 61st section of the Common Law Procedure Act, 1854, merely intended to place debts in the same position as other property which might be taken in execution. It would be monstrous to hold, without a single expression in the Act to that effect, that a creditor may resort to a debt to satisfy his judgment when he cannot resort to a chattel. I therefore think that the plea is good, and that the defendant is entitled to judgment.

MARTIN, B. I also think that the plea is good. Similar cases have come before the Judges at Chambers, and they have invariably expressed the same opinion.

WILDE, B., concurred.

Judgment for the defendant.

HAZARD v. MARE. Jan. 12, 1861.—To an action of debt the defendant pleaded, that after the accruing of the debt he became bankrupt, and that, after the bankruptcy, he and P. R., in pursuance of the 230th section of the Bankrupt Law Consolidation Act, 1849, made an offer of composition, which was accepted by nine-tenths in number and value of the creditors, the offer being to pay 4s. in the pound in full satisfaction of his debts, such composition to be paid to all the creditors in cash within fourteen days after the second sitting, to be appointed under the 280th section: that the Court ordered the adjudication to be annulled: that P. R. joined in making the offer of composition, in consideration of all the effects of the defendant being assigned to him by the defendant: that the defendant and P. R. paid the composition to the other creditors, and that the defendant had always been ready and willing to pay, and brought into Court the amount of the composition on the plaintiff's debt ready to be paid to him. Held, that the plea was bad for not shewing a payment or tender within the fourteen days.

[S. C. 30 L. J. Ex. 97; 9 W. R. 252; 3 L. T. 743.]

Debt for goods sold and delivered.

Plea. That after the accruing of the causes of action, and after the coming into force of the Bankrupt Law Consolidation Act, 1849, &c., the defendant was a trader, &c., and then, and for six months next preceding the time of filing the petition, carried on business as such trader within the jurisdiction of her Majesty's Court of Bankruptcy, in [435] the district of and acting in London, and being unable to meet his engagements with his creditors, and being desirous of laying the state of his affairs before them, under the superintendence and control of the Court, and of submitting himself to the jurisdiction thereof, and then having assets ready to be produced to the Court, to the value of 200l. and upwards, duly, and according to the provisions of the same Act, presented his petition to her Majesty's Court of Bankruptcy for the district aforesaid, setting forth the true cause of such inability as aforesaid, praying that his person and property might be protected from all process; and in order that such proposal as he might be able to make, or such modification thereof as by three-fifths in number and value of his creditors might be determined, might be carried into effect under the superintendence of the said Court, according to the provisions of the said last mentioned Act, such petition being in the form mentioned in Schedule A., &c. (The plea then stated, that the petition was verified by affidavit: that the petition, with the affidavit annexed, was duly filed: that all things happened to give jurisdiction to the Court to act in the matter of the petition: that a proposal by the defendant for the future payment of his debts was duly made: that such proposal was not assented to at the first private sitting or any adjournment thereof: that all things happened necessary to authorize and empower the Court to adjudge the defendant a bankrupt: that the Court, after such private sitting, adjudged the defendant a bankrupt and adjourned the proceedings into the public Court, &c.: that assignees were appointed and notices of adjudication given and published: that meetings were appointed for the purposes of the defendant surrendering: that the defendant surrendered himself and submitted himself to be examined touching the disclosure and discovery of his debts. The plea then proceeded as follows.) In the last of the said meetings, on the [436] day and at the place appointed in that behalf, the defendant finished his examination on oath before the said Court, and upon such examination made a full disclosure and discovery of his estate and effects; that all meetings, notices, and things were held, given, done, and executed, necessary to entitle the defendant to call and hold the meetings hereinafter mentioned; that after he had so passed his last examination, within the true intent and meaning of the statute, the defendant called a meeting of his creditors, according to the provisions of the statute, whereof, and of the purport whereof, twenty-one days' notice was duly given in the *London Gazette*, according to the true intent, &c.; that such meeting was accordingly held at the time and place and in all respects according to the said last mentioned notice, and at the last mentioned meeting the defendant and one P. R. then made an offer [in writing and signed by the defendant and the said P. R.(a)] of composition to all the defendant's creditors within the true intent and meaning of the statute, and then offered and agreed to pay

(a) These words were inserted when the plea was amended.

to all such of the creditors of the defendant as had received a dividend of 1s. 6d. in the pound, already declared under the said bankruptcy, a composition at the rate of 2s. 6d. in the pound on the debts respectively due to them from the defendant, in full satisfaction and discharge of such debts, and to pay and satisfy all such of the creditors of the defendant as had not yet (b) received the amount of 1s. 6d. in the pound then already declared, a composition at the rate of 4s. in the pound on the debts respectively due to them from the defendant in full satisfaction and discharge of such debts, such composition to be paid to all the said creditors in cash within fourteen days after the second sitting to be appointed under the 230th section of the said Act, if [437] nine-tenths in number and value of the creditors present at such sitting should agree to accept such offer, and nine-tenths in number and value of the creditors, within the true intent and meaning of the statute, assembled at such last mentioned meeting, which was duly held in all respects according to the said Act, agreed to accept the same, &c. : that all things then occurred and happened and existed necessary to render the same a valid agreement within the true intent, &c. ; that thereupon another meeting, for the purpose of deciding upon such offer, was appointed to be held according to the provisions of the said statute, as by the said statute is specified and required ; that notice thereof was duly given ; that the meeting was afterwards accordingly duly held at the time and place in all respects according to the said notice and the said statute ; that at such second and last meeting nine-tenths in number and value of the creditors of the defendant, &c., then being present at, &c., did also agree to accept such offer within the true intent, &c. : that thereupon the said acceptance of the said offer having been duly testified by the last mentioned creditors in writing, &c., and all sums directed by the Court to be paid having been paid and discharged, the Court, upon the application of the defendant, then duly made, by its order dated the 24th of November, 1857, and sealed with the seal of the Court, after reciting that such application, as last aforesaid, had that day been made to the Court by the bankrupt, it was, upon reading the order of bankruptcy whereby adjudication was made, and also the certificate made in pursuance of the rules and order of the Court relating to composition after bankruptcy, and also the order ordering composition to be paid, ordered that the petition of the bankrupt should be dismissed, and that the adjudication of bankruptcy against the defendant should be and it was thereby annulled. Averments: that all things occur-[438]-red and existed necessary to render the said order valid and effectual, *and the aforesaid agreement and acceptance of the said offer binding and obligatory upon the plaintiff*; (a) [and the same was so made and became so valid and effectual long before the commencement of this suit: that P. R. joined in making the said offer of composition in consideration of the defendant having agreed to convey to the said P. R. all the assets of the defendant's estate then in the hands of or belonging to the assignees under the bankruptcy, or which might become vested in the defendant upon a super-

(b) Struck out when the plea was amended.

(a) Struck out, and the words below in brackets substituted, when the plea was amended.

To the plea as it originally stood there was a replication, which, after setting out the offer of composition, &c., alleged that P. R. and the defendant did not, nor did any or either of them, within fourteen days after the said second sitting in the said offer mentioned, which period had elapsed long before the commencement of this suit, or at any time whatsoever, pay or tender to the plaintiff, or to any one on his behalf, the amount of the composition due and payable to the plaintiff as a creditor, according to the force, form and effect of the provisions contained in the Bankrupt Law Consolidation Act, 1848.

Demurrer and joinder.

This demurrer was argued in Easter Term (April 25) 1860, by Hayes, Serjt., for the defendant, and Macnamara for the plaintiff, when, in addition to the cases cited on the second argument, *Taylor v. Pearce*, 2 H. & N. 36, and *Tindall v. Hibbard*, 2 C. B. N. S. 199, were cited. The Court asked if the defendant would bring the amount of the composition into Court; and it was ultimately arranged between the counsel that all proceedings should be stayed on payment of the amount of the composition, with interest and costs, within a week. The money not having been paid at the time stipulated, the Court ordered that the defendant should be at liberty to amend the plea on paying into Court the amount of the composition, &c.

seeds of the bankruptcy being issued, of which the said creditors at such meetings had notice, and which conveyance was accordingly duly made and executed by the defendant to the said P. R. after the said proposal had been accepted by the said creditors: that the plaintiff, before the making and presenting of the petition in this plea first mentioned, and making of the [439] said offer and of the said agreement, was a creditor of the defendant, within the true intent of the statute, for 270l.; that by means of the premises and by force of the statute, the said offer so proposed, and the said agreement so made as aforesaid, and the last mentioned order of the Court, became and were and are binding and obligatory on the said creditors of the defendant and upon the plaintiff, as such creditor, for the sum of 270l.: that the defendant and P. R. duly paid the said composition to the other creditors of the defendant, and have always been ready and willing to pay to the plaintiff the said composition on the said sum of 270l. And the defendant now brings into Court the sum of 61l. 2s. ready to be paid to the plaintiff, and says that the said sum of 61l. 2s. is sufficient to satisfy the plaintiff the said composition and all causes of action in respect thereof.]

Demurrer and joinder.

Macnamara (with whom was Lush) argued in support of the demurrer.(a) The plea is bad, because it does not state that the amount of the composition was paid or tendered to the plaintiff before action brought. It is not enough to allege that the defendant and P. R. were always ready and willing to pay the composition. The plea states an accord without satisfaction. In order to make the plea good, it should have averred that the money was paid or tendered to the plaintiff at the time provided for in the offer of composition, viz. within fourteen days after the second sitting: *Evans v. Powis* (1 Exch. 601), *Oughton v. Trotter* (2 N. & M. 71). In the notes to *Cumber v. Mane*, 1 Smith Lead. Cas. 252 (4th edition), referring to cases in which a debtor has induced a number of his creditors to accept a composition amounting to less than their [440] entire demand, it is said:—"Nor will the debtor be entitled to the benefit of it, if he neglect to perform accurately what is to be done on his part. Thus he must tender the composition money on the appointed day, for, as Lord Ellenborough said in *Cranley v. Hillary* (2 M. & Sel. 120), the party to be discharged is bound to do the act which is to discharge him." It is not alleged that there was any agreement to accept the substituted liability of P. R. in satisfaction of the defendant's debt; and the 230th section of the Bankrupt Law Consolidation Act, 1849, does not provide for satisfaction by anything short of payment of the composition in cash. Here the discharge was conditional on payment or tender of the composition within fourteen days after the second sitting. The plaintiff was not bound to accept it except within that time, nor could the subsequent payment operate as satisfaction of his debt: *Walker v. Seaborne* (5 B. & C. 378), *Shipton v. Casson* (1 Taunt. 526), *Drake v. Mitchell* (3 East, 251).

Hayes, Serjt. (with whom was Griffiths), for the defendant. An agreement for a composition after bankruptcy operates as the substitution of a new contract for the original obligation of the debtor. It is true that in Comyns's Digest, tit. Accord B., it is laid down that an accord must be executed, "it is not good if he shews only a tender and refusal." An accord is considered an agreement which, as between debtor and creditor, is not intended to operate unless it is actually performed. Here, however, the body of creditors agree, the forbearance of each being a consideration for the forbearance of the others, and a third person becomes security for the payment of the composition. The 133rd section of the 6 Geo. 4, c. 16, did not interfere with the rights of persons not parties to the agreement: [441] *Tuck v. Tooke* (9 B. & C. 437); and a creditor who held aloof was not bound. That was a defect which the 230th section was intended to remedy. It enacts that every creditor "shall be bound to accept of such composition so agreed to." A strict legal tender of the composition is not necessary. The debtor may not be able to find or make a tender to the creditor. Here it was part of the bargain that all the defendant's effects should be given up to P. R., which is stated to have been done with the knowledge of the creditors, and the bankruptcy was annulled. Therefore, neither the defendant nor the other creditors can be remitted to the position in which they previously stood. [Bramwell, B. The adjudication is to be annulled "upon payment of such sum as the Court shall direct."]

(a) In Michaelmas Term, Nov. 12. Before Pollock, C. B., Bramwell, B., Channell, B., and Wilde, B.

That does not refer to the payment of the composition, but of the expenses incurred under the petition and adjudication. In *Cork v. Saunders* (1 B. & Ald. 46), A., being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the then next Michaelmas; and it was provided that they would enter into an agreement to release the defendant from his debts on receiving such a composition as the produce of his effects would admit of being paid at that time. The defendant executed an assignment of his effects. At the next Michaelmas several of the creditors who had signed this instrument agreed that the business should be carried on by the trustees for a further time: it was held that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement. The Court relied on the fact that the debtor could not be replaced in the same position [442] as before the assignment. [Bramwell, B. There the creditor might have compelled the trustees to divide the proceeds; but can it be shewn that this agreement could be enforced by a creditor who did not assent to it?] It is a binding statutory agreement. [Wilde, B. What is meant by the expression "bound to accept of such composition"?] It means, shall be accepted in lieu of the plaintiff's original right. *Cranley v. Hilliary* (2 M. & Sel. 120) and *Cooper v. Phillips* (1 C. M. & R. 649) only shew that the plea is no answer unless the defendant pays the amount of the composition into Court. The plaintiff's original right and a right to the composition cannot co-exist. In *Norman v. Thompson* (4 Exch. 755), a plea of composition stated the defendant's readiness and willingness to pay the composition, and concluded by paying the amount into Court without any averment of tender before action, and it was held that the plea was good. *Cockshott v. Bennett* (2 T. R. 763), *Steinman v. Magnus* (11 East, 390) and *Sibree v. Tripp* (15 M. & W. 23) were also referred to.

Macnamara, in reply. The expression "bound to accept such composition," in the 230th section, may mean bound to accept it if the conditions are performed. Here neither the plaintiff nor even the creditors who accepted the offer were bound to accept the compensation unless tendered within the fourteen days. If this were otherwise a creditor might be bound to accept it even after the lapse of many years. The defendant's property was not given up to his creditors, but only assigned to indemnify P. R. his surety; and the plaintiff was prejudiced by being deprived of the opportunity of having the defendant's property distributed under his bankruptcy. *Bradley v. Gregory* (2 Camp. 383) and Litt. [443] ss. 342, 343, shew that the amount of the composition should have been tendered.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. We think the plaintiff is entitled to judgment. The words at the end of the 230th section of the Bankrupt Law Consolidation Act, 1849, "and every creditor of such bankrupt shall be bound to accept of such composition so agreed to," in our opinion, are only important to bind the non-assenting creditors, but they bind them as much, neither more nor less than the assenting creditors. The question then is, what is the position of the assenting creditors? And, to determine that, the words cited may be left out of consideration.

Now, it is to be observed that the only consequence the statute attaches to the agreement to accept a composition (beside the binding of non-assenting creditors) is, that the Court shall annul the adjudication and supersede or dismiss the fiat or petition. The effect of the agreement, as a defence or answer to the original claim, is not expressed, but left as a common law consequence. The statute may be read therefore as if it had been, "if all the creditors agree to accept a composition, the adjudication shall be annulled and the petition dismissed." But if this had been a mere voluntary agreement by all creditors, it is clear that payment or tender, or attempt to pay or tender, would have been necessary to make a defence to the original claim. The agreement set forth in the plea is distinct, that the sum agreed to be paid, and not the agreement to pay it, was to be taken in satisfaction of the original debt. Then *Evans v. Powis* (1 Exch. 601) is in point against the defendant.

[444] It is said this leaves the debtor at the mercy of a recusant creditor, whose abode is not known and who avoids a tender. Even if so, we think we ought not to construe the act of parliament otherwise than we do. But the objection is imaginary; practically such difficulties will not occur. Debtors generally know where

their creditors live; and we incline to think that a formal tender might not be required if a reasonable effort to pay were made; or at all events the composition might be made payable within a time after notice or demand, or some other term might be introduced to protect the debtor. But mischief may be shewn to exist to the creditors if the defendant's argument be well founded. Suppose the creditor does not know of the bankruptcy. Suppose he does not know of the composition and brings his action; and suppose further (as may be the case), that the debtor is no party to the offer to compromise but only his "friend," might he not reasonably complain that he brought a fruitless action owing to his debtor giving him no notice. We say a fruitless action because, if the new agreement is a discharge of the original claim, the defendant may set it up without paying money into Court. Or suppose the debt is contested by the debtor or the "friend" who offered the compromise, what is the creditor to sue for? Or suppose the parties will not or cannot pay the composition, is the plaintiff to have judgment for the amount of the composition only? Without, therefore, saying that there is no objection to the plaintiff's construction or that the defendant's is open to more, we think that there are at least difficulties in each, and certainly not enough in the plaintiff's to warrant us in adding a term to the statute, as we think the defendant's argument does.

Judgment for the plaintiff.

[445] SARAH RILEY, Administratrix of John Riley v. JOSEPH BAXENDALE AND OTHERS. Jan. 15, 1861.—A declaration, by the administratrix of J. R., alleged that J. R. was the servant of the defendants, on the terms that the defendants should take due and ordinary care not to expose the said J. R. to extraordinary danger and risk in the course of his said employment; yet the defendants did not take due and ordinary care not to expose, &c., and so carelessly conducted themselves that J. R. was, while employed as such servant, exposed to extraordinary danger and risk in the course of his employment, and was, through the carelessness and wrongful conduct of the defendants, and by being exposed to extraordinary danger and risk as aforesaid, struck by a railway truck and killed. Held, that no such contract could be implied from an ordinary contract of service.

[S. C. 30 L. J. Ex. 87; 9 W. R. 347.]

Declaration. Sarah Riley, administratrix &c. of John Riley, sues Joseph Baxendale and J. H. Baxendale, for that, in the lifetime of the said John Riley and before and at the time of the committing of the grievances, &c., John Riley had become and then was the servant of the defendants, to wit, a porter, on the terms that the defendants should take due and ordinary care not to expose the said John Riley to extraordinary danger and risk in the course of his said employment; yet the defendants did not take due or ordinary care not to expose the said J. Riley to extraordinary danger and risk in the course of his said employment; and so carelessly, negligently and improperly conducted themselves in that behalf, that the said John Riley was, whilst employed as such servant, exposed to extraordinary danger and risk in the course of his said employment; and was, by and through the mere carelessness, negligence, improper and wrongful conduct of the defendants in that behalf, and by being exposed by them to extraordinary danger and risk as aforesaid, struck by a railway truck and killed; whereby the plaintiff, his widow, lost his society, assistance and support, and was put to and incurred expense by reason of his death, &c.

Pleas. First: Not guilty. Secondly: That the said John Riley was not at the time of the alleged grievances a servant of the defendants on the terms in the declaration mentioned.

[446] At the trial, before Pollock, C. B., at the London Sittings after Michaelmas Term, it appeared, from the opening statement of the plaintiff's counsel, that the deceased John Riley was a porter in the service of the defendants who are carriers, and was employed at the defendants' place of business at Haydon Square, adjoining the terminus of the Blackwall Railway. The trucks, as they arrive, are let down from the railway into the defendants' warehouse by an hydraulic apparatus. For the purpose of unloading or shunting the trucks they are placed on a turntable. When the turntable was originally placed in the warehouse there was ample room to work at it; but afterwards Lancashire and Yorkshire trucks were employed which were larger and

could not be safely turned on the table unless by a careful person. On the 12th of March, 1860, one of these trucks had been let down and the deceased was attempting to turn it, when he was struck by it and crushed between the buffer and the wall. It was suggested that it was negligence in the defendants not to have provided safe tackle and competent servants. The learned Judge intimated that in his opinion the facts stated, if proved, would not shew any liability on the part of the defendants; and the plaintiff was nonsuited.

Montagu Chambers now moved to set aside the nonsuit and for a new trial. The defective arrangement of the turntable is evidence of negligence for which the defendants are liable: *Vose v. The Lancashire and Yorkshire Railway Company* (2 H. & N. 728), *Tarrant v. Webb* (18 C. B. 797). [Martin, B. The hiring was simply an ordinary hiring. Whether the defendants are liable or not, there is no such contract as that declared on.] In *Wiggett v. Fox* (11 Exch. 832, 838), it is said that "the servant undertakes, as between him and his master, to run [447] all ordinary risks of the service." That shews that there is an implied contract between master and servant as to the risks of the service. If the servant refused to incur or go on with such risk, an action would lie against him founded upon the contract. In *Roberts v. Smith* (2 H. & N. 213) the declaration was similar to that in the present case, and no objection was taken to it. At most the objection is only a formal one. (He also referred to *Hutchinson v. The York, Newcastle and Berwick Railway Company* (5 Exch. 343), *Brydon v. Stewart* (2 Macqueen, 30) and *The Bartonhill Company v. Reid* (3 Macqueen, 266).)

MARTIN, B. I am of opinion that there ought to be no rule, on the ground that there is no such contract as that set out in the declaration. There has been a series of cases in which the duty of the master has been improperly declared upon as a contract. This imposes a difficulty on the defendant by making it impossible for him to demur, and all that he can do is to deny the contract. I am of opinion that on the hiring of a servant no such contract as this is to be implied; there is a mere contract of service. No such contract as that stated in the declaration really existed, and the liability of a master for injury to his servant in the course of his employment is one of a different character.

WILDE, B. I am of the same opinion. In the present case there was not, as a matter of fact, any such contract as that alleged. But it is said that such a contract must be implied as matter of law. But a contract to be implied can only be one which arises out of some duty so generally understood that it leads to the implication of a contract. I should be slow to decide that a new contract of this sort is to be implied. It does not follow that wherever a duty [448] is cast upon a person the law will imply a contract on his part to perform it. That is sufficient for the decision of this case.

POLLOCK, C. B. I agree with the rest of the Court that there should be no rule. One of the points which I decided was, that there was no such contract as that declared upon. Generally speaking, a mere duty cannot be turned into a contract, and great inconvenience would result if we were to permit it to be declared on as such. If the obligation had been alleged as a duty, the defendant might have demurred. But when it is alleged as a contract the defendant cannot demur, because it is possible that there may be such a contract in point of fact. If I had been applied to at the trial for leave to amend, I should have given no encouragement to the application. I think that the doctrine established by *Priestly v. Fowler* (3 M. & W. 1) ought not to be trenchanted upon. Servants are often far better judges than their masters of the dangers incident to their employment, and whether their fellow servants are trustworthy persons.

Rule discharged.

THOMAS v. EVERARD. Jan. 28, 1861.—A deed of separation between husband and wife contained a covenant by the husband that he would not molest or disturb his wife in her person or manner of living, nor institute any suit to compel her to cohabit with him, &c., and a covenant by E. that the wife should not at any time thereafter "molest or disturb the husband," or require by any means whatsoever, either by Ecclesiastical censure or otherwise, or in any other manner endeavour to compel the plaintiff to cohabit with her, or to enforce any restitution of conjugal rights, &c. Held, that a suit by the wife in the Divorce Court for a judicial

separation was not any breach of the covenant not to "molest or disturb" the husband.

[S. C. 30 L. J. Ex. 214. Applied, *Hunt v. Hunt*, [1897] 2 Q. B. 549.]

The declaration stated that, by an indenture, dated, &c., and made between the plaintiff of the first part, Ann the wife of the plaintiff of the second part, and H. Everard and the defendant of the third part; reciting as therein is [449] recited, and that a marriage had been some time since duly solemnized between the parties thereto of the first and second parts, &c. (The indenture then recited that there were issue of that marriage six children under the age of twenty-one years; that a post nuptial settlement had been executed, whereby certain property of Ann Thomas was secured for her separate use for life, and after her death for the use of her children, but of which property the plaintiff was wrongfully possessed: that the plaintiff had left his wife and children and was living in Ireland: that proceedings were pending against the plaintiff, in the Court of Chancery in Ireland, for compelling the restitution and resettlement of the property: that proceedings had been threatened against the plaintiff in the Ecclesiastical Court for a divorce between him and his wife, and alimony for herself and children.) And further reciting that, in order to put an end to the suit or proceeding so pending as aforesaid, and also to prevent further litigation and expense, certain articles of agreement had been made and entered into by and between the several parties thereto, and the aforesaid persons, on the 11th day of November then last, whereby (amongst other things) terms had been settled and agreed upon for the refunding or securing the aforesaid trust monies and property, and making further provision for the future maintenance and benefit of the said Ann Thomas and her aforesaid children; and whereby also it had been arranged and agreed, on the requirement of the said Ann Thomas, that such deed of separation, with such additional provision for herself and children, should be made and executed between and by her and her aforesaid husband, as are hereinbefore respectively contained and set forth: It was witnessed that for effectuating the said last mentioned requisition and agreement, and in consideration of the covenants and agree-[450]-ments therein and hereinafter contained on the part of the said defendant and H. Everard respectively, and also in consideration of the sum of 5s. &c., the plaintiff, for himself, his heirs, executors, &c., did covenant, &c., with the defendant and H. Everard, their executors, &c., by the said indenture in manner following, that is to say, that she the said Ann Thomas might, from time to time and at all times thereafter, live separate and apart from him the plaintiff as if she was sole and unmarried; and that she should be free from the power, command, restraint, control, authority and government of him the plaintiff, and should and might live and reside at such place or places and in such manner as to her should from time to time seem meet; and that he the plaintiff should not nor would molest or disturb the said Ann Thomas in her person or in her manner of living; nor at any time or times thereafter by any means, either by Ecclesiastical censures, or by taking citation or process, or by commencing or instituting any suit whatsoever, or otherwise howsoever, endeavour to compel her the said Ann Thomas to cohabit or live with him the plaintiff, or to enforce any restitution of conjugal rights, nor should nor would for that purpose, or otherwise, use any force, violence or restraint to the person of the said Ann Thomas, or sue or cause to be sued any person or persons whomsoever for receiving or entertaining her; but that she the said Ann Thomas might in all things live as if she were sole and unmarried, without the restraint or interference of him the plaintiff, or by any person or persons by or through his means, consent or procurement. And by the same indenture it was and is further witnessed that, in consideration of the covenants and agreements therein and hereinbefore contained on the part of the plaintiff, the said H. Everard and the defendant, for themselves severally and respectively and for their several [451] and respective executors, &c., did covenant, promise and agree with and to the plaintiff, his executors, &c., by the said recited indenture in manner following, that is to say, that she the said Ann Thomas should not at any time thereafter molest or disturb the plaintiff, or require by any means whatsoever, either by Ecclesiastical censure, or by taking out any citation or process, or by commencing or instituting any suit whatsoever, or in any other manner, endeavour to compel the plaintiff to cohabit or live with her the said Ann Thomas, or to enforce any restitution of conjugal rights, nor should require or by any means whatsoever endeavour to compel the

plaintiff to allow her any further or greater or other alimony or maintenance than such as had been provided under and by virtue of the said therein and hereinbefore mentioned post nuptial settlement between them the plaintiff and Ann his wife. (Then followed a covenant by H. Everard and the defendant to indemnify the plaintiff against the debts of his wife, and all actions in respect thereof.) Averments: that the plaintiff hath always observed, performed, fulfilled and kept all things on his part to be observed; and all things have happened, &c., to entitle him to maintain the action. Breach: that the said Ann Thomas did molest and disturb the plaintiff, contrary to the said covenant of the defendant and in breach thereof, to wit, by citing the plaintiff and taking proceedings against the plaintiff in her Majesty's Court of Divorce, and in order to endeavour to procure a judicial separation between the plaintiff and his said wife Ann Thomas, and for that purpose the said Ann Thomas did in further breach of the said covenant petition and file in her Majesty's Court of Divorce a petition praying, amongst other things, for a judicial separation between the plaintiff and his said wife Ann Thomas, and which said petition and suit of the said [452] Ann Thomas was by the said Court duly heard and dismissed and determined.

Demurrer and joinder therein.

Day, in support of the demurrer. The words in the covenant "molest or disturb" do not include a judicial proceeding to obtain redress in respect of rights violated since the execution of the deed. If those words are to have a larger or wider interpretation than the mere protection of the husband against pecuniary claims of the wife, the covenant would be bad in law, as contrary to public policy. [Channell, B. It is not suggested that the suit in the Divorce Court included an application for alimony.] Any covenant, the effect of which is to prevent a husband returning to his wife, or a wife to her husband, is void. [Channell, B. The words "molest and disturb" must be construed with reference to the whole deed. There is an able note in Mr. Jarman's edition of Bythewood's Conveyancing (vol. 9, p. 544), stating how far deeds of separation operate. Martin, B. The words mean what they import, viz. an actual molestation or disturbance.] He cited *Warrender v. Warrender* (2 C. & F. 488).

The Court then called on

Needham to support the declaration. The words "molest and disturb" are sufficiently large to include a suit for a judicial separation. In order to ascertain the meaning of the covenant the whole deed must be read together. Its object was to put an end to all proceedings by the one party against the other. The deed contains a co-relative covenant by the husband. The fact that the deed provides for everything to which the wife would be entitled in a suit for a judicial separation, shews that the proceedings were vexa-[453]-tious, and consequently a molesting and disturbing of the plaintiff. The intention was that the deed should be a deed of peace. Moreover the declaration states that the suit was duly heard and dismissed, no doubt on the ground that the wife could obtain nothing more than by a decree in the suit than she was already entitled to under the deed. [Martin, B. The words "molest or disturb," in that covenant, mean personal molestation or disturbance. There is a covenant that "the plaintiff should not nor would molest or disturb the said Ann Thomas in her person or in her manner of living," nor by any means whatsoever compel her to live with him. Then the defendant covenants that "the said Ann Thomas should not at any time thereafter molest or disturb the plaintiff," nor by any means whatsoever compel him to live with her. There is no covenant that the wife shall not institute a suit for a judicial separation. Wilde, B. Possibly the proceedings in the Divorce Court may have included a claim for alimony, but no breach is alleged in that respect.]

Per Curiam.(a) The plaintiff may have liberty to amend within a fortnight; otherwise judgment for the defendant.

Rule accordingly.

[454] STROYAN AND ANOTHER v. KNOWLES AND OTHERS. *HAMER v. KNOWLES AND OTHERS*. Jan. 12, 1861.—Where the working of mines, in however careful a manner, has caused a subsidence of the adjacent land, the owner is entitled to recover in respect of damage to buildings thereon, although erected within twenty years,

(a) Martin, B., Channell, B., and Wilde, B.

provided their weight did not contribute to the subsidence.—In 1833, a manufactory was erected on a close, and in 1841, and between that time and 1849, the buildings were enlarged. In March 1842, the close and buildings, which were leased for a term which expired in October, 1851, were conveyed in fee by S., the owner, to C. C. died in 1849, and in November 1851 the devisees under his will conveyed the close and buildings to the plaintiff in fee, who before 1849 was assignee of the term and occupied the buildings. In 1849 and 1850 the defendants, in getting coal from their mines, near but not immediately adjoining the close, caused the surface to subside, by which the buildings were injured. The devisees of C. did not thereby, in fact, sustain any damage, inasmuch as they incurred no expense, and continued to receive the full rent for the premises, and upon the sale thereof obtained the full value, without reference to any injury thereto (of which they were ignorant) by the mining operations. Subsequently to the sale to the plaintiff, the working of the mines under lands, near to but not adjoining the close on which the buildings stood, occasioned a further subsidence. No damage was done by the working of the mines subsequently to July 1852, but the subsidence of the ground continued, the consequence of the previous mining operations. The mining was skilfully conducted, and the buildings did not contribute to the subsidence. In August, 1855, the plaintiff brought an action against the defendant. Held, that he was entitled to recover damages in respect of the deterioration in value of the manufactory, the machinery broken, the increased expense of keeping it in repair and working order, and the diminished profits both in respect of his occupation before and after the purchase.—Held, also, that the devisees of C. might maintain an action for the injury to their reversion during the subsistence of the lease as trustees, and for the benefit of the vendee.

[S. C. 30 L. J. Ex. 102; 9 W. R. 615; 3 L. T. 746. Applied, *Richards v. Jenkins*, 1868, 18 L. T. 445. Referred to, *Lamb v. Walker*, 1878, 3 Q. B. D. 394; *Attorney General v. Conduit Colliery Company*, [1895] 1 Q. B. 301; *Manchester Corporation v. New Moss Colliery Company*, [1906] 1 Ch. 290.]

This was a special case stated by an arbitrator for the opinion of the Court, with power to the Court to draw inferences. The pleadings in the causes formed part of the case, and were as follows :—

Stroyan and Another v. Knowles and Others.

Declaration. That at the time in this declaration mentioned certain land, mills, buildings and workshops, steam-engines, mill-gearing and machinery, at Little Lever, were in the possession of divers persons as tenants to the plaintiffs, the reversion then belonging to the plaintiffs; yet the defendants, knowing the premises, so wrongfully, carelessly, negligently and improperly, and without leaving any proper or sufficient support in that behalf, worked certain mines under the premises and under ground near and contiguous thereto; and dug for and got and removed and carried away the mines and minerals, coal and earth there, and the [455] produce of the said mines there, and the support which the premises derived therefrom; that by reason thereof the foundations of the premises were greatly weakened and injured, and the ground on which the same stood respectively and the said land swagged and gave way; and the mills and machinery and dwelling-houses were rendered unfit for habitation and use and seriously and permanently shaken; and, by reason of the premises, the mills, dwelling-houses, &c., were sold for less money than they would have been had it not been for the wrongful acts of the defendants. Second count: that the defendants being entitled to work and get the mines under the said premises, making reasonable compensation to the plaintiffs for any damage that might be occasioned to such premises by reason of such working, &c., did work the mines as in the last count mentioned, and the plaintiffs sustained such injury, &c.; and although the plaintiffs have been always ready and willing to accept compensation, &c., yet the defendants refused to make such compensation, &c.

Pleas. First: Not guilty. Second: That the reversion did not belong to the plaintiffs. Thirdly: That the plaintiffs were not entitled to the support of the mines,

&c., for the said premises. Fourthly: That the cause of action did not accrue within six years before suit.

Hamer v. Knowles and Others.

Declaration. That the plaintiff was possessed of certain land, mills, workshops, steam-engines, mill-gearing and machinery, and certain dwelling-houses, &c., were in the possession of divers persons as tenants to the plaintiff, the reversion then belonging to the plaintiff; that the defendants negligently and improperly worked certain mines under the premises and under ground near and contiguous thereto, and carried away mines and minerals, coals and earth, and the support which the premises derived [456] therefrom, and by reason of the premises the foundations of the premises were greatly weakened, the ground on which the same stood swagged and gave way, and the mills, &c., were shaken and gave way, and the plaintiff was unable to carry on his business as a cotton spinner and manufacturer as he would otherwise have done; and his said business was greatly hindered and stopped and the dwelling-houses, whereof the reversion belonged to the plaintiff, were shaken and the reversionary estate deteriorated in value, &c.; and by reason of the premises he suffered great injury and incurred large expenses for removing and repairing the mills, buildings, dwelling-houses, steam-engine, mill-gearing and machinery; and in attempting to keep the works, steam-engine, mill-gearing and machinery in a proper condition for work; and the depreciated value of the said steam-engine, mill-gearing, machinery, &c.; and is now liable and will have to incur large additional cost in restoring, rebuilding and repairing the same, &c.; and in the loss of profit and large expenses and loss of time suffered by the stoppage of the mill, works, steam-engine, mill-gearing and machinery, and his work-people remaining idle in consequence thereof; and in the loss of rent and use of the premises whilst so stopped and whilst undergoing repair, and by being prevented by the injury to the foundations from enlarging and extending his mill, and in loss from work done by the machinery in the mills not being so well done as it would have been but for the improper acts of the defendants, and in not obtaining an equal quantity of work from the mill as he would have done, &c. Second count: for not making reasonable compensation, &c. (as in *Stroyan v. Knowles*).

Pleas. First: Not guilty. Secondly. That the plaintiff was not possessed of the premises and that the reversion did not belong to him. Thirdly. That the plaintiff was [457] not entitled to support. Fourthly. That the causes of action did not accrue within six years. Fifthly. As to the injury to the land, accord and satisfaction by making good certain damage.

On these pleas issues were joined.

The arbitrator found that:—

By indenture of lease and release, dated the 30th and 31st of December, 1828, Matthew Fletcher, the owner in fee of certain estates in Little Lever, conveyed certain closes of land, Rain Shore, Alder Field and the Green, to James Seddon in fee, save and except and always reserved to M. Fletcher, his heirs, &c., all mines, veins and beds of coal, lying and being within and under the said lands, &c., with liberty, right and privilege to and for the said M. Fletcher, his heirs, &c., from time to time and at all times, of ingress, egress and regress unto, upon and from the said hereditaments; and to do all such lawful acts, by making roads, sinking pits, erecting engines and otherwise, as shall be needful or requisite for digging, opening, working, getting or searching for all or any of the said mines, beds or veins of coal under any lands and premises in Little Lever aforesaid, or for stacking, &c.; and also to use and exercise all such other liberties and privileges in or upon the said hereditaments and premises hereinbefore released as may be necessary to full and complete enjoyment of the said mines, &c., or for carrying on the works thereof to the best advantage, he the said M. Fletcher making reasonable recompence to the said James Seddon, his appointees, heirs and assigns, for any damage that may be occasioned to the said hereditaments hereby released, by the exercise of all or any of the privileges hereinbefore reserved or any part or parts thereof.

Rain Shore and Alder Field are adjoining closes. Roads and buildings intervene between them and "The Green." [458] At the time of the conveyance there were no buildings on the land.

In 1833 a loom-shed, engine-house and steam-engine were erected on "The Green."

Between 1841 and 1849 these premises were enlarged and additional machinery placed in the building.

Prior to 1842 "The Green" and the buildings thereon were on lease for a term which expired on the 31st of October, 1851.

In 1842 the hereditaments conveyed to Seddon were conveyed to J. McClure in fee. McClure died in 1849, having by his will devised the premises to the plaintiffs Stroyan and Macartney in fee.

On the 1st November, 1851, Stroyan and Macartney conveyed the premises to W. Hamer in fee.

The defendants are lessees under Fletcher of the mines under the said hereditaments and of coal lying under other lands in Little Lever. In 1849 and 1850 they got coal from these mines, which caused the land on which the mill and buildings stood to subside. The foundations were damaged, and the buildings drawn towards the coal workings. The part of the close, called "The Green," unbuilt upon, it was alleged, was rendered for a time unsafe to be built upon. The mining operations which caused the damage were carried on upon land near to but not immediately adjoining the plaintiffs' property. They were carefully and skilfully conducted, and the breaking of the coal measures, so as to damage the plaintiffs' mill and buildings, was unusual. Generally the coal measures and the superincumbent soil break at a right angle with the plane of the mine.

The building and machinery did not contribute to the subsidence of the ground.

The case stated that no materials were laid before the arbitrator whereby he could form any estimate of the extent [459] to which the mining operations of the defendants had injured the plaintiffs' reversionary estate and interest by rendering the foundations of the buildings permanently insecure; nor whereby he could form an opinion whether the injury done, prior and up to the time of the sale and conveyance to Hamer, was or was not merely commensurate with the damages actually sustained. Assuming, in the absence of satisfactory evidence to the contrary, that the injury was commensurate only with the damage, he found that the expenditure of the sum of 62l. 5s. would have repaired the damage done to the freehold, and he assessed the plaintiffs' damages contingently at that sum. The plaintiffs did not in fact sustain any damage, inasmuch as they incurred no expense and continued to receive the full rent for the premises until the sale thereof, and obtained the full value of the premises upon the sale thereof without reference to any alleged or supposed injury thereto (of which they were ignorant) by the defendants' mining operations; and the action is in fact brought by the plaintiffs as trustees for and for the benefit of the plaintiff W. Hamer. If the defendants are liable in the action *Stroyan and Another v. Knowles*, he found all the issues for the plaintiffs.

Hamer v. Knowles and Another.

The facts of this case, as to the title and mining operations down to the time of the sale and conveyance to Hamer, from the 1st of November, 1851, are above stated.

William Hamer before 1849 became assignee of the term, and thence continually until the termination of the leasehold interest carried on the business of a fustian manufacturer. The cottages were let to tenants by the week or fortnight.

By the subsidence of the foundations of the mill and soil the mill and cottages were damaged and deteriorated in value for the purposes of occupation; the engine and machinery broken, and the expense of keeping them in work-[460]-ing order increased; the quantity of goods produced was diminished and the quality of such goods deteriorated; and consequently the profits of the plaintiff's trade were lessened. The arbitrator assessed these damages contingently at 90l.

Subsequently to the conveyance to Hamer other coal was gotten by the defendants from mines under lands near to but not next adjoining "The Green," which occasioned further subsidence of the ground of the close and the foundations of the buildings. The mining was skilfully conducted, and the damage to the mill and buildings not foreseen. No coal was gotten subsequently to July 1852, the getting of which did any damage to the close called "The Green" or the buildings thereon, but the subsidence of the ground continued from time to time in consequence of the previous mining operations. The injury and damage in respect of the occupation of the mill, &c., after the said purchase, were of the same nature and kind as those above mentioned in

respect of the occupation before the purchase. The arbitrator assessed compensation in respect of damage sustained after the commencement of the action occasioned by the mining operations before action, and also in respect of the temporary, present and future deterioration of the property. He assessed the damages contingently under this head of claim at 1500l. &c. The arbitrator found the issues on the fourth and fifth pleas for the plaintiff; and if the defendants are liable he found the issues on the other pleas for the plaintiff. If the defendants are liable they are to bear their own costs of the reference and pay the plaintiff's costs, &c.

Bovill (with whom were Monk and Milward) argued for the plaintiffs.^(a) The defendants are liable to make good the [461] damage which has been caused by their workings though they are not immediately under the lands of the plaintiffs. *Primâ facie* the owner of the surface has a right of support from the subjacent strata, and if the owner of the minerals works them, it is his duty to leave sufficient support for the surface in its natural state: *Snart v. Morton* (5 E. & B. 30, 46), *Humphries v. Brogden* (12 Q. B. 739, 751). In *Roberts v. Haines* (6 E. & B. 643) the Court of Queen's Bench held that an Inclosure Act, which enacted that it should be lawful for the lord to come upon certain common and waste lands and search for and get coal, making compensation, did not confer on the lord any power so to work the mines as to destroy the support of the surface. That decision was affirmed in the Exchequer Chamber: *Haines v. Roberts* (7 E. & B. 625). In *Brown v. Robins* (4 H. & N. 186) the defendant had gotten the minerals from under land adjacent to that on which the plaintiff's house stood, and the house sank in consequence of the mining operations; it was found by the jury that the land would have sunk just the same whether there had been a house on it or not; and the Court held that, inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, the plaintiff was entitled to recover whether he had acquired a right of support for his foundations or not. It is wholly immaterial that the works did not immediately adjoin the plaintiff's premises. In *Bonomi v. Backhouse* (E. B. & E. 622) the mines were worked at 280 yards distance from the plaintiff's house. Though there were buildings on the plaintiff's land, it is found that they did not contribute to cause the subsidence.

In *Stroyan and Another v. Knowles* it is found that there was damage to the freehold which might have been repaired for 62l. 5s. Though the plaintiffs in effect sue as trustees for [462] Hamer, they were the persons really injured. [Wilde, B. The statement that the plaintiffs incurred no expense, continued to receive the full rent, and obtained the full value of the premises on the sale, is strong evidence to shew that they sustained no damage, but it is merely evidence.]

As to *Hamer v. Knowles*, the only question is, in respect of what injury is the plaintiff entitled to recover? The case of *Brown v. Robins* (4 H. & N. 186) shews that the defendants, as wrong doers in removing the support of the plaintiff's premises, are liable for all the consequences of their acts, and therefore they are liable to pay all the damages assessed by the arbitrator in this cause.

Manisty (with whom was J. A. Russell). First, as to the case of *Stroyan and Another v. Knowles*, it is not shewn that there was any injury to the reversion. The premises were leased to Hamer and subsequently sold to him. There was nothing but an injury of a temporary nature, the whole of which might have been repaired for 62l., and in respect of which in fact the plaintiff Hamer does recover in the other action. [Wilde, B. Does not the arbitrator use the words "damage done to the freehold" as distinguished from damage done to the leasehold interest?]

As to *Hamer v. Knowles*, the arbitrator has assessed two sums, 90l. and 1500l., in respect of the deterioration of the mill for the purposes of occupation, the repairing and maintaining it, and the diminution of the profits of the occupier. The latter is not a proper head of damage. The value of the whole mill may be less than the loss which a manufacturer might sustain by continuing to work in a damaged mill. [Channell, B. You must go the length of saying that the plaintiff is not entitled to recover for the loss of profits as damages. Wilde, B. Suppose the mill had begun to [463] sink on a particular day and continued to do so for a fortnight, one machine after another being successively thrown out of gear, might not the loss of profit by the interruption of the work have been legitimately taken into consideration by the

(a) In Michaelmas Term, Nov. 14 and 19. Before Pollock, C. B., Bramwell, B., Channell, B., and Wilde, B.

arbitrator in assessing the damage? It must not be assumed that the arbitrator has allowed for loss of profits during the whole time the mill continued to work after the subsidence.] The arbitrator has assessed the damages on a false principle. In *Bonomi v. Buckhouse* (E. B. & E. 622, 638) Wightman, J., said:—"With respect to the damages, I am of opinion that, as the action is founded upon the consequential damage, the plaintiffs can only recover in this action to the extent of the damage they have actually sustained, which may include not merely what they are obliged to lay out in actual repair, but the diminution in the value of the premises by reason of the damage." But when the subsidence took place, the plaintiff should not have continued to work the mill, and so aggravate the damage. Moreover the defendants are not liable for damage to buildings erected within twenty years, they having worked their mines carefully and skilfully, and taken every precaution to prevent a subsidence. No doubt, the owner of land has a right, as against the owner of a mine, to have his land supported in its natural state; but if he places buildings on the land, he does not acquire any right to have them supported unless they have been erected for twenty years. [Wilde, B. *Brown v. Robins* (4 H. & N. 186) is an authority in point.] There it was not necessary to decide this question, for the buildings had been erected more than twenty years before the damage was done. The case is analogous to that of light. If a person has had a window in a particular part of his house for twenty years, he acquires a right to the light and air through it; but if he enlarges the window he loses the [464] right: *Renshaw v. Bean* (18 Q. B. 112). So here, when the plaintiff erected houses on the land, he lost his old right of support, and he has not yet acquired a new right. [Wilde, B. In *Renshaw v. Bean* the Court said that their judgment did not proceed upon the ground that the plaintiff, by the alteration in his windows, had entirely lost the right which he before enjoyed, but that he had acquired nothing more in addition to that former right.] At all events the Court will not decide the questions upon this case, but leave the plaintiffs to their action on the award.

Bovill replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. We are of opinion that the plaintiffs are entitled to recover in both cases. The arbitrator's meaning is perfectly clear. In the first mentioned action he is dealing with a claim for damage to a reversionary interest. He describes the damage done as being a subsidence of the soil and injury to foundations. He states that he cannot find any injury beyond the damage actually done; and that, as 62l. 5s. would have repaired the damage to the freehold, he assesses the plaintiff's damages contingently at that sum. This clearly means he assesses the damage to the reversion at that amount. If there were any doubt, it would be removed by his language in reference to the second case in distinguishing between the two classes of damages he there mentions.

Then it was said he had assessed the 1500l. for contingent damages which might never accrue. We think this objection unfounded. All matters in difference are referred. The plaintiff says the defendant has done a wrongful act, [465] which has been attended, and will be further attended, with damage to the plaintiff, the whole of which he claims. This is a proper subject for the arbitrator to award on. Then it was said the plaintiff ought not to have gone on working the mill and so aggravating the damages. No doubt, if he knew he would aggravate them. But if he had reasonable cause to expect the contrary, as that the ground would not further subside, he would be warranted in going on with the works. Nay, it may be that the cost of totally removing his works and leaving them unoccupied is more than equal to the total of the annual loss of continuing them. These were matters for the arbitrator to consider, and we cannot see he has determined them improperly. Then it was said the plaintiff had no right of support for buildings; but we think that if their being there did not contribute to the subsidence (as the arbitrator finds), the plaintiff is entitled to damages for injury to them through the defendant's wrongful act in causing the land to subside—the ground on which they stood. This was decided in *Brown v. Robins* (4 H. & N. 186).

We can see no reason why the Statute of Limitations is a bar. Then it was urged that we ought not to decide the questions on this case, but leave the parties to their action on the award; but we think that the plaintiffs are entitled to our decision.

Rule that all the issues joined in the action of *Stroyan and Another v. Knowles and Others* be found for the plaintiffs; and that the issues on the 1st, 2nd and 3rd pleas (as well as the issues on the 4th and 5th pleas, already found by the arbitrator) in the action of *Hamer v. Knowles and Others* be found for the plaintiff.

[466] OCKFORD v. FRESTON. CHAPMAN v. FRESTON. Jan. 18, 1861.—F. having been adjudicated bankrupt and having surrendered, the 6th of November was appointed for his last examination. At this meeting his examination was proceeded with, and the meeting was adjourned to the 3rd of December. The bankrupt was not imprisoned or in custody at the date of the adjudication. On the 1st of December he was arrested under a writ of ca. sa. issued out of this Court, founded upon a certificate granted by a Commissioner, under the 257th section of the Bankrupt Law Consolidation Act, 1849. Held, that he was protected from arrest by the 112th section of that Act, and the Court therefore discharged him.—A bankrupt arrested under a writ of ca. sa., when privileged from arrest under the 112th section, is entitled to be discharged from custody, and cannot be detained under a writ of ca. sa. lodged with the sheriff after the period of protection has expired. Dubitante Martin, B.

[S. C. 30 L. J. Ex. 89; 9 W. R. 315.]

Gray, in this term, had obtained rules, calling on the plaintiffs to shew cause why the writs of ca. sa. issued in these causes should not be set aside, and the defendant discharged out of custody.

Ockford v. Freston.

From the affidavits on which the rule was granted, it appeared that on the 15th of September 1860 a petition for adjudication of bankruptcy was presented, in the Bristol district of the Court of Bankruptcy, against H. Freston, under which he was duly adjudicated a bankrupt on the 17th September. On the same day Freston surrendered. On the 2nd of October the first meeting under the bankruptcy was duly holden, and assignees were chosen therein. The second meeting was held on the 6th of November, when the bankrupt's examination was proceeded with, and the meeting was adjourned until the 3rd of December, and the bankrupt was allowed until that day for finishing his examination. On the 1st of December the bankrupt was arrested, by the officer of the sheriff of Middlesex, under a ca. sa. issued in this action at the suit of the plaintiff. The bankrupt was not in prison or in custody at the date of the adjudication. The writ was founded on a certificate granted by the Commissioner under [467] the 257th section (a) of the Bankrupt Law Consolidation Act, 1849, on the 29th of November.

Coleridge shewed cause (Jan. 17). The question is whether, the meeting for finishing the bankrupt's examination having been adjourned from the 6th of November to the 3rd of December, the certificate rightly issued in the interval. [Wilde, B. You would admit that the certificate under the 257th section cannot be granted until after the Court had refused to grant any further protection. Martin, B. What power has the Court to grant protection from arrest before the bankrupt has finished

(a) Which enacts, that "every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof; and the Court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall on the application of such assignees, or of any such creditor, grant a certificate, under the seal of the Court, in the form contained in Schedule B. to this Act annexed, and every such certificate shall have the effect of a judgment entered up in one of her Majesty's superior Courts of common law at Westminster until the allowance of the certificate of conformity of such bankrupt; and the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt; and the production of any such certificate to the proper officer of any such superior Court shall be sufficient authority to him to issue and seal such writ," &c.

his examination, except under the 162nd section?] The 112th section enacts "That if the bankrupt be not in prison or custody at the date of the adjudication he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender, during the time by this Act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed as the Court shall from time to time by indorsement upon the summons of such bankrupt think fit to appoint." It may fairly be contended that the time allowed to the bankrupt "for finishing his examination" was on the 6th of November, though there was an adjournment of the meeting. The words "as the Court shall from time to time by indorsement upon the summons of such bankrupt think fit to appoint," must be construed as overriding the whole clause, and giving to the Court a salutary power of withdrawing protection. [Wilde, B. The Court should hear all that the bankrupt has to say, and not punish him first and then again examine him. Martin, B. It would appear that the 112th section gives the bankrupt absolute protection when the last examination is adjourned to a day certain. The 162nd section provides that in cases where the adjournment is sine die the bankrupt shall be free from arrest for such time (if any) as the Court shall, by indorsement on the summons of the bankrupt, think fit to appoint. Wilde, B. If the argument for the plaintiff were well founded the 162nd section would be unnecessary.] By the 256th section it is enacted, that if, at any sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the Court that the bankrupt committed any of the offences thereafter enumerated, the Court shall refuse to grant the bankrupt any protection from arrest. [Channell, B. That is at the sitting appointed for his last examination, or at any adjournment thereof, when he does finish his examination.] In sections 160 and 162, the legislature distinguishes between the day appointed for the last examination and the adjournment days.

Gray, in support of the rule. No doubt it has for a long time been the practice of the Commissioners, as soon as a bankrupt surrenders, to indorse on his summons a protection from arrest. But the protection does not arise from the [469] act of the Commissioner, but is given to the bankrupt by the statute. It has long since been decided that the indorsement is not necessary to entitle a bankrupt to protection: *Ex parte Leigh* (1 Glyn & J. 264), *Price's case* (3 Ves. & B. 23). But the officer was liable to a penalty if he detained a bankrupt who produced a summons so indorsed. (c) By the 112th section of the Bankrupt Law Consolidation Act, 1849, the bankrupt is protected from arrest until after the completion of his examination. [Channell, B. The Commissioners have continued what was found to be a useful practice under the 6 Geo. 4, c. 16.] The Commissioners had no power, until after the final examination, to do an act which might subject the bankrupt to imprisonment for an indefinite time. The certificate is void and the ca. sa. ought to be set aside, because there is no judgment upon which it can be founded.

Cur. adv. vult.

Chapman v. Preston.

In this case a certificate, under the 257th section, was granted on the 3rd of December, being the day to which the final examination of the bankrupt was adjourned, and a ca. sa. was issued thereon and lodged with the sheriff on the following day.

Coleridge shewed cause (Jan. 17). In this case it is not denied that the certificate is regular, having been granted after the final examination of the bankrupt. The writ of ca. sa. is therefore good, and the contention of the defendant must be that because he was arrested under a void writ he cannot be detained under a valid writ. *Hooper v. Lane* (6 H. L. C. 443) is distinguishable from the present case. There the sheriff [470] had in his office several writs against the defendant, and arrested him on an invalid writ. [Wilde, B. The writ in that case was utterly void,—it was a mere piece of paper, not sealed. Here, though the first writ might have been annulled by setting aside the certificate, it was not void. Channell, B. The writ would be effective for the purpose of protecting the sheriff. Martin, B., referred to *Barratt v. Price* (9 Bing. 566).] In that case the defendant had been arrested without any warrant,

(c) See 5 & 6 Vict. c. 122, s. 23.

and there never was a legal custody of any sort. There, as well as in *Hooper v. Lane* (6 H. L. C. 443), the party who lost his liberty was deprived of it by the wrongful act of the officer who took him. Here the sheriff, in arresting the defendant at the suit of Ockford, could not have acted otherwise than he did. If the certificate in that case was set aside the writ would follow it; but, until that time, the custody is so far legal as to justify the detainer under the second writ.

Gray, in support of the rule. It is not contended that the arrest under the first writ was wrongful in such a sense as to render the sheriff liable to an action; nor is it necessary to shew that in order to bring the case within the principle established by *Hooper v. Lane* (6 H. L. C. 443). It is submitted that if a person is arrested who is legally exempt from liability to arrest, as in the case of privilege, he is entitled to his discharge, if he is not guilty of laches in applying for it, though detainers have been lodged against him. The person so privileged, whether witness, party or bankrupt, has a right to have the opportunity of returning in safety to his home. The position of a bankrupt coming to attend his last examination resembles that of a man coming to a Court to discharge a public duty. [Martin, B., referred to *Barrack v. Newton* (1 Q. B. 525).] There are several cases in bankruptcy which shew that where a [471] bankrupt is entitled to his discharge upon an arrest, he will be discharged from all detainers subsequently lodged against him: *Ex parte Hawkins* (4 Ves. 691), *Ex parte King* (7 Ves. 312), *Ogle's case* (11 Ves. 556), *Ex parte Ross* (1 Rose, 260), *Sidgier v. Birch* (9 Ves. 69). [Wilde, B. Those are cases of contempt, and the Court asserted its privilege.] This is not the privilege of the Court, but of the bankrupt, given him by statute. It is the validity of the arrest which alone gives efficacy to the detainers. [Wilde, B. Your argument is that two things are necessary to give validity to a detainer; an arrest under a valid writ, and a person capable of being arrested.] In the present case the first writ had no operation, because the bankrupt was privileged from arrest.

Cur. adv. vult.

The following judgments were now pronounced.

POLLOCK, C. B. In these cases I am of opinion that the rules must be absolute; and I may add that my brother Channell is of the same opinion. After the full discussion of these cases, I do not think it necessary to labour the judgment which I am about to pronounce. With regard to the first rule, I agree with the argument of Mr. Gray, that the bankrupt's protection does not arise from the act of the Commissioner, but from the statute, and that the Commissioner has no power to deprive him of it. The original protection was given by the 6 Geo. 4, c. 16, and that enactment has been repeated nearly verbatim in the later statute. Therefore, in the case of *Ockford v. Freston*, the bankrupt being clearly entitled to his protection, the rule must be absolute to discharge him out of custody.

[472] In the case of *Chapman v. Freston* the question is different. The bankrupt being in custody, a detainer is lodged against him; and the question is whether he can be legally detained, the sheriff not having been in fault in arresting him; or whether he ought to be discharged, the arrest having been a proceeding to which he was not liable. No doubt, the cases make a distinction between the sheriff being a party to a wrongful act, and where he is free from blame; but I think the decision of the House of Lords in *Hooper v. Lane* (6 H. L. C. 443), in principle, embraces this case; and, to my mind, it appears a trifling and almost ridiculous distinction to say that a man who is not liable to arrest shall be discharged if the sheriff was in fault, but shall be subject to a detainer if the sheriff was so far justified in taking him as not to be liable to an action for so doing. No doubt, the sheriff is protected if he acts in obedience to the writ: that is so whether there is a judgment or not, or whether the judgment is irregular and capable of being set aside—with that the sheriff has no concern, he is justified if he obeys the writ. But it seems to me that there is no sense in the distinction that a man not liable to arrest has a right to his discharge if the sheriff is in fault, but has no right if the sheriff is not blameable. Why should a person, who is not liable to arrest, but has been arrested under circumstances which do not render the sheriff liable to an action, be subject to a detainer any more than a person who has been arrested under circumstances which render the sheriff responsible? The illegality of the custody is the same in both cases—the man ought not to have been arrested, and is entitled to his discharge; and yet it is said that where the sheriff is in fault he cannot be detained, but where the sheriff is not blameable he may

be detained. I own I cannot see the sense of that distinction. It appears to me [473] better to lay down this broad principle in favour of liberty, that, where a man is illegally arrested, a detainer lodged against him during the continuance of the illegal custody shall not prevail so as to procure his detention.

Having regard to the general principles on which the common law of this country proceeds, it appears to me that my view is justified by the case of *Hooper v. Lane*. There Lord Cranworth, C., in delivering judgment, said:—"In *Pearson v. Yewens* in the Common Pleas, and *Collins v. Yewens* in the Queen's Bench, the defendant was discharged from custody on the express ground that he had been taken on an illegal arrest to which the sheriff had made himself a party, and so that the case of *Barratt v. Price* was applicable. And though, on the same arrest, the Court of Exchequer, in *Robinson v. Yewens*, afterwards refused to discharge the defendant in that action, that was because, on the evidence then brought forward, that Court was not satisfied that the sheriff was in any way privy to the original, to the illegal detention; and there is no doubt of the right and duty of the sheriff to arrest any one against whom he has a writ, and who can be found in his bailiwick, whether he is at large there or is illegally detained there by a stranger." Lord Cranworth then remarks on what fell from Parke, B., in the case of *Robinson v. Yewens*, and, after observing that Maule, B., expressly stated that the question was one of fact, whether the sheriff did or did not illegally arrest the defendant, proceeds to say: "The Court of Common Pleas, on one state of facts, came to the conclusion that he did, and applied the authority of *Barratt v. Price*. This Court, on another state of facts and more evidence, came to a contrary conclusion." Then Lord Cranworth expresses himself thus: "Though your lordships are not bound by the decisions of the Courts below, [474] yet it is manifestly inexpedient that what has been there continuously acted on as good law should afterwards be called in question in this House, unless it is made very clearly to appear that the principles on which the judgments have proceeded rest on no solid foundation. So far from that being the case in reference to the question now under consideration, I think that the doctrine propounded and acted on in *Barratt v. Price* is founded on solid good sense; and even if it be inconsistent with the earlier case in *Dyer*, referred to in the argument (*Thurland's case* (2 *Dyer*, 244 a.)), I have no hesitation in advising your lordships to follow what can hardly be disputed to be the modern doctrine, acted on for the last twenty years and upwards, namely, that if a sheriff, by the illegal act of himself or his officers, has taken a person unlawfully into custody," (and it appears to me that, when a man who is not liable to be arrested is taken into custody, that can hardly be considered a legal act,) "so that the custody amounts to a false imprisonment," (and it may be a false imprisonment though no action would lie against the sheriff) "he cannot avail himself of that illegal detention to execute against the body of the prisoner other writs which he holds at the suit of other plaintiffs." It appears to me that these expressions leave it open to us to reconsider the matter agitated in *Robinson v. Yewens*; and that it is a very flimsy distinction to say that, where a man has been illegally arrested, he cannot be detained if the sheriff is liable to an action, but if the sheriff is not liable to an action he may be detained.

For these reasons, I am of opinion that these rules ought to be absolute.

MARTIN, B. I am also of opinion that the rule in *Ockford* [475] v. *Preston* ought to be absolute. This is a matter of considerable importance, because the rule which we are about to pronounce is not in accordance with what is said to be the practice of the Court of Bankruptcy, and it is right that the matter should be fully investigated before we sanction a proceeding at variance with the practice of the learned persons who administer the bankrupt law. It seems to me, however, on looking into the act of parliament, that the question is tolerably clear; and that the Commissioner had not power to grant the certificate which he granted in this case, inasmuch as the time for granting it had not arrived.

The 112th section of the Act enacts (his lordship read this section). This appears to me a clear enactment that the bankrupt shall be free from arrest for such further time as shall be allowed him for finishing his examination, and no indorsement on the summons of the bankrupt is necessary to entitle him to that right. The 113th section points out what is to be done if the bankrupt is arrested whilst protected by order of the Court; and, as my brother Wilde observed, it is expedient that the Commissioners should do what they have been in the habit of doing, namely, indorsing on the

summons that the bankrupt is free from arrest, because it may save him the inconvenience of being arrested and applying for his discharge, and it gives the officer about to arrest notice that he must forbear. I concur in thinking that such a practice is beneficial and attended with convenience.

Now, we must see what the statute enacts with respect to the time allowed to the bankrupt for finishing his examination, and for this purpose we must refer to the 160th and three following sections. The 160th requires the bankrupt to prepare a balance sheet, and the 162nd section enacts, [476] "That it shall be lawful for the Court, at the time appointed for the last examination of the bankrupt, or at any enlargement or adjournment thereof, to adjourn such examination sine die; and in such case the bankrupt shall be free from arrest or imprisonment for such time (if any) as such Court shall from time to time, by indorsement on the summons think fit to appoint." Reading the 112th and 162nd sections together their effect appears to be, that the 112th protects the bankrupt up to the time appointed for his last examination or the adjournment thereof, and that, on any examination adjourned sine die, the Commissioner, if he desires that the bankrupt shall be free from arrest, must make an indorsement on his summons. That being so, we must have recourse to the 256th section (his lordship read this section). It seems to me that, upon the true construction of this section, the power of the Commissioner to act under it is at the last adjournment of the last examination of the bankrupt; and that he has no power to act until the inquiry, so far as he is concerned, is concluded; and in the event of his being then satisfied that the bankrupt has committed any of the offences mentioned under the nine heads in the latter part of the section, he ought to refuse to grant the bankrupt any further protection.

Then comes the 257th section, upon which the question in this case depends. The first part of that section in analogous to the provision in the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 87, which requires the insolvent, before adjudication, to execute a warrant of attorney authorizing judgment to be entered up in the name of his assignees, so as to enable them, under the authority of the Court, to take possession of his future property. The 257th section enacts, "That the assignees for the time being of the estate and effects of any bankrupt, when the accounts relating to his [477] estate shall have become records of the Court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from him to his creditors; and every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof." This is an express enactment that the assignees shall be judgment creditors of the bankrupt for the total amount of his debts, and that every creditor, after proof of his debt, shall be a judgment creditor to the extent of such proof. The section goes on—"And the Court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees, or of any such creditors, grant a certificate under the seal of the Court," &c., "and every such certificate shall have the effect of a judgment." I think, on the true construction of the 257th section, that the Commissioner has no power to grant a certificate until he has acted under the 256th section; and inasmuch as he granted a certificate before the period for his so acting arrived, he has done that which the legislature has not authorized him to do. We have no power to set aside the certificate, but we have power over the writ. I am of opinion that it ought to be set aside.

With respect to the case of *Chapman v. Preston*, if the matter had rested with myself alone, I should require time for consideration, because I am by no means satisfied that the bankrupt is entitled to his discharge. If the case depended on the authority of *Hooper v. Lane*, it would be my duty to give effect to it; but in my opinion this case is not governed by it, and we are asked to go a step further than the House of Lords. I think it is a mistake to suppose [478] that we ought, in a case of this kind, to do otherwise than consider what is the law, and it seems to me a hardship on a man, who is no more a party to an illegal arrest than any other member of the community, that when he seeks to enforce his legal writ and take his debtor into custody, he is to be affected by the illegal conduct of persons with whom he has no concern; and because the sheriff, who is not an agent appointed by him, but an officer to whom he must deliver the writ, and over whom he has no control, has acted wrongly, he is to be deprived of the benefit of his writ. If the matter were to be

considered *de novo*, I cannot help thinking that most persons would be of opinion that a man ought not to be deprived of his legal right because other persons have acted illegally. There is, however, the decision in the House of Lords, upon which I am bound to act. But it seems to me that our decision in effect overrules *Robinson v. Yewens* (5 M. & W. 149), while *Hooper v. Lane* leaves it untouched. In *Robinson v. Yewens*, Parke, B., Alderson, B., and Maule, B., distinctly say that, under circumstances like the present, the defendant was not entitled to his discharge. I own, if it had rested with me, before I discharged this defendant out of custody, I should have liked to be satisfied that the judgment of this Court in *Robinson v. Yewens* was wrong.

WILDE, B. I am of opinion that both these rules should be absolute. With respect to the case of *Ockford v. Freston*, I entirely agree with the construction put upon the statute by my brother Martin. It is said that the practice of the Court of Bankruptcy has adopted a construction different from that which our judgment will establish, but I am not satisfied that is so, in the sense suggested. The matter was [479] fully explained in the course of the argument. The Commissioners have been in the habit of writing on the back of the summons a protection to the bankrupt, although in point of law that was unnecessary. In other words they have done more than was absolutely necessary, and for my part I think that, as it is attended with convenience, they may well continue to do so although we decide that it is not necessary. Then, why is it not necessary? That depends on the 112th section, which says, in distinct terms, that the bankrupt shall be free from arrest in coming to surrender, and after surrender during the time limited for surrender, and for such further time as shall be allowed him for finishing his examination. In this case the bankrupt was arrested after an adjourned meeting and before his final examination. It cannot be said that an adjourned meeting for the purpose of continuing his last examination is not part of the time allowed him for finishing his examination, and therefore the protection extends to that time. Mr. Coleridge however put the matter on the only ground on which it could be put, and argued that those words must be governed by the succeeding words, "and for such time after finishing his examination until his certificate be allowed as the Court shall from time to time, by indorsement upon the summons of such bankrupt, think fit to appoint." But such a construction would violate the grammar and sense of the enactment. It is said that we ought not to be bound by the rules of grammar in cases where there is a plain intention at variance with the grammatical construction; but it is obvious that the Courts cannot dispense with the rules of grammar, for, if they did, they would have no means of construing acts of parliament. Where a section consists of several members, and at the end of it is found a general expression, the only means we have of determining whether that expression refers to the antecedent members is by [480] seeing what is the plain grammatical construction of the sentence. If we put upon this section the construction contended for, we should be doing great violence, not only to the grammar, but to the intention of the legislature; for a similar provision, giving protection up to the time of the last examination, is to be found in the 6 Geo. 4, c. 16 (sect. 117), without any such qualification as is now attempted to be imposed. I see no reason for supposing that the legislature, when in the last Act they adopted the language of the 6 Geo. 4, c. 16, intended to attach to it anything more than the words themselves import.

That being so, the other questions became unimportant, because there is a direct legislative provision that the bankrupt shall be absolutely free from arrest up to the time of his last examination; and there is nothing at variance with that in the subsequent sections. Section 256, which gives the Commissioner power to refuse the bankrupt any further protection, speaks of "the last examination" or "any adjournment thereof;" and section 257 provides for the Commissioner granting a certificate after he has refused the bankrupt any further protection. Those sections furnish no argument against the clear meaning of the 112th section, and therefore we must give effect to it. For these reasons, I am of opinion that the bankrupt is protected from arrest.

The question in *Chapman v. Freston* turns upon whether the bankrupt, being by the statute free from arrest, can be legally kept in custody by reason of a detainer lodged against him. That must be decided by the principle unanimously adopted in *Hooper v. Lane*. The principle there laid down, whether rightly or wrongly, is this,

that if a man be in illegal custody when a detainer is lodged against him, that detainer shall not operate against him; in other words, if he is once in illegal custody he must be set at liberty before [481] he can be legally arrested. I agree that there is a difference between the writ in *Hooper v. Lane* and the writ in this case, because here the defendant could not have been discharged by habeas corpus, so far as the writ was concerned. But Mr. Gray put the case on a ground which I think is unassailable—that, although it may have been a legal writ, the bankrupt was by law free from arrest: that, to constitute a legal arrest, two things are necessary, viz. a good writ to arrest, and a man who is by law capable of being arrested, which was not the case here, since the bankrupt was not by law liable to be arrested. If, after his arrest, he had applied to a Judge at Chambers for a writ of habeas corpus, it seems to me that he would have been entitled to his discharge, and for this reason—because he was not by law liable to arrest. If that be so, the arrest was not under a lawful writ, and then the principle in *Hooper v. Lane* applies, and the detainer lodged against him was inoperative.

For these reasons I think that the rule in *Chapman v. Freston* should also be made absolute.

Rules absolute.

EALES v. THE CUMBERLAND BLACK LEAD MINE COMPANY (LIMITED). Jan. 24 and 26, 1861.—The defendants were a joint stock Company, incorporated by the registration of a memorandum of association under the 19 & 20 Vict. c. 47, but no articles of association were executed. Before the first general meeting the subscribers of the memorandum of association, acting as directors of the Company, appointed one of their own number manager of the mine, at a salary of 350l. a year. Held, that, under the provisions contained in Table B, the subscribers of the memorandum of association, as directors, had power to make the appointment, and that it was not illegal either at common law or otherwise.

[S. C. 30 L. J. Ex. 141; 7 Jur. (N. S.) 169; 3 L. T. 861. Principle applied, *Kavanagh v. Working Man's Benefit Building Society*, [1896] 1 Ir. R. 56.]

Debt for work and labour.

Pleas (inter alia). First, never indebted. Secondly, that the contracts were made and the debts contracted by and by means of the fraud of the plaintiff.

[482] At the trial, before Bramwell, B., at the Middlesex sittings in last Michaelmas Term, it appeared that the defendants were a joint stock Company incorporated under the 19 & 20 Vict. c. 47. The memorandum of association was signed by seven persons, of whom the plaintiff was one, on the 22nd of December, 1858, and was afterwards duly registered, but no articles of association were ever executed. On the 29th of March, 1859, at a meeting of the subscribers of the memorandum of association, a resolution was passed, which appeared in the minute books of the Company as follows:—

“At a meeting of the Board of Directors held this 29th day of March, 1859,—

“Present: R. Eales, Esq., in the Chair,

“Messrs. D. T. Johnson, W. Watkins, and Thomas Fuller,—

“Resolved—That the directors visit the mine on Tuesday the 5th of April, &c. That . . . this meeting be adjourned until that day, to be held upon the mine, for the purpose of making the appointment of Mr. R. Eales as manager of the mine, and for other business.

“R. EALES, Chairman.”

On the 5th of April, 1859, a further meeting of the directors was held, and a resolution passed and entered in the Company's minute book, of which the following is a copy:—

“At an adjourned meeting of directors held on the mine this 5th day of April, 1859,

“Present: D. T. Johnson, R. Eales, W. Watkins, R. Watson, J. Dixon and Thomas Fuller,

“The minutes of the last meeting were read and confirmed.

“Resolved—That R. Eales be the manager of the mine, at a salary of 350l. per annum.”

[483] The plaintiff removed from Exeter to Keswick for the purpose of taking the management of the mine. At the first ordinary general meeting of the shareholders, which was held on the 28th of October, 1859, directors were appointed, and a resolution was passed that the salary of the plaintiff should be 150l. a year; but it did not appear that the resolution was assented to by the plaintiff.

The defendants' counsel submitted, first, that the original contract was invalid, and, secondly, that the contract for salary at the rate of 150l. a year had been substituted for it. The jury having found a verdict for the plaintiff,

Phinn, in Michaelmas Term, obtained a rule nisi for a new trial, on the grounds: first, that there was no evidence of any valid or binding contract between the plaintiff and the Company created by the resolutions of the 29th of March and the 5th of April, 1859; and, secondly, that the contract, if any, created by the above resolutions was illegal and void, and was of no effect until confirmed by a general meeting of the Company.

Collier and Karslake now shewed cause. This being a Company registered under the 19 & 20 Vict. c. 47, and no articles of association having been executed, the Company is subject to the regulations in the Schedule, Table B. The 41st section of the Act is that which governs contracts made by the Company. By clause 2, "Any contract which, if made between private persons, would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the Company in writing, signed by any person acting under the express or implied authority of the Company, and such contract may in the same manner be varied or discharged." The subscribers of the memorandum of association had authority to bind the Company. By the 44th clause of Table B., [484] "the number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." And, by the 45th, "until directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of this Act, be deemed to be directors." By the 46th clause, the business of the Company is to be managed by the directors; and it appears, from clause 61, that appointments of officers may be made by directors. There is no section of the Act or clause of the regulations which makes it necessary that the appointment should be confirmed by a general meeting. [Martin, B. Clause 47 provides that the office of director shall be vacated if he holds any other office or place of profit under the Company. That seems to shew that the statute contemplates a director being appointed to an office.]

Phinn and Griffiths, in support of the rule. The main question is, whether directors can bind a Company by giving to each other offices at salaries to continue beyond the period of their continuance in office. The question was considered by the House of Lords in *Ernest v. Nicholls* (6 H. L. C. 401). Table B., clause 22, contains directions as to the first general meeting of the Company, at which, by clause 48, the whole of the directors are to retire from office, and, by clause 51, the vacancies are to be filled up by the election of the ordinary directors to be chosen by the shareholders. The subscribers of the memorandum of association are statutory directors, not having the powers of ordinary directors. [Wilde, B. By clause 45, they are to be deemed directors for all the purposes of the Act.] That clause provides that, until directors are appointed, the subscribers of the memorandum of association shall be deemed to be [485] directors. Their office is declared by the Act; they cannot take upon themselves any other; they have no power to resign, and it would be contrary to the Act for such a director to take upon himself any other office. The subscribers of the memorandum of association, as directors, are trustees for those who may become shareholders, and it is contrary to public policy that they should be allowed to pay themselves. In equity no trustee is permitted to do so. This is not a question between a stranger and the Company, but between the Company and the directors. (They referred to *Regina v. The Commissioners for Paving, &c., Cheltenham* (1 Q. B. 467).)

MARTIN, B. The question whether there was any evidence of a contract depends upon the 19 & 20 Vict. c. 47. It appears to us that the contract was one which, if made by a private person, might have been made by parol without writing. Then the 3rd clause of the 41st section of that Act enacts that "any contract which, if made between private persons, would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the Company by any person acting under the express or implied authority of the Company, and such contract may in the same way be varied or discharged." And the section goes on to enact that

"all contracts made according to the provisions therein contained shall be effectual in law, and shall be binding on the Company and their successors and all other parties thereto, their heirs, executors and administrators, as the case may be." Here the directors who made the appointment were acting under the authority of the Company. It was argued that the contract was void at law. But where a contract is entered into between two parties it should be enforced, unless it is [486] clearly shewn to be illegal. No authority has been cited to shew that this contract is illegal at common law. No doubt, Companies cannot enter into contracts contrary to the 19 & 20 Vict. c. 47. The validity of their contracts depends upon that statute, but I think that the statute does not render this contract illegal. I agree with Mr. Phinn that it may be dangerous to allow directors to bind the Company by such a contract as this. But it is our duty to construe the Act without reference to considerations of that sort. People must take care not to become members of Companies unless they are satisfied with the directors. By clause 13, when the memorandum of association has been registered the subscribers are incorporated. The 44th clause provides that "the number of directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." By the 45th clause, "until directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of this Act, be deemed to be directors." There is no provision that the directors shall have any greater power than the subscribers to the memorandum of association. The 61st clause is a legislative declaration that the directors may appoint officers; but that, by clause 47, is subject to the provision that the office of director shall be vacated if he holds any other office or profit under the Company. That shews that it is legal to appoint a director to an office of profit. It was argued that it is unsafe to give temporary directors such a power. Still these directors, though only directors for the time being, have the power of directors for all purposes. Therefore the rule must be discharged.

CHANNELL, B. I am also of opinion that the rule must be discharged. The question is, whether such a contract as that sought to be enforced by the plaintiff can be binding. [487] I see nothing to render it illegal at common law. As to the statute 19 & 20 Vict. c. 47, Table B., rules 61 and 47, so far from leading to the inference that the appointment of a director to an office to which a salary is attached is illegal, in effect shew that it is legal, subject to the consequence that the party appointed vacates his office of director. I do not feel pressed by the argument that the authority of the statutory directors is limited in point of time; the authority of all the directors is limited in that respect by the 48th clause. The power of the statutory directors appears to be the same as that of the directors to be elected by the shareholders.

WILDE, B. It is conceded that the persons who passed the resolution appointing the plaintiff manager of the mine were directors, and that the Company has not made any rules for itself. The 19 & 20 Vict. c. 47, allows persons associating together to form a Company to make rules by which they may circumscribe the powers of the directors. This Company not having done so, the rules in Table B. apply to it. Rule 46 is as follows: "The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not by this Act or by the articles of association, if any, declared to be exercisable by the Company in general meeting" &c. Therefore there is a statement, which is plain and unambiguous, that the directors are to exercise all the powers of the Company except those which are to be exercised by a general meeting. Neither the statute nor any rules direct that the power here exercised is to be exercised only by a general meeting. It has been objected that it is inexpedient to permit directors to appoint one of their own number to an office of profit. I think the objection is a sound one, for the directors might enter into contracts [488] injurious to the Company. But the answer is, that the shareholders might have executed articles of association restraining their powers. A former statute on this subject (7 & 8 Vict. c. 110, s. 29) provided that no contract in which a director should be interested should have any force unless confirmed by a general meeting. In the present Act the legislature has thought fit to withdraw that protection from shareholders, leaving them to take care of themselves. The 45th rule provides that, until directors are appointed, the subscribers to the memorandum of association shall for all purposes have the power of directors. If, therefore, shareholders desire to protect themselves, they must take care to limit the powers of their directors.

BRAMWELL, B. I am of the same opinion. It may be that the directors have been guilty of a breach of trust in appointing the plaintiff manager of the mine at an extravagant salary; but with that we have no concern.

Rule discharged.

HOLE v. THE SITTINGBOURNE AND SHEERNESS RAILWAY COMPANY. Jan. 14, 15, 1861.—The defendants, a railway Company, were authorized by their act of parliament to construct a railway bridge across a navigable river. The Act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge and for opening it to admit such vessel. The defendants employed a contractor to construct the bridge in conformity with the provisions of the act of parliament, but before the works were completed the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river. Held, that the defendants were liable for the damage thereby caused to the plaintiff.

[S. C. 30 L. J. Ex. 81; 9 W. R. 274; 3 L. T. 750. Distinguished, *Butler v. Hunter*, 1862, 7 H. & N. 833; *Gray v. Pullen*, 1864, 5 B. & S. 978. Referred to, *Dalton v. Angus*, 1881, 6 A. C. 829; *Hardaker v. Idle District Council*, [1896] 1 Q. B. 340; *Britannic Merthyr Coal Company v. David*, [1910] A. C. 74. Considered, *Maxwell v. British Thomson Houston Company*, 1902, 18 T. L. R. 278.]

The first count of the declaration stated that, before and at the time of the committing by the defendants of the several grievances &c., there was and yet is a certain arm of the sea called the Swale, situate in the county of Kent, [489] and which said arm of the sea was and is a public navigable channel and passage for all the liege subjects of our lady the Queen to pass and repass with their ships and vessels at their free will and pleasure: that before the times aforesaid, and after the passing and coming into force of an act of parliament made in a session of parliament holden in the 19th and 20th years of her present Majesty, intituled &c. (19 & 20 Vict. c. lxxv.), the defendants, under and by virtue of the provisions of the Act, constructed and built a swing or opening bridge over and across the said public navigable channel or passage of the Swale, and which said bridge, at the time aforesaid, was over and across the said channel or passage, and under the management and direction and control of the defendants, and without the opening of which said bridge by the defendants, at the times aforesaid, to admit ships or vessels with their cargoes navigating the said channel and passage to pass the same bridge, any such ship or vessel with its cargo so navigating the said channel or passage of the Swale at the times aforesaid could not pass through the same or through the said bridge: that, before and at the time of the committing by the defendants of the grievances &c., a ship or vessel called the "Jason," laden with a cargo of goods and merchandize of the plaintiff under a charter-party with the owners of such ship or vessel, was being navigated with the said cargo, for the plaintiff, through and along the said channel or passage of the Swale, and the plaintiff and the master of the said ship at the time last aforesaid were respectively desirous that the said ship or vessel called the "Jason" with the plaintiff's said cargo therein should pass through the said bridge, whereof the defendants always had notice; and that all things were done and performed, and all requests made, and all notices given, and all things and events happened and occurred, and all things existed, and all times [490] elapsed, to entitle the plaintiff to have the said bridge opened by the defendants, to enable the said ship or vessel &c. to pass through the said bridge, without being detained for any longer space of time than as in the said Act in that behalf mentioned: Yet the defendants, not regarding their duty in that behalf, wilfully, wrongfully and injuriously, and contrary to the said Act, neglected and refused to open the said bridge on the occasion on which the plaintiff and the master of the said ship were respectively so desirous that the said ship or vessel &c. should pass through the said bridge, for a much longer space of time than was sufficient to enable any trains or carriages, animals or passengers, ready to traverse the railway or carriage road over the said bridge, to cross the said bridge, and for opening the said bridge to admit the said ship or vessel &c. to pass the same, and for more than ten minutes on

such occasion aforesaid; and thereby the defendants on the occasion aforesaid wilfully, wrongfully and unlawfully, and contrary to the said statute, detained the said ship or vessel called the "Jason," so navigating the said channel of the Swale with the said cargo therein, and hindered and prevented the said ship or vessel with the said cargo therein from passing through the said bridge for a much longer space of time than was sufficient to enable any train or carriages, animals or passengers &c. to cross the said bridge, and for opening the said bridge to admit the said ship or vessel &c. to pass the same, and for more than ten minutes on the occasion aforesaid, to wit, for the space of one week and more. The declaration then proceeded to allege that thereby the ship, with the plaintiff's cargo therein, was necessarily hindered and delayed in navigating the public navigable channel of the Swale, and through the bridge to the plaintiff's wharf beyond the bridge; and the plaintiff was prevented from discharging the cargo at the wharf for a longer space of time than he [491] otherwise would have been, and thereby sustained great loss and damage; and the plaintiff, in order to prevent further loss and damage and to discharge the cargo according to the charterparty, was necessarily forced and obliged to unload the cargo into lighters to convey it to the plaintiff's wharf, and thereby the plaintiff was put to expense. The declaration contained similar counts for the detention of two other ships of the plaintiff, called the "Admiral" and the "Alice."

Pleas (inter alia). First, not guilty. Secondly, that the defendants did not construct or build the said bridge, nor was the same under the management, direction or control of the defendants as alleged. Issues thereon.

At the trial, before Cockburn, C. J., at the last Kent Summer Assizes, the following facts appeared:—The plaintiff was a tanner, carrying on his business at Milton, near Sittingbourne, in the county of Kent. The defendants are a Company incorporated by the 19 & 20 Vict. c. lxxv. for the purpose of making a railway from Sittingbourne to Sheerness, in the county of Kent. By the 18th section of that Act (a) the defendants were empowered to construct a railway commencing in the parish of Sittingbourne and crossing the passage called the Swale, which is a public navigable channel, by an opening bridge, and terminating at Sheerness. In November, 1856, the defendants entered into a contract with one Withers for the construction of the railway and works, according to the provisions of the Act, and he accordingly erected an opening bridge across the Swale, about three miles above the Milton town wharf. The 26th section of the 19 & 20 Vict. c. lxxv., enacts "that it shall not be lawful for the Company, or any person acting under them, to detain any vessel navigating the Swale for a longer space of time than may be sufficient to [492] enable any trains or carriages, animals or passengers, ready to traverse the said railway or carriage road over the said bridge, to cross the said bridge, and for opening the said bridge to admit such vessel to pass through the same; and in case the Company, or any person acting under them, shall detain any such vessel for a longer space of time than ten minutes, or demand, take or receive any toll for the passage of any vessel through the said bridge, the Company or person so offending shall in every such case forfeit and pay any sum not exceeding the sum of 10l.; but nothing in this Act shall prevent any remedy for damages which any party may sustain in respect of any such detention as aforesaid." In February, 1860, the plaintiff chartered two vessels, called the "Jason" and "Admiral," to bring a cargo of bark from Antwerp to the Milton town wharf. On the 13th February the vessels arrived at the defendants' bridge, when it was found to be closed. On application to the engineer, he stated that the bridge could not be opened for a week or a fortnight. The bridge was in fact out of repair, and could not be lifted in consequence of one of the wheels being broken. The vessels remained there until the 16th February, when the plaintiff hired three barges, and by that means discharged the cargo within the time allowed by the charterparty. At this time Withers, the contractor, had not completed the works, and he did not deliver them up to the defendants until July, 1860.

It was submitted, on behalf of the defendants, that under these circumstances they were not liable. The learned Judge reserved the point: and a verdict was found for the plaintiff, with 25l. 15s. damages.

Hawkins, in last Michaelmas term, obtained a rule nisi to enter the verdict for the defendants, on the ground that there was no evidence to fix them with liability.

[493] Lush and Denman appeared to shew cause in the present term (Jan. 14); but the Court called on

Hawkins and Hannen to support the rule. The contractor is liable, not the defendants. The defendants did a legal act in causing the bridge to be constructed. At common law, if the same person is owner of the soil on both sides of a navigable river, he may construct a bridge over it, if in so doing he does not interrupt the navigation. [Pollock, C. B. I doubt if any person is at liberty to make a bridge over a road. It is some injury to the road to deprive it of light and air. Martin, B. Probably it is a question of fact whether the erection is a nuisance to the road.] The 19 & 20 Vict. c. xxv., recites, that "the making of a railway from Sittingbourne to Sheerness, &c., with an opening bridge at or near the King's Ferry, over the passage called the Swale, would be attended with public and local advantage." The 18th section defines the undertaking of the Company, viz. the railway and bridge over the Swale.^(a) The 19th section empowers the Company to make the railway and bridge according to certain plans. Section 21 requires the bridge to be constructed according to plans approved of by the Admiralty. By section 26 the Admiralty may establish rules and regulations for opening and closing the [494] bridge. In erecting the bridge the defendants have not exceeded the powers conferred on them by the statute, and the obstruction of the navigation has been caused by the imperfect execution of the works by the contractor. [Wilde, B. Suppose the bridge was constructed so imperfectly, that a carriage going over it fell into the water, would not the defendants be liable?] Here the injury has arisen from works in the course of construction. [Pollock, C. B. How can the Company, who have contracted with a person to build the bridge for them, transfer their liability by means of that contract to some one else?] If the obstruction had been caused by the works which the Company directed the contractor to perform, they would no doubt be liable; but as the obstruction arose from the negligent mode in which the contractor executed the works, the Company are not responsible. [Pollock, C. B. The maxim applies: *qui facit per alium, facit per se*. An obligation under an act of parliament differs very little from a contract. Suppose a person, who undertook to build a prison or a county hospital, contracted with another person to construct a part of it, and he executed the work imperfectly; if the former were sued, what answer would it be to say that he had engaged another person to do the work? The defendants are in the situation of original contractors.] *Steel v. South Eastern Railway Company* (16 C. B. 550) decided that, where work is done for a railway Company under a contract (parol or otherwise), the Company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it and direct what shall be done. [Pollock, C. B. There is a wide difference between a liability arising from the relation of master and servant and that which exists in the present case. The defendants are authorized [495] by act of parliament to construct certain works, and they are liable if injury results from the improper execution of the works. A person authorized by act of parliament to construct works cannot transfer that authority to another person without being responsible for the proper execution of them.] No doubt, a person who employs a contractor to build a house which is a nuisance to his neighbour, does not, by entering into the contract, get rid of his responsibility, but the defendants are in a different position. They are authorized by act of parliament to build a bridge across the river Swale, provided they do not exceed the powers conferred on them by the Act. If the bridge is built in such a way as to obstruct the navigation of the river, it is a nuisance.

(a) Sect. 18. "That the undertaking of the Company shall be the following railway and works, namely,

"A railway commencing at or near Water Lane, in the parish of Sittingbourne, and crossing the passage called the Swale by an opening bridge, and terminating at or near the Ordnance land, near Broad Street, Mile Town, Sheerness, in the parish of Minster in the Isle of Sheppy.

"A bridge over the said passage called the Swale, in the line of the said railway, at or near the ferry, called the King's Ferry, over the said passage, with a carriage road over such bridge for the passage of carriages, animals and passengers, with convenient and proper approaches thereto, as shewn on the plans of the said railway hereinafter referred to."

The defendants, having lawful authority to build the bridge, employed another person to execute the work: then the question is, could that person have built the bridge without obstructing the navigation and so causing a nuisance? If he could, he is liable, not the defendants; for they employed him to do a legal act, and he has done an illegal act, the doing of which was in violation of the terms upon which he was employed. In *Overton v. Freeman* (11 C. B. 867) the defendants contracted with parish officers to pave a certain district, and entered into a subcontract with one Warren, under which Warren was to lay down the paving of a street, the materials being supplied by the defendants and brought to the spot in their carts. Preparatory to the paving, the stones were laid by labourers employed by Warren on a pathway, and left unguarded at night. The plaintiff having fallen over the stones, it was held that Warren was responsible and not the defendants. It was argued, but without success, on behalf of the plaintiff, that the injury of which the plaintiff complained was the result of a public nuisance, and that whoever contributed in any [496] degree to the wrong was responsible for it. Maule, J., in the course of his judgment in that case, comments upon *Matthews v. The West London Waterworks Company* (3 Campb. 403), where a verdict was obtained against a waterworks Company for an injury resulting to the plaintiff from the negligence of men employed by certain pipe layers, who had contracted with the Company to lay down some water pipes in a public street. He observes that it is but a *nisi prius* case; that the report is short and unsatisfactory, and the particular circumstances are not detailed. There is no distinction whether the negligence of the servants of the contractor caused injury to the person or to property. That appears from *Allen v. Hayward* (7 Q. B. 960), where a person had contracted with Commissioners for improving a navigation to perform certain works. In executing part of the work contracted for he made a drain which, from a defect in the materials, could not resist water, and without authority turned on the water, which flooded the plaintiff's land. [Pollock, C. B. There the mischief was entirely collateral.] In *Reedie v. The London and North Western Railway Company* (4 Exch. 244) it was held that the Company were not responsible for the negligence of the servant of a contractor, who allowed a stone to fall on a person passing along the highway. It is submitted that there is no distinction whether the mischief arises from negligence in dealing with real property or a chattel. [Pollock, C. B. Suppose a person employs a contractor to build a house in London, and the contractor builds it so as to darken the windows of another person, is not the employer liable? Wilde, B. Or suppose the contract binds the contractor not to darken the windows? It appears to me that there is a distinction between cases where the injury results from collateral negligence and where it results [497] from the imperfect execution of the work contracted to be done.] Suppose the bridge had fallen down before it was delivered up by the contractor, and killed a person, would the Company have been liable? In *Ellis v. The Sheffield Gas Consumers' Company* (2 E. & B. 767), that which the contractor had been employed to do was a nuisance and illegal. They also referred to *Gayford, App., Nicholls, Resp.* (9 Exch. 702).

POLLOCK, C. B. I am of opinion that the rule must be discharged. The short ground on which my judgment proceeds is, that this does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which the maxim "*Qui facit per alium facit per se*" applies. Where a person is authorized by act of parliament or bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work. In *Ellis v. The Sheffield Gas Consumers' Company* (2 E. & B. 767) Lord Campbell said it is "a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself." Here the contractor was employed to make a bridge, and he did make a bridge, which obstructed the navigation. The case then falls within the principle laid down in *Ellis v. The Sheffield Gas Consumers' Company* (2 E. & B. 767).

Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act—the remedy is against the person who [498] did it. That, however, generally affords but a poor compensation to the party injured; for the

wrong doer is usually a common workman. Then comes the inquiry, who is the master? The contractor. In such cases the employer is not responsible.

But when the contractor is employed to do a particular act, the doing of which produces mischief, another doctrine applies. Here the legislature empowered the Company to build the bridge: in building that bridge the contractor created an obstruction to the navigation, and for that the Company are liable. I suggested, in the course of the argument, that where a man employs a contractor to build a house, who builds it so as to darken another person's windows, the remedy is not against the builder, but the owner of the house. It may be that the same principle applies to cases where a man is employed by another to do an act which it is the duty of the latter to do. In such cases it is the duty of the owner of the soil to inquire what is in the course of being done—to know what is the plan—to see that the materials are good, and to take care that no mischief ensues. So here it was the duty of the Company to see how the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do—what materials he would use, and to have seen that the specification and the materials were such as would ensure the construction of a proper and efficient bridge. But I do not rest my judgment on that ground, but simply on this, that there is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed and was authorized to do.

MARTIN, B. I am of the same opinion. I wish to confine my judgment to the facts of the case. When they [499] are known it is evident that the ruling of the Lord Chief Justice was correct. The plaintiff's vessels came to the entrance of a navigable river and found it obstructed. His cause of action is founded on the well known principle, that he has a right to maintain an action against the party who caused the nuisance. In order to deliver his cargo in time he was obliged to incur expense by forwarding it in barges, which, in my opinion, gave him a right to special damage against the party who created the nuisance. He finds that the defendants, a railway Company, were, by their Act, authorized to build the bridge. The bridge was imperfectly constructed, and could not be opened in consequence of some defect in the machinery. Who was it, then, who obstructed the plaintiff's vessels? On reference to the 19 & 20 Vict. c. lxxv., I find a provision that a light shall be exhibited every night on the bridge during its construction. (Sect. 24.) Now suppose the Company had contracted with a person that he should hang out a light, and the contractor had omitted to do so, is there any pretence for saying that the Company would not have been responsible? The 26th section enacts that it shall not be lawful for the Company to keep the bridge closed so as to detain any vessel navigating the Swale more than a certain time—they may stop a vessel so long and no longer. The plaintiff's vessel was detained for a longer time. By whom? By those who caused the obstruction. I do not say that the contractor is not liable; he may be liable as one of the persons who caused the obstruction; or the Company may have a right of action against him on his contract. But that is no answer to the plaintiff. The persons liable to him are those who, by themselves or their contractors, created the obstruction. Then it was said that the case resembles that of master and servant; but there is no similarity. The parties do not stand [500] in the relation of master and servant. It is simply the case of a person having a right of action against the party who injured him. *Ellis v. The Sheffield Gas Consumers' Company* (2 E. & B. 767) is almost in point. In that case the defendants, in causing the streets to be broken up for their pipes, did an illegal act. Here, though it would have been a legal act to construct a proper bridge, an improper bridge was erected, which was a nuisance.

WILDE, B. I am of the same opinion. I am glad that the case has been fully argued, because, though I entertained a strong impression that the law would turn out to be as we find it, still, when we come to formulate the principle in words, there is some little difficulty. The distinction appears to me to be that, when work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is

responsible for it. The present defendants were authorized to take land for the purpose of their railway, and to build a bridge over the Swale. Instead of erecting the bridge themselves, they employed another person to do it. What was done was done under their authority. In the course of executing their order, the contractor, by doing the work imperfectly, obstructed the navigation. It is the same as if they had done it themselves. It is not distinguishable from the case where a landowner orders a person to erect a building upon his [501] land which causes a nuisance. The person who ordered the structure to be put up is liable, and it is no answer for him to say that he ordered it to be put up in a different form.

CHANNELL, B. Not having heard the whole argument, I will say no more than that I see no reason for doubting the correctness of the decision.

Rule discharged.

EX PARTE THE DEPUTY CORONER OF MIDDLESEX. Jan. 29, 1861.—A deputy coroner, appointed under the 6 & 7 Vict. c. 83, is privileged from arrest whilst preparing to hold an inquest.

[S. C. 30 L. J. Ex. 77; 7 Jur. (N. S.) 103; 9 W. R. 281; 3 L. T. 754.]

Huddleston, on behalf of the deputy coroner of Middlesex, moved to discharge him out of custody. It appeared that the deputy coroner was at the office of the coroner, for the purpose of procuring certain papers, which he required to enable him to proceed to hold some inquests, when he was arrested by process out of this Court. By the 6 & 7 Vict. c. 8, a coroner has power to appoint a deputy, who is in the same position, with respect to his privilege from arrest, as the coroner himself. [Martin, B., referred to *Callaghan v. Twiss* (9 Irish Law Rep. 422).] He referred to *Jarvis on the Office and Duty of Coroner*, p. 63.

The Court ordered the officer to discharge the prisoner forthwith.

[502] THE LANCASHIRE WAGGON COMPANY (LIMITED) *v.* FITZHUGH. Jan. 11, 1861.—Declaration that plaintiffs having bailed and let to P. divers waggons for a certain term, and being entitled to, and the owners of the waggons subject to, the interest of P., thereupon, during the said term and while the plaintiffs and P. were so interested, the defendant converted the same to his own use and sold the same, whereby the plaintiffs were injured in their title to the waggons, and the same became lost to the plaintiffs.—Pleas: Fourthly, that the defendant sold, but not in market overt, the waggons as sheriff in the execution of a writ of *fi. fa.*, and that at the time of the sale the defendant had not any notice of the plaintiffs' interest in the waggons. Demurrer.—Fifthly, that the defendant seized and sold the waggons, not maliciously, and not in market overt, as sheriff, &c.; and that the plaintiffs had not sustained and will not sustain any damage.—New assignment to both pleas. That defendant converted the waggons by absolutely selling the plaintiffs' interest and delivering the waggons to divers persons in pursuance of the sale, and thereby causing the same to be used by the said persons and worn by such user, &c. Demurrer.—Held: first, that the fourth plea was good; but secondly, that the plaintiffs were entitled to judgment on the new assignment.

[S. C. 30 L. J. Ex. 231; 3 L. T. 703. Considered, *Hollins v. Fowler*, 1875, L. R. 7 H. L. 770; *Gaulry v. Ledwidge*, 1876, Ir. R. 10 C. L. 33. Referred to, *Consolidated Company v. Curtis*, [1892] 1 Q. B. 498.]

The second count of the declaration stated, that the plaintiffs, having bailed and let to one George Pell divers railway waggons for a certain term, and on certain terms, and being entitled to, and the owners of the said waggons, subject to the interest in the same of the said G. Pell during the said bailment and letting, thereupon, during the said term, and while the plaintiffs and the said G. Pell were respectively so interested, the defendant broke, forced and pulled certain parts of the said waggons from the same, and thereby damaged the said waggons, and converted the same to his own use, and sold the same to some person or persons to the plaintiffs

unknown, whereby the plaintiffs were greatly injured in their said title and interest to and in the said waggons, and the same have become lost to the plaintiffs, &c.

Fourth plea. That the defendant sold, but not in market overt, the said waggons, and thereby converted the same to his own use, as and being, and not otherwise than as, sheriff of the county where the said grievances were committed, in the due execution by the defendant, as such sheriff, of a certain writ of execution of our lady the Queen to him delivered, whereby he was commanded, as such sheriff, to seize and sell the goods and chattels of the said [503] G. Pell in his bailiwick, to satisfy certain monies due and owing from the said G. Pell to the Great Western Railway Company, and recovered by the said Company against him; and that, at the time of such sale and conversion of the said waggons, the defendant had not any notice of the plaintiffs' title to or interest in the said waggons. And that the defendant did not break, force or pull any part or parts of the said waggons, or any of them, from the same.

Fifth plea. That the defendant seized, and took, and sold, not maliciously, and not in market overt, the said waggons, and thereby converted the same, as and being, and not otherwise than as, sheriff of the county where the said grievances were committed, in the due execution by the defendant, as such sheriff, of a certain writ of execution of our lady the Queen to him delivered, whereby he was commanded, as such sheriff, to seize and sell the goods and chattels of the said G. Pell in his bailiwick to satisfy certain monies due and owing from the said G. Pell to the Great Western Railway Company, and by them recovered against him. And that the plaintiffs had not, at the commencement of this suit sustained, and will not sustain, any damage by reason of the premises; and that the defendant did not break, force or pull any part or parts of the said waggons, or any of them, from the same.

The plaintiffs demurred to the fourth plea.

They also replied to the fourth and fifth pleas:—That they brought their action, not only for the grievances therein admitted, but for that the defendant converted the said waggons to his own use further than is in these pleas admitted, to wit, by absolutely selling the plaintiffs' interest therein, and delivering the said waggons to divers persons in pursuance of the sale, and thereby causing the same to be used by the said persons and worn by such user; and also, for that the defendant damaged the said [504] waggons by causing them to be used whereby they were worn; and for that the waggons were lost to the plaintiffs by reason of the matters mentioned in the second count, and that by reason of the matters newly assigned the plaintiffs were injured in their said title and interest.

The defendants demurred to the new assignment. And the parties respectively joined in demurrer.

Gray argued for the plaintiffs.(a)¹ The fifth plea states that the plaintiffs were not damaged; and, therefore, according to the case of *Tancred v. Allgood* (4 H. & N. 438), that would be an answer to the action. But the fourth plea is bad because it does not contain such an allegation: it admits that the plaintiffs have lost their goods. If a sheriff, under a writ of execution against the goods of A., seizes the goods of B. not knowing they are his, and sells them, the sheriff is liable to an action. [Bramwell, B. The declaration alleges that the defendant converted and sold the goods; the plea, in effect, states that the conversion consisted in the sale.] Suppose the purchasers broke up the waggons for firewood. It is conceded that if a sheriff converts goods which are bailed to a third person, the owner has no right of action unless there is damage to his reversionary interest. But the conversion is the wrongful act, and though no cause of action arises from the conversion simpliciter without damage, yet damage may or may not occur after the conversion and delivery of the goods to the purchaser.

Manisty (with whom was Milward), for the defendant. It is admitted that the sale took place during the term for which the waggons were bailed and let to Pell. Pell was entitled to use the waggons and deal with them as he [505] thought fit. If the purchaser only used them as Pell might have done, no action would lie against him. The plaintiffs had no right of action in trover; (a)² they are only entitled to sue for injury to their reversion. The new assignment is bad; it merely repeats the complaint which is answered by the pleas. The declaration states that the defendant

(a)¹ In Michaelmas Term, Nov. 21. Before Pollock, C. B., Bramwell, B., Channell, B., and Wilde, B.

(a)² See *Gordon v. Harper*, 7 T. R. 9.

converted the waggons to his own use, and thereby the same have become lost to the plaintiffs. The new assignment adds nothing; it only shews how the loss took place. The substantial question then is whether the fourth plea is good. [Bramwell, B. Suppose a sheriff sells the entire interest in a chattel of which the execution debtor is in possession for only a limited interest, is the sheriff liable to an action?] It is submitted that he is not. A sale by a sheriff, not in market overt, would not confer any title as against the owner: it is wholly nugatory. Here the sheriff had a right to seize and sell. In *Dean v. Whittaker* (1 C. & P. 347), it was held that if a party has goods on hire for a term, and the sheriff seizes them under an execution against the goods of that party, the owner of the goods may maintain an action on the case against the sheriff if the sheriff sells the entire property of such goods; but, to support the action, he must shew that as soon as the goods were seized he apprised the sheriff that the goods were lent for a term only, in order that the sheriff might know that he had only a right to sell the qualified property that the hirer had in the goods. The new assignment contains no such allegation, and the defendant, who had a right to sell, is not liable to an action merely because he professed to give a title, which in law he had no power to give: *Owen v. Legh* (3 B. & Ald. 470). [Pollock, C. B. If a person lets a chattel to hire, the [506] letting creates no estate, it is mere contract. Can the hirer let to another?] If a person hires a horse, may he not lend it to a friend? [Wilde, B. That depends upon the terms upon which it was let.] If a horse is let for a certain term, during that period the owner cannot maintain trespass (a)¹ or trover in respect of an injury done to it. Assuming that the property in a chattel is in the party who hires it, he is the only person who can maintain an action in respect of it. [Wilde, B. The property may be entirely in the bailor. Could a sheriff sell the interest of a pawnbroker, as pawnee? Pollock, C. B., referred to *Legg v. Evans*. (b)¹] The interest of a pawnee is a mere lien, a personal right which cannot be parted with, and Parke, B., in the judgment in that case, distinguishes it from those cases where goods are let to hire for a certain period, "because there the person hiring them has the absolute use of the goods for a particular term, and that interest may be disposed of." *Primâ facie* the defendant was bound to sell Pell's interest. If his interest was of such a limited nature that it could not be sold, that should have been replied. If in any case a hirer may have a saleable interest, it must be assumed upon these pleadings that Pell had such an interest.

Gray, in reply. Possibly the bailee might have sued for the injury to these goods, for the right of property is not essential to the maintenance of such an action. Suppose a bailee has goods in his possession without a title to them, he may maintain an action against a stranger who takes them from him. [Pollock, C. B. A special or qualified property is only a special property for the purposes of litigation with particular persons, enabling the possessor to sue if [507] he is deprived of such use as the contract intended to give him. (a)² But, as against the true owner, the only action he could maintain would be on the contract. Wilde, B. It has been taken for granted that the interest of a person to whom goods have been let to hire can be sold. (b)² Bramwell, B. If a person lets a horse to hire, cannot the hirer maintain trover if the owner takes it away?] The owner may sue even if the bailee can. Suppose a bailee having a limited interest in a chattel of great value sells it as his own; and the vendee puts it to some use by which it is wholly lost to the owner, as if he builds it into a house, or takes it to America: if there was no warranty on the sale the seller might keep the entire price, while the owner, if the defendant's contention is right, would have no right of action against him, because the sale did not operate to transfer the property. In the case of *Owen v. Legh* (3 B. & Ald. 470) nothing more than a sale had taken place, but the decision in that case might have been different if the purchaser had cut and carried away the crops. Here the defendant put the plaintiff's property into the hands of another under colour of sale. That was an interference with the property of the plaintiffs; and the new assignment shews

(a)¹ See *Ward v. Macauley*, 4 T. R. 489.

(b)¹ 6 M. & W. 36. As to the right of a pawnee to sell or assign his interest in the pawn, see Story on Bailments, ss. 324, 328.

(a)² See Stephen's Commentaries, vol. 2, p. 73.

(b)² See per Abbott, C. J., *Dean v. Whittaker*, 1 C. & P. 347, 349.

an injury to the plaintiffs by acts done subsequently to the sale. Even if the fourth plea is good, the plaintiff is entitled to judgment on the new assignment.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. This case arose on cross-demurrers to a plea and new assignment. The action was brought against [508] a sheriff for seizing goods which had been let to hire. It is probable that the question in the case cannot be satisfactorily settled till the facts are known by a trial. We shall therefore state our opinion, and the reasons for it, as briefly as possible.

We think the defendant is entitled to judgment on the fourth plea. The second count complains that the defendant broke and damaged the waggons and converted and sold the same, not expressly alleging any delivery to the vendee. The defendant, by his fourth plea, denies the breaking and damaging, which are therefore out of the question. The rest of the second count therefore is, that the defendant converted the waggons to his own use and sold them. The defendant pleads that the conversion consisted in the selling of them, which he did as sheriff under a *fi. fa.* We think, if there was no conversion except in selling, that that is no conversion in law, and no cause of action. Therefore we think the fourth plea good.

But we think the new assignment thereto good. The plaintiffs new assign that the conversion did not consist in the mere sale but in the delivery also, and in causing the purchasers to use and damage the waggons. This is not open to the objection that it is a departure from the declaration, as the word "converted" may include such matters or any others. The new assignment then shews a cause of action.

The fifth plea is not demurred to. It denies the breaking and damage, and pleads the sale as sheriff, and that the defendant thereby converted; and alleges that the plaintiff had not sustained and could not sustain any damage. The plaintiff's new assignment is good, to this plea, for the same reason that it is good to the other.

Judgment accordingly.

[509] NYLANDER v. BARNES. Jan. 29, 1861.—A plaintiff, captain of a foreign ship usually trading to this country, is liable to give security for costs.

[S. C. 30 L. J. Ex. 151; 7 Jur. (N. S.) 194; 9 W. R. 339; 3 L. T. 819.]

Gray had obtained a rule calling on the plaintiff to shew cause why proceedings should not be stayed until security for costs had been given.

From the affidavits on which the rule was obtained, it appeared that the action was brought to recover 383*l.*, balance of account, for freight, primage and demurrage of the ship "Norland." The defendants had paid into Court 335*l.* The writ issued on the 8th of December.

An order having been made by a Judge for particulars of the plaintiff's occupation, his attorney stated as follows:—"The plaintiff is a native of Norway, and is a master mariner, commanding the ship 'Norland,' in which vessel he trades regularly between Sundswall and England, having no permanent residence whatever."

One of the defendants deposed that the ship "Norland" had sailed from Cardiff to Alexandria, and that he believed that the ship did not trade regularly between Sundswall and England: that he believed that the plaintiff resided in Sundswall, and had no property in this country.

An affidavit on the part of the plaintiff stated that he was in England at the time of the commencement of this suit, and was in the habit of remaining here for considerable periods.

Edward James and Dowdeswell now shewed cause. The question is whether a plaintiff, being the captain of a foreign ship, navigating habitually to the ports of this country, is liable to give security for costs. *Henschen* [510] v. *Garves* (2 H. Black. 384) and *Jacobs v. Stevenson* (1 B. & P. 96), shew that a foreigner employed on board an English ship is not bound to give such security. There is no distinction between the case of a person employed on board an English ship, and the captain of a ship habitually trading to this country. In *Nelson v. Ogle* (2 Taunt. 253) the plaintiff was a foreigner, employed by different ship-owners in navigating their ships, and was never resident in any particular place longer than while his ship was detained in any port she might put into, or, in case of his discharge from one ship, until he met with another.

The Court said that the plaintiff's case was not distinguishable from that of an English sailor, and refused to compel him to find security. Though the report does not state whether these ships were British or foreign, they must have been foreign ships, because at that time, by the 34 Geo. 3, c. 68, ss. 2, 5, 6, then in force, the master of a British ship must have been a British subject. In Tidd's Practice, 9th ed., p. 535, it is said, "The rule requiring such security has been relaxed by the Court of Common Pleas in favour of foreign seamen serving on board English ships, or being in the habit of navigating them to or from the ports of this country." [Martin, B. In Archbold's Practice, by Chitty and Prentice, 19th ed. p. 1327, it is said that a foreigner serving on board a foreign vessel, constantly sailing to and from this country, will not be compelled to give security.] They also referred to *Durell v. Matheson* (8 Taunt. 711) and *Foss v. Wagner* (2 Dowl. P. C. 499).

Gray, in support of the rule. The general rule is that where a plaintiff resides abroad he must give security for [511] costs. But not if he is only temporarily resident abroad. The plaintiff's home is not in this country; he is master of a foreign vessel which does not appear to be a regular trader belonging to one of the American lines of packets, but a vessel in which he might at any time go elsewhere, if an advantageous opportunity offered. [Wilde, B. The plaintiff has now gone to Alexandria, and is certainly not in the position of a person commanding a ship which trades regularly to a port in this country.] The passage cited from Tidd's Practice has no reference to a foreigner navigating a foreign vessel. It is possible that the plaintiff may not return to this country for many years.

MARTIN, B. The rule must be absolute. The practice may cause hardship in some cases, but it has been established for a long period of time. If an action is brought by a foreigner against a person resident here, it is reasonable that the costs of the latter should be secured, in the event of the foreigner being unsuccessful. The practice may possibly enable dishonest debtors to prevent their creditors from suing them, in consequence of the difficulty a foreigner, having no connections here, may have in finding security. But, no doubt that evil has been long since considered. Except for the authorities cited from Taunton's Reports, I should have thought it clear that the present was a strong case for requiring security for costs.

CHANNELL, B. I am of the same opinion. The rule, that a foreigner resident abroad, when plaintiff, should give security for costs, is intelligible, reasonable and easy of application.

WILDE, B. I am of the same opinion. The case of [512] *Nelson v. Ogle* (2 Taunt. 253) does not conclude this question. It does not appear to have decided that a man of all others least stationary in this country—a foreigner navigating a foreign ship—is not liable to give security for costs. When the case is examined it appears that the plaintiff, though a native of a foreign country, had no fixed place of residence, and that he was employed by different shipowners. It has been supposed that the Court were speaking of foreign ships, but there is no reference to such vessels. I can well understand the language of the Court as applying to the case of a seafaring man, in the habit of navigating English ships, under such circumstances that he could not be said to reside anywhere.

Rule absolute.

JOSLING v. IRVINE. Jan. 31, 1861.—The defendant, on the 26th of July, sold by sample to the plaintiff 3000 gallons of naphtha, at 2s. 2d. On the 27th the plaintiff resold the same to one H., also by sample, at 2s. 6d. It appeared that the sample contained 73 per cent. of benzol, an article used in the manufacture of Magenta dye then newly discovered, and for that purpose was worth 5s. 9d. a gallon. The defendants failed to deliver the naphtha. It was proved that H. had claimed the difference between 5s. 9d. and 2s. 6d. from the plaintiff. In assessing the damages for the non-delivery of the naphtha the jury gave this amount to the plaintiff as damages. Held, that there must be a new inquiry, because it did not appear at what price the plaintiff could have procured naphtha according to the sample at the time of the breach.—On a second inquiry it appeared that naphtha known to contain 73 per cent. of benzol could not have been bought for less than 5s. 9d. at the time of the breach. The learned Judge, before whom the inquiry was executed, told the jury that the plaintiff would have no answer to

an action by H. for the difference, and advised the jury to give such a sum as would enable him to pay H. The jury having given this amount: Held, that the damages were rightly assessed, and that there was no misdirection.

[S. C. 30 L. J. Ex. 78; 4 L. T. 251. Followed, *Brown v. Muller*, 1872, L. R. 7 Ex. 323.]

Declaration. That, on 26th of July, 1860, the plaintiff bargained and agreed with the defendant to buy of him, and the defendant then agreed to sell to the plaintiff, 3000 gallons of naphtha, according to a certain sample at 2s. 2d. a gallon, 1000 gallons to be delivered weekly, and to be paid for by the plaintiff at fourteen days, prompt, from the date of each delivery, &c.: that, though the times for the delivery of the naphtha, and every part thereof, had elapsed, and the plaintiff had performed all conditions [513] precedent on his part, and all things had been done and happened, and the plaintiff was ready and willing to do all things which it was necessary that he should be ready and willing to do in order to have the naphtha delivered, yet the defendant did not nor would deliver the naphtha by weekly deliveries of 1000 gallons according to the agreement, or otherwise howsoever. And the defendant wholly neglected and refused to perform his part of the agreement, whereby the plaintiff has been hindered and prevented from performing a certain other contract made by him with one E. Hoile for the sale to him of the said naphtha at greatly increased prices, &c.

Judgment having been signed for want of a plea, a writ of inquiry was executed before the Secondary of London. The evidence on his notes was, in substance, as follows:—

On the 26th of July, 1860, the plaintiff purchased 3000 gallons of naphtha of the defendant, by sample. The contract was as follows:—

“London, July 26, 1860.

“Bought of Mr. Irvine, 3000 gallons of naphtha, at 2s. 2d. per gallon, 1000 gallons to be delivered weekly, &c.
“JOSLING & Co.”

On the 27th the plaintiff entered into a contract with Hoile & Co. to sell the same for 2s. 6d. No part of the naphtha was delivered. The price went up.

On cross-examination, the plaintiff said that he could not say that there was any rise in price between the 26th and the end of July, or at the beginning of August. A fortnight after the date of the contract he knew that the defendant could not carry it out.

H. Gray, the plaintiff's clerk, proved that the value of naphtha depends on the quantity of benzol or benzine which it contains. Benzol is used in producing the Magenta dye. It is one of the constituent parts of ordinary naphtha; but [514] its quantity varies. The plaintiff could not get other naphtha. The defendant offered two lots of 500 gallons each, not agreeable to sample. The sample contained 73 per cent. of benzol. Naphtha containing that proportion of benzol was worth, in July last, 5s. 6d.

E. Hoile, a manufacturing chemist, proved that he agreed to purchase the 3000 gallons of the plaintiff: that naphtha containing 73 per cent. of benzol was worth, in July last, from 6s. 8d. to 5s. 10d., and that he had given the plaintiff notice that he should proceed against him to recover 525l., i.e. 3s. 6d. a gallon on 3000 gallons, being the difference between the price he had agreed to give for the naphtha and 6s. at which he estimated it.

F. Lamb, a merchant, proved that the market value of naphtha containing 73 per cent. of benzol was 5s. 6d. to 5s. 9d. There was no material change between the middle of July and the middle of August. After that time it advanced 50 per cent.

Another witness stated that the quantity of benzol in the sample was 80 per cent.

The jury, under the direction of the Secondary, having assessed the damages at 537l. 10s.,

Gates, in this term, obtained a rule to shew cause why the damages should not be reduced to the sum of 50l., or why the inquisition of damages should not be set aside and a new writ of inquiry executed, on the ground that the enhanced value which Hoile set upon the naphtha should not have been received in evidence, and that the jury should not have been allowed to take it into consideration.

Pearce now shewed cause. The first question is, whether, in estimating the

damages, the liability of the plaintiff, under his contract with Hoile, may be taken into consideration. In *Randall v. Raper* (E. B. & E. 84) the defendant had [515] sold to the plaintiff seed barley warranting it to be chevalier seed barley, but delivered seed barley of an inferior kind. The plaintiff, relying on the warranty, sold the barley, with a similar warranty, to T., who sowed it and obtained an inferior crop. T. claimed compensation, which the plaintiff agreed to give him, but no sum had been paid or agreed upon. It was held that, in assessing the damages on a writ of inquiry, the jury ought to include the amount to which the plaintiff had become liable to his vendee in respect of the difference of the crops. [Bramwell, B. If, when the contract was broken, the plaintiff had gone into the market and bought naphtha from another person, the defendant must have paid the difference in price which the plaintiff would have been compelled to pay. The only way in which evidence of the resale was admissible was to shew the rise in price. The question is, could other naphtha containing the same quantity of benzol have been bought. The sum to which the plaintiff is entitled is that which would have replaced him in the same position as if the contract had not been broken.]

Gates, in support of the rule. The plaintiff seeks to recover damages not only for the loss he has sustained, but also in respect of the profits which Hoile might have made. Such damage is too remote. The defendant had no concern with the contract between the plaintiff and Hoile; and therefore, according to the principle established by *Portman v. Middleton* (4 C. B. N. S. 322), no damage can be recovered in respect of it. It is admitted that the plaintiff is entitled to the difference between the price at which he bought and that at which he resold on the 27th. But, after that, up to the time when the contract should have been completed, it is not alleged that there was any rise in the price of naphtha. [516] [Bramwell, B. The contract was broken, as to 1000 gallons, on the last day of July. The question is, at what price could the plaintiff have bought on that day naphtha of a quality similar to the sample he bought of the defendant? Martin, B. The naphtha was bought by sample; it was then resold; when analysed, it proved to be worth 6s. a gallon: then was that its value at the time of the sale?]

BRAMWELL, B. I am of opinion that there ought to be a new inquiry. If the plaintiff could not have gone into the market and bought naphtha except at a price by which he would lose 537l. 10s., he ought to recover that amount. But if, from any cause whatever, he could have bought naphtha for a less sum, the damage which the plaintiff is entitled to recover is the difference between that sum and the contract price. I cannot ascertain from the notes the real facts on that point.

CHANNELL, B. I think there should be a new inquiry in order that the facts may be fully brought before us. It does not distinctly appear what the price of naphtha was before the middle of August. There was a breach by the non-delivery at the end of the first week, and if, within a reasonable time for the plaintiff to buy naphtha elsewhere, the price had risen, the plaintiff would be entitled to the difference as to that parcel; and, assuming that the price had then risen to 5s. 9d., the damages are right. If the price had only risen at the expiration of the second or third week, the plaintiff would merely be entitled to the difference in price as to those parcels.

WILDE, B. I am of the same opinion. It is clear that, when a contract of this description is broken, the purchaser is entitled to the difference between the contract price and [517] the market price at or about the time when the contract ought to have been performed. Here the delivery ought to have taken place on three several days, the 1st, 8th and 15th of August. The way to arrive at the proper measure of damage is to inquire the market price at the first, second and third of these periods. It is immaterial whether the rise in price is occasioned by scarcity, or increased demand, or any other cause. I also think that the contract with Hoile is immaterial, and has no bearing on the question. If I could see that there was the slightest trace of an inquiry having taken place as to the market price on those days, I should not disturb the verdict.

MARTIN, B. I also think that there ought to be a new inquiry. The facts, as I understand them, are that the plaintiff, on the 26th July, purchased of the defendant, by sample, 3000 gallons of naphtha, at 2s. 2d. a gallon, which the plaintiff sold on the 27th, also by sample, to Hoile & Co., for 2s. 6d. There was therefore an increase on the market price. When the naphtha was analysed it was found to contain 73 per cent. of benzol. The plaintiff said to the defendant, "If you had delivered the naphtha,

it would have been found to contain that amount of benzol, and therefore would have been worth 5s. 6d." The real transaction was, that the defendant sold an article which was of greater value than any of the parties were aware of at the time of the sale. The plaintiff could not complete his contract with Hoile & Co. except by purchasing naphtha at this enhanced price, and that is an expense which he incurred by the defendant's default. Upon these facts, I think that the case of *Randall v. Raper* (E. B. & E. 84) is decisive to shew that the damage which the plaintiff is liable to pay to the subpurchaser may be taken into consideration. I agree that, if a person purchases stock, or any other article, which [518] has a certain known price and quality, the market price at the time of the breach affords a fair measure of damage. But, in this case the value of the naphtha may have risen immediately after the sale, and there may have been no ascertainable market value.

The rule will be absolute, and it may be a part of such rule that the writ of inquiry be executed before a Judge at Nisi Prius, the defendant to take short notice of trial for the sittings after term.

Rule accordingly.

The writ of inquiry was then executed before Martin, B., at the London Sittings after Hilary Term, when, in addition to the evidence given on the former occasion, it was proved that, in July 1860, the market price of naphtha known to contain 73 per cent. of benzol was 5s. 9d. Hoile & Co. had become bankrupt. The learned Judge told the jury that the plaintiff would have no answer to an action by the assignees of Hoile & Co. for the difference between 2s. 6d., the contract price, and the value 5s. 9d., and his lordship advised the jury to give to the plaintiff such a sum as would enable him to pay Hoile's assignees.

Gates, in Easter Term (April 17), moved to set aside the assessment of damages, and for a new inquiry on the ground of misdirection.

BRAMWELL, B. I am of opinion that there should be no rule. There is no real difference between my opinion and that of my brother Erle, as expressed in the case of *Randall v. Raper* (E. B. & E. 84). When a person has bought an article, and the seller does not deliver it, if the buyer can go into the market and get it elsewhere, the difference between the [519] two prices, if any, is the measure of damage. The buyer need not go into the market the next day, but is entitled to the difference in price at the time when he might reasonably procure the article. Here it was proved that the plaintiff could not have bought naphtha of the same quality as that contracted to be sold except at an increase of price equal to the damages claimed. If one man has the sagacity to discover the value of an article which another possesses, and buys it, he is entitled to the benefit of his bargain. To hold that the buyer is bound to tell the seller the value would be to establish a rule for the benefit of the idle and ignorant. *Randall v. Raper* (E. B. & E. 84) is distinguishable from the present case. There the seller, by delivering barley not according to contract, the defect in which could not be discovered till the barley was delivered, deprived the buyer of the opportunity of going into the market and getting other barley. In the present case I concurred in granting the rule on the former occasion, because, though there was evidence that naphtha containing 73 per cent. of benzol was worth 5s. 9d., it was consistent with that that such naphtha might have been bought at 2s. 6d., because people in general did not know that there was benzol in it. Upon the Secondary's notes, it was not clear whether or not there was any evidence of the market price of such naphtha.

WILDE, B. I am satisfied that the proper question was left to the jury. I agree with my brother Bramwell as to the distinction between this case and *Randall v. Raper* (E. B. & E. 84).

MARTIN, B. I think that, when the amount of the loss which will be sustained by a plaintiff can be fixed with certainty, a Judge should endeavour to persuade the jury to adopt it as the measure of damages.

Rule refused.

[520] THE SOUTH EASTERN RAILWAY COMPANY v. WARTON. Jan. 28, 29, 1861. —Declaration on a bond, conditioned for the due performance by the defendant of a contract to execute certain railway works according to a specification. Breach: that the defendant did not complete three tunnels according to the specification. —Plea (by way of estoppel): that, before the suit, by another deed, it was declared that, with certain exceptions therein mentioned not relating to the causes of action, the defendant and the plaintiffs had adjusted and mutually satisfied every other claim or demand which the said parties then had against each other, as the plaintiffs and the defendant did by the said deed severally admit. —Replication: setting out the deed which, after reciting the contract to execute the railway works, and a provision therein for the reference to arbitration in case the defendant should be hindered in the execution of the works by the plaintiffs or their engineers; and that the plaintiffs had made out an account containing a variety of matters in respect of which they claimed compensation, a copy whereof was contained in a schedule to the deed, further recited: that, with the exception of the claims contained in the schedule, S. E. R. Company (the plaintiffs) and C. W. (the defendant) had settled, adjusted and mutually satisfied every other account, claim or demand which the parties had against each other arising out of the said contract, as the said S. E. R. Company and C. W. did thereby severally admit and acknowledge; but the claims of the said C. W., set forth in the schedule, were disputed; and that it had been agreed that the claims of C. W. in the schedule should be referred to the award of G. W.: Witnessed: that the parties covenanted to abide by the award of G. W.; that the submission should not be defeated by the death of the parties, and that the costs should be in the discretion of the arbitrators, &c. Held, that there was no estoppel; that by the true meaning of the deed the arbitrators were confined to the matters mentioned in the schedule, and that the admission was made for the purpose of the reference only.

[S. C. 31 L. J. Ex. 515.]

Declaration. That the defendant by his bond, sealed with his seal, bearing date the 9th of April, A.D. 1847, acknowledged himself to be bound to the plaintiffs in 20,200l. subject to a condition whereby, after reciting that by indenture dated the 9th of April, A.D. 1847, made between the defendant and H. Warden of the one part and the plaintiffs of the other part, for the considerations therein expressed, the defendant and H. Warden covenanted with the plaintiffs that they would make, execute and complete certain railway works authorized by "An Act to authorize the South Eastern Railway Company to make a railway from Tunbridge Wells to join the Rye and Ashford extension of the Brighton, Lewes and Hastings Railway, near Hastings," together with the ballasting, and all requisite excavations, embankments, cuttings, tunnels, &c., brickwork, masonry, &c., described in the said indenture, and the specifications, &c., thereto annexed &c., in the manner particularly mentioned in the said indenture or the specification thereunto [521] annexed,—the condition of the bond was declared to be that if H. Warden and the defendant did make, execute and complete the railway and works according to the indenture and specification, then the bond should be void; otherwise the same should remain in full force. Breach: that the defendant and the said H. Warden did not make or complete the railway and other works according to the stipulations in the indenture and specifications in that they did not execute and complete three tunnels according to the specification, whereby the bond became forfeited.

Plea. That the plaintiffs ought not to be permitted to say that there are any such causes of action as in the declaration alleged, or to sue for the same, because after the accruing thereof, and before the commencement of this suit, by another deed, dated the 7th of April, 1854, made between the plaintiffs of the one part, and the defendant and H. Warden of the other part, and sealed with the common seal of the plaintiffs and with the seals of the defendant and H. Warden, it is declared that, with certain exceptions in the said deed mentioned, and which exceptions never did, and do not in any way, touch, affect or relate to the said causes of action, or any part thereof, the defendant and H. Warden and the plaintiffs had settled, adjusted and mutually satisfied every other claim or demand which the said parties then had against each other, arising

in any account, matter or thing whatsoever, as they the plaintiffs and the defendant and the said H. Warden did by the said deed severally admit and acknowledge, and this the defendant is ready to verify: wherefore he prays judgment if the plaintiffs ought to be admitted, against their own deed, to say that there is any such existing cause of action as alleged.

Replication (setting out the deed, and a schedule annexed to it, in words and figures, the material parts of which were in substance as follows):—The indenture, which was between the South Eastern Railway Company of the one [522] part, and the defendant and Henry Warden, called “the contractors,” of the other, recited that the South Eastern Railway Company were authorized to make the railway, and had caused a specification to be prepared for a double line of railway from the Grove Tunnel to the turnpike road from Robert’s Bridge to Brighting; and that, by the indenture of April 1847, “the contractors” covenanted that they would well and sufficiently, and with the best materials, make, execute and complete the said double line of railway being a distance of fifteen miles, together with the ballasting, with all requisite excavations, &c., tunnels, brickwork, masonry, &c., described, &c., and deliver over the same when completed within twelve months from the time when possession was given to “the contractors” of the said land: that “the contractors” should provide all stores, bricks, &c., described or referred to in the specification, &c.: that “the contractors” should fulfil all the requisitions, conditions, &c., contained in the said specification or drawings, or that might be reasonably inferred therefrom: that if “the contractors” should be hindered in the execution of any of the works in consequence of any acts or omissions of the South Eastern Railway Company or their engineers, such hindrance should not vacate or otherwise affect the agreement, except that the question whether what (if any) compensation should be made should be settled by arbitration. That in consideration of the premises the South Eastern Railway Company agreed to pay to “the contractors” 202,000*l.* at the times and in manner subject to the proviso thereafter mentioned: that no breach except non-payment should annul the contract, or discharge “the contractors” from the observance of the covenants on their part, but compensation for damage (if any) from such breach or non-observance should be paid to “the contractors” on account of any delay: that “the contractors” commenced the works in April 1847, but did not [523] complete them till September 1851. The indenture then proceeded:—“And whereas C. Warton (the defendant) and H. Warden have made out and delivered to the South Eastern Railway Company an account in writing, signed by them respectively and marked with the letter ‘A,’ including a variety of matters, in respect whereof they claim to be paid compensation by the South Eastern Railway Company, and the particulars of which account amount to the sum of 28,280*l.*, in discharge whereof they have offered to take 20,000*l.*, and a copy of which account is contained in a schedule hereunder written. And whereas, with the exception of the claims of the said C. Warton and H. Warden contained in the said schedule, the said C. Warton and H. Warden and the South Eastern Railway Company have settled, adjusted and mutually satisfied every other account, claim or demand which the said parties have or hath against each other, arising out of the said contract, or any other account, matter or thing whatsoever, as they the said South Eastern Railway Company and the said C. Warton and H. Warden do hereby severally admit and acknowledge; but the claims of the said C. Warton and H. Warden, contained and set forth in the schedule, as well as the amount claimed thereby, are disputed by the South Eastern Railway Company. And whereas it has been agreed between the South Eastern Railway Company and the said C. Warton and H. Warden, that the claims of the said C. Warton and H. Warden against the South Eastern Railway Company in the said schedule should be referred to the award, arbitration, &c., of G. W., J. R. and T. B.” “Now these presents witness: That in pursuance of the said agreement the South Eastern Railway Company covenant, promise and agree with C. Warton and H. Warden, &c., and the said C. Warton and H. Warden covenant with the South Eastern Railway Company, to abide by the award of [524] the arbitrators,” &c.: that the submission shall not be defeated by the death of C. Warton and H. Warden: that the parties shall attend to be examined if required: that they produce books and permit inspection: that they will not delay the arbitration: that if the parties shall not attend upon the arbitrators after ten days’ notice the arbitrators may proceed *ex parte*: that the parties shall be examined on oath: that the costs shall be in the discretion of the arbitrators: that the arbitrators shall

have all the powers of a Court of equity and Court of law: that the submission may be made a rule of the Court of Queen's Bench; and that, in the event of any valid objection to the award, that Court shall have power to refer it back, &c.

The schedule, which was also set out, contained claims for compensation, delay in giving possession of the land to the contractors, in substance as follows:—

Unemployed plant, &c.: Salaries to agents, &c.	Total of claims	£2800
Company's engineers: Delaying the works in various ways till October 1848.	Total of claims	7400
Delay in obtaining land and materials between October 1848 and October 1849.	Total of claims	2100
From October 1849 to October 1850: Delay by non-delivery of permanent materials and non-possession of land		2200
October 1850 to September 1851: Delay by non-delivery of permanent materials and giving up clay cuttings, &c.		2400
Retention of 10,000l. guarantee fund, loss of interest, &c.		1750
Maintenance of road for longer period than contemplated by contract, &c.		2500

Demurrer and joinder.

[525] Knowles (with whom was Deedes), in support of the demurrer. The plea is good, and the replication affords no answer to it. The only objection which can be suggested to the plea is, that the declaration is not on the deed which contains the estoppel. In *Bowman v. Taylor* (2 A. & E. 278, 291) the principle of estoppels is said to be, "that where a man has entered into a solemn engagement by deed, under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted." According to that doctrine there is an estoppel in the present case. [Martin, B. Was it meant that this dispute as to the tunnels should be included in the reference?] The words of the acknowledgment are sufficiently large to include the dispute as to the tunnels, and therefore evidence is not admissible to shew that the intention of the parties was different from that which they have expressed: *Lainson v. Tremere* (1 A. & E. 792). *Carpenter v. Buller* (8 M. & W. 209) will probably be relied upon by the other side. In that case it was held that when a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is not, as between the parties to that instrument and in an action upon it, competent to the party bound to deny the recital; but a party to an instrument is not estopped in an action by another party not founded on the deed, and wholly collateral to it, to dispute the facts so admitted. It should however be observed that in *Carpenter v. Buller* the estoppel was not pleaded. The deed of 1847 provides for reference of matters in dispute. The deed of 1854 cannot be said to be wholly collateral, for it carries out the arrangements. In this respect the case resembles *Wiles v. Woodward* (5 Exch. 557). The object of the parties was to put [526] an end to all differences. [Channell, B. If the deed of 1854 had been a release the matter would have been clear. Martin, B. It seems to me an estoppel only for the purposes of the arbitration. Did the parties mean more than that?] The acknowledgment may be good as an estoppel in pais, being a matter by which the situation of the parties was altered. They also referred to *Freeman v. Cooke* (2 Exch. 654) and *Rowntree v. Jacob* (2 Taunt. 141).

Lush (with whom was Welsby) appeared for the plaintiffs, but was not called upon to argue.

MARTIN, B. We are of opinion that there must be judgment for the plaintiffs. The action is on a bond conditioned for the performance of covenants by the defendant and H. Warden in a deed dated in 1847; and the breach is, that the defendant and H. Warden broke a covenant to execute certain works contained in the deed. There is a plea, by way of estoppel, which is in confession and avoidance. The plaintiffs reply setting out the indenture, and to this replication there is a demurrer. It then appears that in 1854 the parties, by an instrument under seal, stated that, with the exception of certain claims contained in the schedule, the plaintiffs and the defendant and H. Warden had settled, adjusted and mutually satisfied every other account, claim or demand arising out of the contract on which the action is

brought. Mr. Knowles contended that, the language being general, the effect which the Court must give to it does not depend upon the intention of the parties. I cannot concur with him. Every deed must be construed according to that which, looking at the document itself, appears to be the intention of the parties. It is true that in construing a deed the Court cannot look at collateral matters, but the [527] intention of the deed as appearing upon the face of it must be regarded. If, in the present case, it had appeared that the parties intended to abandon every claim except those referred to in the schedule, the argument on the part of the defendant would have been unanswerable. But when the whole deed is looked at no such intention appears. The parties intended to refer certain matters to arbitration. They introduce the recital that, "whereas, with the exception of the claims of the said Charles Warton and Henry Warden contained in the schedule, the said Charles Warton and Henry Warden and the South Eastern Railway Company have settled, adjusted and mutually satisfied every other account, claim or demand which the said parties have or hath against each other arising out of the said contract, or any other account, matter or thing whatsoever, as they the said South Eastern Railway Company and the said Charles Warton and Henry Warden do hereby severally admit and acknowledge; but the claims of the said Charles Warton and Henry Warden, contained and set forth in the said schedule, as well as the amount claimed thereby, are disputed;" and the recital goes on to state that it had been agreed that the claims contained in the schedule should be referred to an arbitrator. The true meaning of the deed is, that the arbitration shall be confined to the matters specified in the schedule, and the admission is made for the purpose of that deed. I do not think that the parties ever contemplated that whatever cause of action either might have against the other should finally cease. A recital in such a deed would be binding if it was the bargain on the faith of which the parties acted. But that is not the case here. Neither is this an estoppel by means of a recital contained in the deed which is the foundation of the action. In *Carpenter v. Buller* (8 M. & W. 209), it was held that a party to an instru-[528]-ment is not estopped in an action by another party not founded on the deed and wholly collateral to it; but evidence of the circumstances under which such admission was made is receivable to shew that the admission was inconsiderately made, and not entitled to weight as proof of the fact it is used to establish. That appears to me to be conclusive. The arbitration was a wholly collateral matter. The admission, is evidence, and may be strong or of very little value according to circumstances. Here, I collect from the deed that it was not the intention of the parties to prevent the plaintiffs from bringing such an action as the present.

CHANNELL, B. I am of opinion that the plaintiffs are entitled to judgment. This is said to be an estoppel arising out of matter contained in a recital. But what is the true construction to be placed on the recital? The deed appears to have been prepared for the purpose of referring certain disputes to arbitration; and the intention of the recital is to limit the arbitrators to the matters contained in the schedule. If we could see the parties had agreed to release all other claims in consideration of the agreement to refer, then there might be an estoppel; but that does not appear to have been their meaning. On these grounds the plaintiffs are entitled to judgment. It was said that this is not a question of intention. It may be that, when a deed contains a recital of a particular fact in express terms, the effect of the recital cannot be got rid of by shewing what the intention of the parties was. But when the language is general, we may collect the intention from the terms of the whole deed, and in that way we have endeavoured to arrive at the true construction of the deed in the present case.

Judgment for the plaintiffs.

[529] POTT AND ANOTHER, Assignees of William Dean and James Dean, Bankrupts v. LOMAS. Jan. 11, 1861.—In an action by the assignees of D. a bankrupt against L., it appeared that D., before his bankruptcy, being indebted to B., at the request of the agent of B., verbally promised to give B. an order on the defendant who was indebted to him. D. then gave to B. an order (unstamped) as follows:—"D. to B., Debtor. To balance of account 23l. Mr. L. Please to pay the above account and charge it to our account as paid. 20th Oct. 1857." The defendant then gave the following document to B.:—"Mr. B. I agree to pay you cash as

per order of D." D. subsequently became bankrupt, and the defendant, after the bankruptcy, paid the 23l. to B. Held, that, the order being inadmissible for want of a stamp, there was no evidence of an equitable assignment of the debt, so as to entitle the defendant to credit for the payment made by him after the bankruptcy.

[S. C. 30 L. J. Ex. 210 ; 3 L. T. 816.]

Debt by plaintiffs, as assignees of W. Dean and J. Dean, bankrupts, for money payable to the bankrupts, for work done and materials provided for the defendant, &c.

Pleas (inter alia). First, payment, Secondly, set-off. Thirdly, as to 23l. 7s. 5d., for a plea upon equitable grounds, that W. Dean and J. Dean, before either of them became bankrupt for valuable consideration in that behalf, did, upon the requisition of John Butterworth, and pursuant to an agreement in that behalf made by and between W. Dean and J. Dean and J. Butterworth, by a certain writing directed and delivered to the defendant, equitably assign and appropriate to the payment of 23l. 7s. 5d., then due by W. Dean and J. Dean to J. Butterworth, an equal sum of money out of the amount due or to become due to W. Dean and J. Dean for work done and materials provided by them for the defendant ; and the defendant then had notice of and assented to the said writing ; and the defendant, before the suit, satisfied and discharged the claim of J. Butterworth in respect of the said 23l. 7s. 5d. by payment of an equal sum to him out of money due for the work done and materials provided and appropriated thereto as aforesaid ; and the several acts, matters and things mentioned in this plea were respectively done really and *bonâ fide* and not by-way of fraudulent preference ; and the plaintiffs never had any equitable right, title or interest in or to the said 23l. 7s. 5d.

[530] Fourthly, as to the same 23l. 7s. 5d., for a defence upon equitable grounds. That W. Dean and J. Dean, for certain valuable consideration in that behalf, did, upon the requisition of J. Butterworth, and pursuant to an agreement made by and between the said W. Dean and J. Dean and J. Butterworth, by a certain writing directed and delivered to the defendant, equitably assign and appropriate to the payment of 23l. 7s. 5d., then due by W. Dean and J. Dean to J. Butterworth, an equal sum of money out of the amount due or to become due to W. Dean and J. Dean for work done and materials provided for the defendant ; and the defendant then had notice of and assented to the appropriation ; that the several acts, matters and things in the plea aforesaid were really and *bonâ fide* made, done and entered into before the filing of the petition for the adjudication of bankruptcy against W. Dean and J. Dean in which they were adjudged bankrupts, or any other such petition against them or either of them, and without notice by J. Butterworth or by the defendant of any act of bankruptcy committed by W. Dean and J. Dean or either of them ; that the defendant, before this suit, satisfied and discharged the claim of J. Butterworth in respect of the said 23l. 7s. 5d., which then remained due as aforesaid, by payment of 23l. 7s. 5d. to him out of moneys due for work done and materials provided, and appropriated thereto as aforesaid ; and none of the several acts, matters and things in the plea aforesaid were made or done by way of fraudulent preference ; and the plaintiffs never had any equitable right, title or interest in or to the said 23l. 7s. 5d.

The plaintiffs took issue on all the pleas, and replied to the third and fourth pleas : —That the defendant had not notice nor did he assent to the said equitable assignments or appropriations in the said third and fourth pleas mentioned, nor did he pay the said sum of 23l. 7s. 5d. in those pleas [531] mentioned at any time before W. Dean and J. Dean became bankrupt, or before the filing of the petitions for the adjudication of their bankruptcy, or before the defendant and J. Butterworth had notice of acts of bankruptcy by the bankrupts committed ; and the said moneys in the said third and fourth pleas respectively mentioned, with and out of which the said sums of 23l. 7s. 5d. were paid as in those pleas alleged, after the making of the said equitable assignments and appropriations, remained and continued to be, and were, debts by the consent and permission of J. Butterworth in the order and disposition of W. Dean and J. Dean, as the reputed owners thereof, until they became bankrupts, and until the defendant and J. Butterworth had notice of acts of bankruptcy by them the said bankrupts committed, and until the filing of the petition ; and the moneys with and out of which the said sums were so paid were debts and chattels which W. Dean and J. Dean, at the time they became bankrupts, and when the defendant and J. Butter-

worth had notice of acts of bankruptcy by them committed, and at the time of filing the said petition, had, by the consent and permission of the true owner thereof, to wit the said J. Butterworth, in their, the said bankrupts', order and disposition, and whereof they, the said W. Dean and J. Dean, by the like permission and consent, then were the reputed owners; and that the Court of Bankruptcy, whereby the said W. Dean and J. Dean were adjudged bankrupts, ordered the same to be disposed for the benefit of the creditors under the said bankruptcy.

Issue thereon.

At the trial, before Martin, B., at the last Liverpool Summer Assizes, it appeared that the action was brought by the plaintiffs, as the assignees of W. Dean and J. Dean, who became bankrupts in December, 1857, to recover a balance of moneys alleged to be due for work done by the [532] bankrupts, before their bankruptcy, in building a cotton mill for the defendant at Burnley.

The question was, whether the defendant was entitled to credit for a sum of 23l. 7s. 5d. paid by him to John Butterworth in November, 1859. In order to establish his case upon that point, the defendant proposed to put in an unstamped document which was given to him by the bankrupts, as follows:—

“Burnley, October 20th, 1857.

“Mr. James Dean to John Butterworth, debtor.

“1857, Jan. 1. To balance of account rendered, 23l. 7s. 5d.

“Mr. William Lomas. Sir,—Please to pay the above account, namely 23l. 7s. 5d., to John Butterworth, corn miller, Burnley, and charge the same to our account as paid to us in full. As witness my hand, this 20th day of October, 1857.

“WILLIAM and JAS. DEAN.

“Witness, Thomas Butterworth.”

It was objected that this document was a bill of exchange, and as such was inadmissible for want of a stamp; and it was rejected. It was then proved that the defendant gave the following document to Butterworth:—

“Mr. Butterworth. Dear Sir,—I agree to pay you cash 23l. 7s. 5d., as per order of William and Jas. Dean, if I have so much cash in hand on completion of their contract, of which I think there is no doubt.—I am, Yours truly,

“October 20th.

“WILLIAM LOMAS.”

The following additional evidence was then given. John Butterworth stated that 23l. 7s. 5d. was due to him from the bankrupts in 1857. Thomas Butterworth stated that he called on the bankrupt William Dean with reference to the [533] debt of 23l. 7s. 5d. due to his uncle John Butterworth, and asked him if he would give an order on the defendant for the amount. The bankrupt W. Dean agreed to do so, and Thomas Butterworth then went away.

The learned Judge thought that there was evidence of an equitable assignment of the debt, independently of the order of the 20th of October; and a verdict was accordingly entered for the defendant, leave being reserved to the plaintiffs to move to enter a verdict for such amount as the Court should think fit.

Rew, in Michaelmas Term (Nov. 7), obtained a rule to enter a verdict for the plaintiffs for 23l. 7s. 5d., on the ground that there was no evidence of an equitable assignment to John Butterworth, or of the defendant's right to credit, as against the plaintiffs, for the payment made to Butterworth after the bankruptcy.

Temple and Mellish shewed cause.(a) There was evidence of an equitable assignment of the debt, independently of the bankrupt's letter of the 20th of October. Thomas Butterworth called on the bankrupt, W. Dean, for payment, and asked him for an order on the defendant. W. Dean agreed to give it, and the money was subsequently paid by the defendant to Butterworth, in consequence of something that was said or done by the bankrupts in pursuance of that agreement. No order in writing was necessary. If Butterworth had requested Dean to ask the defendant to pay him, and Dean had verbally assented, that would have been a sufficient equitable assignment of the debt. [Martin, B. The question comes to this, would the defen-

(a) In Michaelmas Term. Before Pollock, C. B., Martin, B., Channell, B., and Wilde, B.

dant have had a case if there had been no order? The agreement between W. Dean and Butterworth, that Butterworth should [534] be paid by the defendant, amounted to an authority, coupled with an interest, which could not have been revoked by the bankrupts. The assent of the defendant was only necessary in order to render him liable to an action by Butterworth. The moment the bankrupt agreed to give an order on the defendant and the defendant had notice of it, the assets in the defendant's hands were bound. The existence of the unstamped written authority does not prevent the defendant from giving evidence of these facts: *Singleton v. Barrett* (2 C. & J. 368). [Pollock, C. B. If Butterworth had brought an action against the defendant, must he have paid the money?] That involves the same question. The defendant's answer of the 20th of October was receivable in evidence, because it was part of the *res gestæ*. It was in fact a declaration of the trust of the fund.

Monk and Rew, in support of the rule. To perfect the assignment it was necessary that there should be an order, written or oral, by the bankrupts to the defendant to pay the money to Butterworth; a mere promise to give an order is not sufficient. In *Firbank v. Bell* (1 B. & Ald. 36), which was a case similar to the present, Lord Ellenborough said, "There is nothing to which the name of an agreement can be given if you do not pray in aid the order." [Pollock, C. B. The only contest there was whether the document required a stamp. Channell, B. Suppose the bankrupts had agreed to give an order, and the defendant had notice of it, perhaps a Court of equity would have treated that as done which was contracted to be done. But here the promise was followed up by performance, and that which was done must be regarded.] The performance had reference to a written document which could not be read for want of a stamp, [535] and of which therefore secondary evidence could not be given.

Cur. adv. vult.

MARTIN, B., now said,—This was an action by the assignees of a bankrupt firm to recover the balance of an account due to the bankrupts. The defence was, that the defendant had paid the amount claimed to one John Butterworth, a creditor of the bankrupts, by their order. The defendant had in fact paid the sum to Butterworth. The evidence, as to the authority to pay it, was this: The defendant stated that Butterworth brought him an order, signed by the bankrupts, for the payment of the sum. It was objected that this document was a bill of exchange and required a stamp. I thought the objection valid, and therefore rejected the document. The defendant then contended that the evidence in the cause shewed an equitable assignment of the debt, which of course would defeat the right of action. The further evidence was the letter given by the defendant to Butterworth, dated the 20th of October, 1857, from which it is sought to be inferred that he had some order for payment from the bankrupts. Thomas Butterworth said that he called on the bankrupt, W. Dean, respecting the debt due to John Butterworth, and asked him to give an order on the defendants. He said he would do so. If we could see that there was any evidence in favour of the defendant, we should be anxious to give effect to it; but we have arrived at the conclusion that we cannot. The only authority to pay is that contained in the bankrupt's letter of the 20th of October, which could not be read for want of a stamp. There is therefore a defect in the proof, and the rule must be absolute.

Rule absolute.

[536] RABEY v. GILBERT. Jan. 30, 1861.—If a party who has not had due notice of the dishonour of a bill of exchange thinks fit to acknowledge his liability, though he does so to a party other than the person who afterwards sues upon the bill, that acknowledgment is sufficient to enable the latter to maintain an action on the bill.—A. indorsed a bill to B., who indorsed the same to C. A. had no notice of dishonour. C. brought an action on the bill against both A. and B., who allowed judgment to go by default. B. paid the bill and sued A. Held, that A., having acknowledged his liability on the bill by suffering judgment by default in an action by C., could not set up the want of a notice of dishonour as an answer to an action by B.

[S. C. 30 L. J. Ex. 170; 9 W. R. 386; 3 L. T. 751.]

Declaration on a bill of exchange for the sum of 63l., dated the 27th of July, 1859, drawn by W. Hodgson on T. Towning, and accepted by him, payable three

months after date; indorsed by Hodgson to the defendant, and by the defendant to the plaintiff. The declaration alleged that the bill was duly presented for payment and was dishonoured: whereof the defendant had due notice.

Plea. That the defendant had not due notice of dishonour.

At the trial, before Bramwell, B., at the Middlesex sittings after last Michaelmas Term, it appeared that the bill had been given by the plaintiff, who was a shareholder in a mine, to one Webb, the purser of the mine, for calls due on his shares. The bill was presented, and dishonoured, on the 30th of October. On the 2nd of November, Webb received notice of dishonour, but the defendant received no written notice until the 10th of that month. It was not denied that this was too late; but evidence was given that the defendant, who was also a shareholder in the mine, was present at a meeting of shareholders held on the 27th of December, at which a resolution was passed that the parties to the bill should be sued. The plaintiff called on the defendant, they talked the matter over, and the defendant said he would go to Truro to try and settle the matter: it was a serious business. The acceptor lived at Truro. The plaintiff and defendant, having both been sued by Webb, allowed judgment to go by default. The plaintiff paid the bill, and brought this action.

The jury found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a verdict for [537] him, if the Court should be of opinion that the verdict on the plea denying notice of dishonour should have been found for the defendant, the plaintiff to have liberty to amend the declaration if necessary.

Collier having obtained a rule nisi accordingly,

M. Smith and Karslake shewed cause (Jan. 26).^(a) A party to a bill of exchange may waive the insufficiency of notice of dishonour; and the result of the decisions is that a slight admission, shewing that he does not intend to rely on the want of sufficient notice, will render him liable: *Booth v. Jacobs* (3 Nev. & Man. 351). If the party gives to the holder an intimation that he is content to treat the notice as sufficient, or to hold himself liable on the bill, it is enough. Such an intimation may materially alter the position of the holder. (They referred to *Brownell v. Bonney* (1 Q. B. 39), *Curlewis v. Corfield* (1 Q. B. 814) and *Jackson v. Collins* (17 L. J. Q. B. 142).)

Collier, in support of the rule. There is a distinction between cases where the question is whether there has in fact been a notice of dishonour, and where the question is whether it has been waived. It is now established as a general rule well understood by all mercantile people, that notice of dishonour must be given on the day next after the bill has been dishonoured or the party giving the notice has himself had notice of the dishonour. When it is doubtful whether notice has been given or not, a slight admission may be sufficient to prove the receipt of the notice. But when it is certain that no notice has been given, strong evidence is necessary to shew that the de-[538]-fendant has agreed to dispense with the notice. What is due notice is well settled by law. If it is to become a question whether reasonable notice is to be sufficient, great uncertainty will be introduced: and it is of the greatest importance to commerce that a clear and precise rule on this subject should be maintained: per Abbott, C. J., *Williams v. Smith* (2 B. & Ald. 496, 500). In *Pickin v. Graham* 1 (C. & M. 725) it was held that a subsequent promise to pay did not dispense with a due notice of dishonour. In *Borradaile v. Lowe* (4 Taunt. 93) it was held that, in order to justify a jury in inferring a waiver of notice of dishonour, there must be an unqualified promise to pay; such, for instance, as "If the acceptor does not pay I will." Here, however, the defendant was not asked to pay, and, in fact, made no such promise: he only said he would go to Truro and see if he could get it settled.

Cur. adv. vult.

BRAMWELL, B., now said,—In this case Mr. Collier moved for a rule to shew cause why a nonsuit should not be entered, on the ground that due notice had not been given of the dishonour of the bill of exchange on which the action was brought; the question having been raised by the plea. The notice was given at a period later than the requisite time, and there was no previous dispensation by the defendant of a proper notice. The question then is, whether a recognition by the defendant of

(a) Before Martin, B., Bramwell, B., Channell, B., and Wilde, B.

his liability to pay the bill, although the notice was given too late, was sufficient to enable the plaintiff to maintain the action.

It is not necessary to determine whether the allegation that notice was given was proved, or whether the plaintiff should have alleged in his declaration a waiver of notice, because leave to amend was granted, and if the plaintiff [539] thinks fit to avail himself of it, an amendment may now be made. The question is whether, under either mode of declaring, viz., that the notice was given or that the defendant dispensed with it, the plaintiff is entitled to recover. We think he is.

If a person who has not had due notice of dishonour, nevertheless thinks fit to acknowledge his liability, though he does so to a party other than the person who afterwards sues upon the bill, that will enable the latter to maintain his action. For that position it is only necessary to refer to the case of *Potter v. Rayworth* (13 East, 417), where the ordinary notice of dishonour had not been given, but the defendant nevertheless promised to pay a person to whom the plaintiff had indorsed the note. Afterwards the plaintiff brought his action and relied on that promise, and Lord Ellenborough in his judgment said, "That whether the promise to pay was made to the plaintiff or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had due notice of dishonour." That means due notice so far as he was concerned. And Bayley, J., "considered the promise by the defendant either as an acknowledgment that he had had due notice of the dishonour, or that without such notice he was the proper person to pay the note, as the party for whose use it was drawn."

In this case the only fact to which it is necessary to call attention is this, that a person to whom the plaintiff had indorsed the bill brought an action upon it against the defendant, who suffered judgment by default. That was a distinct recognition of his liability to that person, and, applying the principle of the decision in *Potter v. Rayworth*, it is equally efficacious as a recognition of his liability to the plaintiff in this action. Therefore we think that the [540] plaintiff is entitled to recover either on the ground of an acknowledgment by the defendant that the notice was sufficient, or on the ground of a waiver of notice.

It is not necessary to examine the cases on this subject. Many observations were made on them in the course of the argument, and perhaps it would not be easy to reconcile them; it is enough to say that *Potter v. Rayworth* is decisive, and consequently the rule must be discharged.

Rule discharged.

[541] HILARY VACATION, 24 VICT.

MORANT v. CHAMBERLIN. Feb. 25, 1861.—The corporation of Yarmouth are, and have been since the time of King John, owners of the soil of the South Quay in that borough. The quay is bounded on the east by houses, and on the west by Yarmouth Haven. From the time of King Charles the First, there has been a common and public highway over the quay; and, so far back as living memory, the occupiers of some of the houses have used a part of the quay fronting them for depositing thereon anchors, timber, boats and other incumbrances. Such user was in fact enjoyed, as of right, for more than twenty years, but not immemorially; and though it caused some inconvenience to the public it did not produce an actual obstruction of the highway. By the rolls of the Court Leet of the borough, from the year 1632 to 1653, it appeared that many persons had been amerced for "overburdening" the quay with anchors, timber, blocks, &c., and thereby obstructing the highway. An occupier of one of the houses, in the exercise of an alleged right, placed upon a part of the quay in front of his house, anchors, timber and other incumbrances, whereby the free use of the highway was obstructed.—Held: First, that, upon these facts, the Court (being at liberty to draw inferences) could not infer that the right claimed had been exercised by the occupiers of the houses before any dedication of the highway to the public.—Secondly: that a highway may be dedicated to the public subject to a pre-existing

right of user by the occupiers of adjoining land for the purpose of depositing goods thereon.

[S. C. 30 L. J. Ex. 299. Adopted, *Fisher v. Prowse* : *Cooper v. Walker*, 1862, 2 B. & S. 782 ; *Reg. v. Londonderry Justices*, [1902] 2 Ir. R. 271. Referred to, *Attorney-General v. Horner*, 1885, 11 A. C. 70 ; *Attorney-General v. Horner* (No. 2), [1913] 2 Ch. 163.]

This was, in form, an action of assault, but it was brought to determine the question of ownership of the soil of certain land at Yarmouth, in Norfolk, and also to ascertain the rights over the land of the public on the one hand, and on the other of certain owners of property adjoining the land.

The declaration stated that the defendant assaulted the plaintiff. And also that the defendant cut, damaged, and destroyed the goods of the plaintiff, that is to say, certain ropes and harness.

Pleas. First, to first count : Not guilty.

Second, to first count. That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

Third, to first count. That, before and at the said time when, &c., one George Palmer was possessed of certain land whereon the plaintiff was then unlawfully trespassing and doing damage, without the leave or license and against the will of the said G. Palmer ; whereupon the defendant, as the servant of the said G. Palmer, and by his command, [542] then requested the plaintiff to cease trespassing upon and leave the said land, which the plaintiff then refused to do, and thereupon the defendant, as such agent and servant, and by such command as aforesaid, at the said time when, &c., gently laid his hands on the plaintiff in order to remove him, and did then remove him from the said land, using no more force or violence than was necessary, and doing no unnecessary damage to the plaintiff on that occasion for the purpose aforesaid, which is the alleged trespass mentioned, and whereof the plaintiff has complained against the defendant.

Fourth, to first count. That before and at the said time when, &c., one G. Palmer was lawfully possessed, as of his own property, of certain goods, and the plaintiff was then about forcibly, unlawfully, and without the leave, license, or consent, and against the wish of the said G. Palmer, to seize, remove, and carry away the said goods ; and thereupon the defendant, at the said time when, &c., as the servant of the said G. Palmer, and by his command, requested the plaintiff to cease seizing, removing and carrying away the said goods, which the plaintiff then refused to do, and at the said time when, &c., continued so seizing, removing and carrying away the same ; wherefore the defendant, in order to prevent such forcible seizure, removal, and carrying away of the said goods by the plaintiff, and because he could not otherwise prevent such seizure, removal and carrying away, did necessarily gently lay his hands upon the plaintiff in order to prevent the same, and thereby committed the assault in the first count complained of, using no more force or violence and doing no more damage to the plaintiff on the occasion aforesaid than was necessary for the purpose aforesaid ; which are the trespasses in the first count mentioned, and whereof the plaintiff has complained against the defendant.

[543] Fifth, to second count. The defendant brings into Court here the sum of 11., and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matters herein pleaded to.

Replications. First : the plaintiff joins issue on the first plea, and takes issue on the second, third and fourth pleas.

Second, to third plea. That, before and at the said time when &c., there was, and of right ought to have been, a certain common and public highway, in, through, over and along the said land in the third plea mentioned, for all the liege subjects of our lady the Queen to go, return, pass, and repass, on foot, and with horses, carts, and carriages, at all times of the year, at their free will and pleasure ; and that the plaintiff, being a liege subject of our lady the Queen, and having occasion to use the said highway, at the said time when, &c., went and passed and repassed in, through, over and along the said land in which, &c., in, by and along the said highway there, using the same as he lawfully might for the cause aforesaid ; and thereupon the defendant, at the said time when, &c., of his own wrong, committed the trespass in the first count mentioned, in manner and form, &c.

Third, to fourth plea. That the said goods in the said fourth plea mentioned were and are divers large quantities of stones and shingle, and divers anchors and pieces of timber, and masts, and spars; and that, before and at the said time when &c., the said stones, shingle, anchors, pieces of timber, masts and spars, were lying and being in, upon and across a certain common and public highway for all the liege subjects of our lady the Queen to go, return, pass and repass, on foot, and with horses, carts, and carriages, at all times of the year, at their free will and pleasure; and that the plaintiff, being one of the liege subjects [544] of our lady the Queen, and having occasion to use the said highway, at the said time when &c., went and passed in, through and along the same; and because the said stones, shingle, anchors, pieces of timber, masts and spars were then lying and being in, upon and across the said highway, and obstructing the same, so that the plaintiff could not then go, pass and repass in, through and along the said highway as he ought to have done, the plaintiff, at the said time when, &c., seized the said goods in order to remove the same from and off the said highway, and to carry away the same to a small and convenient distance, and there leave the same for the use of the defendant; and the plaintiff was, at the said time when, &c., removing the said goods from and off the said highway, and carrying away the same to a small and convenient distance, doing no unnecessary damage to the said goods; whereupon the defendant, at the said time when, &c., of his own wrong, committed the assault in the first count mentioned, in manner and form, &c.

Fourth, to the fourth plea. That the goods in the fourth plea mentioned were and are divers large quantities of stones and shingle, and divers anchors and pieces of timber, and masts and spars, and that, before and at the said time when, &c., the mayor, aldermen and burgesses of the borough of Great Yarmouth, in the county of Norfolk, were, by the council of the said borough, the Local Board of Health for the parish of Great Yarmouth, in the said borough, and surveyors of the highways within the said parishes; and that, at the said time when, &c., the said stones and shingles, anchors, pieces of timber, masts and spars were lying and being in, upon and across a certain common and public highway, situate and being within the said parish, and were obstructing the said highway so that the liege subjects of our lady the Queen could not go, [545] return, pass and repass in, through and along the same highway as they were wont and accustomed to do, to the great damage and common nuisance of all her Majesty's liege subjects going, returning, passing and repassing in, through and along the said highway; and that, before the said time when, &c., the said mayor, aldermen and burgesses gave notice to the said G. Palmer, and required the said G. Palmer to remove the said goods from and off the said highway, and the said G. Palmer, although a reasonable time for that purpose, before and at the said time when &c., had elapsed, refused and neglected so to do, whereupon the plaintiff, (divers of the said liege subjects, at the said time when, &c., having occasion to use the said highway), as the servant of the said, mayor, aldermen and burgesses as such Local Board of Health as aforesaid, and by the command and authority of the council of the said borough, and then being the deputy surveyor of the highways within the said parish of Great Yarmouth, at the said time when &c., seized the said goods in order to remove the same from and off the said highway, and to carry away the same to a small and convenient distance, and there leave the same for the use of the said G. Palmer; and the plaintiff was removing the said goods from and off the said highway, and carrying away the same to a small and convenient distance, doing no unnecessary damage to the goods; whereupon the defendant, at the said time when &c., of his own wrong, committed the said assault in the first count mentioned, in manner and form, &c.

Fifth, to fourth plea. That, before and at the said time when &c., the mayor, aldermen and burgesses of the borough of Great Yarmouth, in the county of Norfolk, were lawfully possessed of certain land, and because the said goods in that plea mentioned were wrongfully in and upon the said land incumbering the same, the plaintiff, at the said time [546] when &c., being the servant of the said mayor, aldermen and burgesses, and by their command, seized the said goods on the said land and so incumbering the same, in order to remove and carry away the same to a small and convenient distance, and there leave the same for the use of the defendant, doing no unnecessary damage to the said goods; and the plaintiff was, at the said time when &c., removing the said goods and carrying away the same to a small and con-

venient distance, doing no unnecessary damage to the said goods; whereupon the defendant, of his own wrong, committed the said several trespasses, in manner and form, &c.

Sixth, to fifth plea. The plaintiff accepts the said 11. in full satisfaction and discharge of the claim of the plaintiff.

Rejoinders. First: joinder in issue taken by the plaintiff's replication to the defendant's second, third and fourth pleas.

Second: joinder in issue upon the plaintiff's further replication to the third and fourth pleas.

Third: further rejoinder to the plaintiff's further replication to the defendant's third plea. That the said public highway, and the right and privilege of the said liege subjects of our said lady the Queen to go, return, pass and repass, on foot, and with horses, carts and carriages, in, through, over and along the said land mentioned, at the said time when &c., were and the same always had been and still are subject to the right of user of the said land by the occupiers of the same for the time being, for the purpose of and by putting, placing and keeping in and upon the said land stones, shingle, anchors, timber, masts and spars, and other things; and the said occupiers of the said land have always had and still have such last mentioned right: that the said liege subjects of our said lady the Queen never had any right or privilege of going, return-[547]-ing, passing or repassing, on foot, or with horses, carts or carriages, in, through, over or along the said land, nor was a way in, through, over or along the said land ever dedicated to or acquired by the said liege subjects of our said lady the Queen, except or otherwise than subject to such right of user of the said land by the said occupiers of the same for the time being: that, at the said time when &c., one G. Palmer was possessed and the occupier of the said land, and certain stones, shingle, anchors, pieces of timber, masts and spars were then lying and being in and upon and across the said land, the same having been before then lawfully put and placed upon the said land by the said G. Palmer, so being then possessed and the occupier of the said land, and that the said stones, shingle, anchors, pieces of timber, masts and spars were so put, placed and were so kept so lying and being in and upon the said land consistently with the rights and privileges of the said liege subjects of our said lady the Queen, and such putting, placing and keeping, lying and being of the said stones, shingle, anchors, pieces of timber, masts and spars was a use of the said G. Palmer of his said right as such occupier of the said land as aforesaid: that the plaintiff, at the said time when &c., was about forcibly, unlawfully, and without the leave, license or consent, and against the will of the said G. Palmer, to seize, remove and carry away the said stones, shingle, anchors, pieces of timber, masts and spars, and thereupon the defendant, at the said time when &c., as the servant of the said G. Palmer and by his command, requested the plaintiff to cease seizing, removing and carrying away the same; wherefore the defendant, in order to prevent such forcible seizure, removal and carrying away of the said stones, shingle, anchors, pieces of timber, masts and spars by the plaintiff, and because he could not otherwise prevent such seizure, removal and carrying away, [548] did necessarily gently lay his hands upon the plaintiff and commit the said act in the said third plea mentioned, for the purpose and in the manner in the said plea in that behalf mentioned.

Fourth: further rejoinder to the plaintiff's further replication to the defendant's fourth plea. That the said ways mentioned in the said replication, to which this rejoinder is pleaded, were and are the ways in the defendant's further rejoinder to the plaintiff's further replication to the said third plea mentioned, and no other ways or way whatsoever; and the defendant repeats the several allegations, statements and averments in the said last mentioned rejoinder made with respect to the said way; and the defendant avers that the said stones, shingle, anchors, pieces of timber, masts and spars mentioned in the said replication, to which this rejoinder is pleaded, were the said stones, shingle, anchors, pieces of timber, masts and spars in the said rejoinder to the plaintiff's said replication to the said third plea mentioned; and the defendant repeats the several allegations, statements and averments in the said last mentioned rejoinder made, and says that the same were and are the goods mentioned in the said fourth plea and in the said replications to which this rejoinder is pleaded; wherefore the defendant, at the time and in manner and under the circumstances mentioned in the said fourth plea, committed the said act to which that plea is pleaded, as he lawfully might for the cause aforesaid.

Fifth: further rejoinder to the plaintiff's last replication to the defendant's fourth plea. That, at the time of the alleged trespass in the first count mentioned, the said G. Palmer was possessed of a dwelling-house and premises, the occupiers whereof for twenty years before this suit enjoyed, as of right and without interruption, the right, privilege and easement of putting, placing and keeping [549] goods of the same quantity, quality and description as the said goods in the said fourth plea mentioned in and upon the said land in the said replication mentioned, and thereby and therewith incumbering the same, for the same purposes and under the same circumstances as those for which the said goods in the said fourth plea mentioned were, at the said time when &c., put, placed and kept in and upon the said land, at all times of the year, for the more convenient occupation of the said dwelling-house and premises of the said G. Palmer, as to the said dwelling-house and premises of the said G. Palmer appertaining; and that the said goods so being in and upon the said land incumbering the same, as in the said replication mentioned, was a use by the said G. Palmer of the said right, privilege and easement.

Sixth: a further rejoinder to the plaintiff's last replication to the fourth plea. (This rejoinder only differed from the preceding one in alleging that the occupiers of the dwelling-house had enjoyed the alleged right from time immemorial.)

Surrejoinder. The plaintiff took issue on all the rejoinders.

Demurrer to the third and fourth rejoinders. Joinder therein.

The cause came on for trial at the Norfolk Spring Assizes, 1859, when, by consent, the question of the ownership of the soil was referred to an arbitrator, who stated the following special case:—

The locus in quo consists of certain land, indicated and coloured green on the plan hereto annexed, being part of the South Quay of Great Yarmouth, bounded on the east by certain houses and on the west by Yarmouth Haven.

It was admitted on the trial, and is now stated as a fact, that, so far back as living memory went, there had been a public highway over the locus in quo.

[550] And that, so far back as living memory went, there had been a user by the occupiers of the premises fronting the locus in quo for the deposit of anchors and other incumbrances thereon.

The South Quay is, and since its establishment has been, a public quay, and has been much in use for the loading and unloading of ships. It has always been one of the main roads leading from and to other roads of the town. The road is indicated by the open space marked on the plan "The South Quay;" and the part of the locus in quo on and over which the occupiers hereinafter mentioned claimed to have and enjoy the right hereinafter mentioned to have been enjoyed by them, is an open space between a certain tramway and the carriage track marked *C. C. C.* on the plan.

As to the borough and port of Yarmouth.

King John, by charter, confirmed to the burgesses of Yarmouth the borough and port in fee farm for ever, with the power to hold courts in the borough. (The history of the port is referred to in Hale's *De Portibus Maris*, p. 61.) The present corporation consists of the mayor, aldermen, and burgesses of the borough, and forms the Local Board of Health for the parish of Great Yarmouth in the borough. Various local Acts have been passed for the regulation of the port and the government of the borough, to some of which reference will be hereafter made.

As to the soil of the locus in quo.

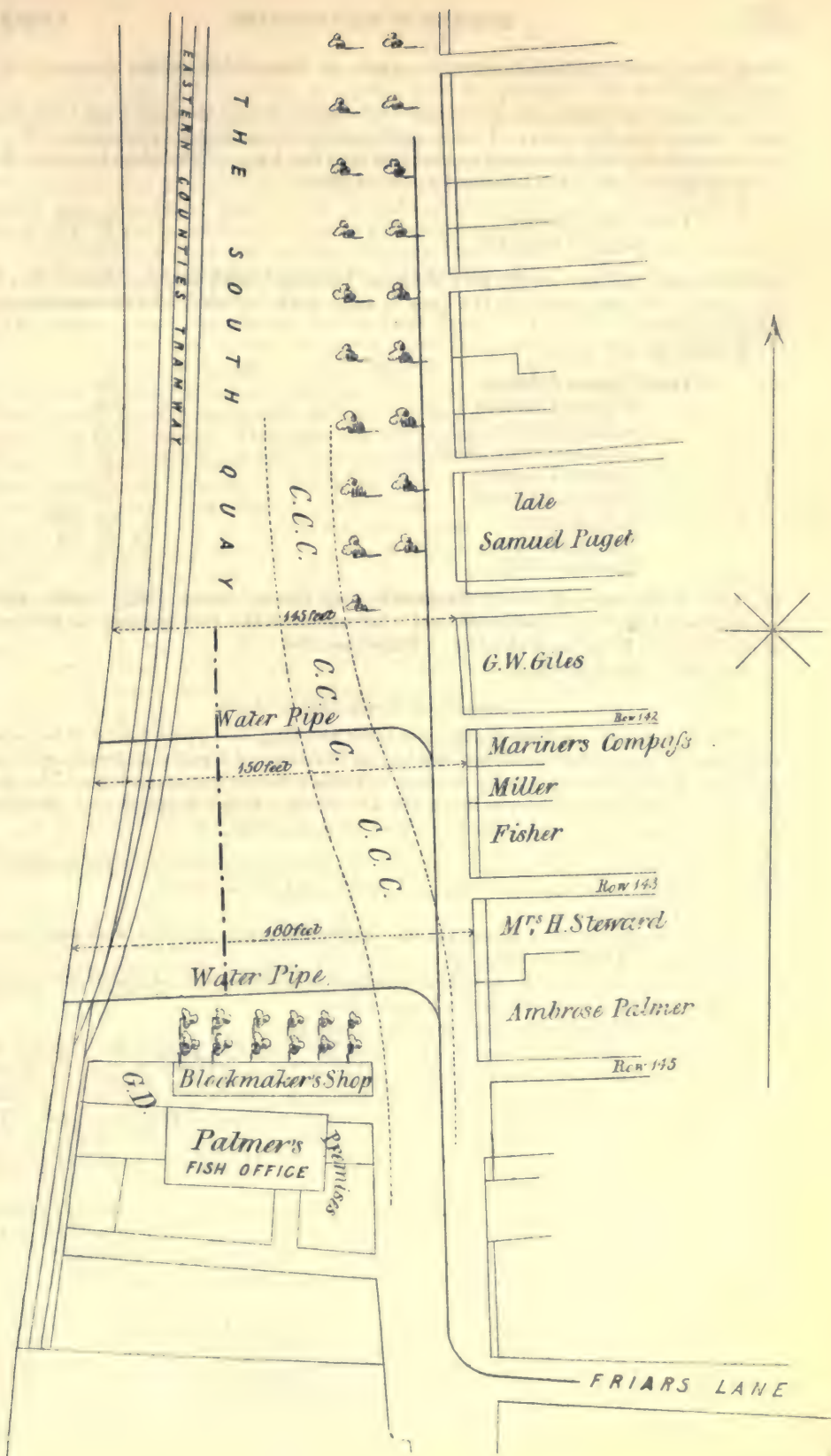
I find that it passed to the corporation by the charter of King John, and that they have ever since been the owners.

As to the road in question.

The date of the origin did not appear, but I find that it was used as a public road in the reign of Charles the First, during and after which certain proceedings were taken, as hereinafter mentioned, for obstructing the road.

By the rolls of the South and South Middle Court Leet [551] of the borough, from the 8th Charles the First (1632) to 1653, it appears that many persons were presented and amerced for committing nuisances on the quay. In some instances the offence was described as "overburdening the quay of the town with anchors, planks, masts, and divers other things." In another, as permitting their timber to lie upon "The Keys of the Town aforesaid, to the destruction of the same." In another, the several parties are charged that they did "overburden the Common called the Deanside and the Keys next their mansion house, within the precincts of this view of

Y A R N O U T H H A V E N
Green



THE SOUTH QUAY

EASTERN COUNTIES TRAMWAY

late Samuel Paget

G.W. Giles

Row 142

Mariners Compo's

Miller

Fisher

Row 143

Mr's H. Steward

Ambrose Palmer

Row 145

Water Pipe

150 feet

180 feet

Water Pipe

Bleekmaker's Shop

Palmer's FISH OFFICE

spinnies

FRIARS LANE

frankpledge, and divers anchors, store, stacks of deals did erect and construct, to the annoyance," &c.

In several the parties are presented "for overburdening the keys next their houses with timber, planks, stacks of deals and heaps of stores, to the annoyance," &c. In one it concludes, "to the annoyance of our lord the King. Therefore in mercy 3l."

And in 23rd and 24th Charles 1st, is as follows:

"That Luke Herring	2s. 6d.
Roger Townsend	13s. 4d.

overburdened the key of the port of Great Yarmouth with timber, blocks, &c., that the passage of the people on the quay is very much impeded, to the annoyance, &c. Therefore," &c.

Another as follows:—

"That Thomas Johnson	6s.
William Linstead	30s.
George Spilman	10s.
Thomas Taylor, Junr.	5s.
Thomas Felstead	2s.
Nathaniel Thirser	5s.
John Thirser	6s. 8d.
Thomas Barker	2l. 6s. 8d.
Matthew Gibbs	30s.

the key of the town of Great Yarmouth with timber, wood, [552] blocks, planks, overburdened, to the impediment and obstruction of the free passage of the people of our lord the King upon the key. Therefore," &c.

In 1650 is the following:—

"South and South Middle Leet.

"The jurors say, on their oaths that Luke Herring, 10s. (then follow other names, with various sums), overburdened the key of the town of Great Yarmouth, within the precinct of this view of frankpledge, with timber, wood, blocks and posts, by which the transit and passage of people on the key there is much impeded and obstructed, to the annoyance, &c. Therefore every of them amerced," &c.

In several cases the persons are charged with annoying the key with anchors and other things near the mansion houses of others, and are amerced.

In 1651 as follows:

"John Jennison doth annoy the key before his mansion house with four piles of barrel staves. Therefore," &c., 2s.

The above house was the house, or was the site of the house, of one of the occupiers of the houses opposite which is the locus in quo.

The above amerciements appear to have been paid.

In 1772 an act of parliament (12 Geo. 3, c. 14) was passed for (among other objects) improving the haven and piers of Great Yarmouth; by section 33 of which it was provided, that persons should not (under a certain penalty) lay any ballast, earth, sand, rubbish or stones on the quays within ten feet of the quay head. There is a section to the same effect (with some variation in terms) in the 25 Geo. 3, c. 36, s. 8 (1784). And by the 39 & 40 Geo. 3, c. 4, s. 14, there is a provision against placing materials on the quays.

In 1810 (50 Geo. 3, c. 23), an Act was passed for (among other objects) removing nuisances and annoyances in the town; by section 54 of which provision is made against [553] the placing of materials or other things upon any of the quays, markets, streets, lanes, rows, public passages or places for any longer time than shall be necessary for moving and housing the same.

An Act was passed in 1835, 5 & 6 Wm. 4, c. xlix., in which, by sections 76 and 77, there are additional provisions against placing articles on the quays.

The goods in question, mentioned in the pleadings in this cause, were not placed or continued on the land in question under circumstances which, according to either of the above Acts, entitled them to be so placed or continued.

In 1847, an Act was passed to enable the Norfolk Railway Company to extend

their railway to Great Yarmouth. By section 11 and following sections, provision was made for making a tramway along the road in question. Such tramway was made about the year 1848, and has since been used according to the provisions of that Act. Its course is indicated on the annexed plan.

As to the user to deposit anchors and other incumbrances on the locus in quo.

It was admitted on the trial, and is now stated as a fact, that, so far back as living memory went, there had been a user by the occupiers of the premises fronting the locus in quo for the deposit of anchors and other incumbrances thereon.

I find that such user was in fact for more than twenty years before this suit enjoyed by the occupiers as a right and without interruption. But I find that such was not immemorial.

The user was by those persons, for the time being, for their own convenience and in general for their own several businesses; and the various articles were placed and remained on the road in point of time according to their pleasure, [554] entirely unconnected with any ordinary public use of the road for the purpose of transit. The articles placed there were chiefly anchors, timber, boats, material for ballast, casks, shingle and naval stores. This user was not uniformly confined by the occupiers to their own business. Upon some occasions the liberty to use the spot in front of the house of one occupier was let by him to another of those occupiers, at a yearly rent.

Such user caused some degree of inconvenience to the public in the ordinary use of the road, but did not produce actual obstruction. The width of the road at the locus in quo is indicated on different parts of the annexed map.

As to the immediate cause of action.

The plaintiff, being deputy surveyor of the highways of the parish in which the locus in quo is situated, and surveyor to the corporation, and surveyor to them as the Board of Health, went by their authority to remove certain articles which had been placed on the locus in quo by the said G. Palmer (who is to be taken as having the rights of one of the occupiers of the houses in question and who had received notice to remove the goods). They consisted of several anchors, a boat, the lower mast of ship, several pieces of timber, some chain cable and a quantity of shingle. These had been placed, not in exercise of the ordinary public use of the highway over the locus in quo, but solely in exercise of the alleged right of the occupiers as before described. And in fact, to enable the public to have the free and ordinarily convenient public use of such highway, it was necessary to remove them. The defendant, under the authority of the occupiers of the houses, and in their belief of their right, offered a certain resistance to the plaintiff, in the course of which (but not in his own defence as pleaded) an assault was by him committed, and the resistance was [555] then by him withdrawn. Should the judgment of the Court be for the plaintiff, it is agreed that the damages on the first count shall be 3l. 5s.

The Court are to have the power to draw any inferences of fact necessary to the decision of the case, and to direct how the issues joined in the case should be entered.

The question for the opinion of the Court is, how the finding on the issues is to be entered. If the judgment be for the plaintiff, it is to be with 5l. 5s. damages.

O'Malley argued the special case for the plaintiff in last Trinity Term (June 4). Upon the facts stated in the special case, the plaintiff is entitled to judgment on the issues joined on the first, second and third pleas. The second replication to the third plea, which alleges a public highway over the locus in quo, ought also to be found for the plaintiff. To that replication there is a rejoinder, that the highway was subject to the right of user of the land by the occupiers of the same, for the purpose of putting certain goods thereon. But the Court cannot infer, from the facts stated in the case, that the highway was dedicated to the public subject to such right of user. Therefore the issue joined on that plea ought also to be found for the plaintiff. The defendant, by the fourth plea, justifies the assault as the servant of Palmer, and in order to prevent the forcible removal of his goods. To that plea there are three replications, in substance alleging that the goods were obstructing the highway, and these replications with the rejoinders thereto, which set up the same right of user, ought also to be found for the plaintiff. An obstruction of a public highway is a common nuisance which anyone may abate; *James v. Hayward* (Cro. Car. 184; S. C. Sir W. Jones, 221), *Lodie v. Arnold* (2 Salk. 458). [Channell, B., referred [556] to *The Mayor of Colchester v. Brooke* (7 Q. B. 339).] The arbitrator has found that the right to incumber the soil

is not immemorial, and that there has been a highway over the locus in quo from the time of Charles the Second; therefore it will be presumed that the highway existed prior to the alleged right of user.

Keane argued the special case for the defendant. The issue on the third plea ought to be found for the defendant. Palmer had, as against the plaintiff, such a possessory right as would have enabled him to maintain trespass: *Every v. Smith* (26 L. J. Exch. 344). [Bramwell, B. According to that, if a person fishes without permission in the pond of another, he may say to the latter, "You have no right to disturb me, because I am in possession." The issue on the third plea ought to be found for the plaintiff.] The issue on the second replication to the third plea ought to be found for the defendant. That replication should have stated that the plaintiff was passing along the highway: *Dovaston v. Payne* (2 H. Black. 527). The interest of the public in a highway consists solely in the right of passage: 2 Smith's Lead. Cas. 118. If a person is on a highway for any other purpose than using it as a highway he is a trespasser: *Regina v. Pratt* (4 E. & B. 860). [Bramwell, B. We are all of opinion that the plaintiff was on the highway in a legal sense, and that there ought to be judgment for him on that replication.] The issue on the third replication to the fourth plea ought also to be found for the defendant. The case falls within the principle of *Rex v. Tindall* (6 A. & E. 143), which decided that a person is not criminally responsible for a nuisance, the consequences of which are slight, uncertain and rare. The plaintiff has no legal ground of complaint unless there was a substantial [557] obstruction of the highway: *Rose v. Groves* (5 Man. & G. 613). If a person traversing a highway finds a slight obstruction in his path which he can avoid by going round it, he must do so. This replication should have shewn that it was absolutely necessary for the plaintiff to remove the defendant's goods in order to exercise his alleged right of way: *Dimes v. Peiley* (15 Q. B. 276), *The Mayor of Colchester v. Brooke* (7 Q. B. 339), *Bateman v. Bluck* (18 Q. B. 870), *The Eastern Counties Railway Company v. Dorling* (5 C. B. N. S. 821). The issue on the fourth replication to the fourth plea ought also to be found for the defendant. The fines which are recorded on the rolls of the Court Leet were inflicted, not for "burdening," but for "overburdening" the land. *Elwood v. Bullock* (6 Q. B. 383) is an authority that a highway may have been granted before legal memory, subject, in parts, to interruption for a beneficial purpose, and for a limited time. Here the right claimed may have been coeval with the dedication of the close as a highway. Moreover, this was not such an obstruction as justified the Corporation, as the Board of Health and surveyor of highways, in removing the goods: *Le Neve v. The Vestry of Mile End Old Town* (8 E. & B. 1054), *The Proprietors of the Witham Navigation v. Padley* (4 B. & Adol. 69). The proper course would have been to proceed under the 73rd section of the Highway Act (5 & 6 Wm. 4, c. 50). The issue on the fifth replication to the fourth plea ought also to be found for the defendant. By acquiescence, for a space of time as far back as legal memory, the occupiers of the adjoining houses have acquired a right to place certain goods on the locus in quo. The issue on the sixth rejoinder to the last replication to the fourth plea ought also to be found for the defendant. The 12 Geo. 3, c. 14, s. 33, and subsequent [558] Acts, are in affirmance of the common law; therefore, notwithstanding those statutes, a person may prescribe in respect of a right to place goods on the quay. In Co. Litt. 115 a., it is said:—"If a statute in the negative be declaratory of the ancient law, that is, in affirmance of the common law, there, as well as a man may prescribe or allege a custom against the common law, so a man may do against such a statute." [Pollock, C. B., referred to the 56th section of the Highway Act.] He also referred to the 26th section of that Act.

O'Malley was not called on to reply.

Couch argued in support of the demurrers to the rejoinders. The third and fourth rejoinders are bad upon this broad ground, that the alleged right of user is without limit. Although it is admitted that there is a highway over which all persons have a right to pass, the occupiers of the adjoining land claim a right to obstruct it at any time, and to any extent they may think fit. In all the cases the right claimed has had some limit. In *Le Neve v. The Vestry of Mile End Old Town* (8 E. & B. 1054) the occupiers of the adjoining houses claimed a right to use the intermediate space between the footway and carriage road in such a manner as suited their trades or occupations. *Poole v. Huskinson* (11 M. & W. 827), which supports the proposition that there may be a limited dedication of a highway to the public, shews that there cannot be a

dedication to a limited part of the public. In *Elwood v. Bullock* (6 Q. B. 383), the right claimed was by persons exercising the trade of victuallers to erect booths on a highway during a fair. That custom was held good on the ground of the benefit which might be supposed to arise from the accommodation afforded to persons frequenting the fair. In *The Marquis of Stafford v. Coyne* (7 B. & C. 257) there was a user by the public of a road for all purposes except that of carrying coals; and that was held to be either a limited dedication to the public or a license. A highway cannot be subject to a user, by particular persons, inconsistent with its use by the public as a highway: *Rex v. The Inhabitants of Leake* (5 B. & Adol. 469). The fifth rejoinder is also bad, since this is not a case within the second section of the Prescription Act, 2 & 3 Wm. 4, c. 71. The sixth rejoinder is also bad, for the alleged right cannot be claimed as an easement over the land of another, because there is no dominant tenement. An easement, as such, can only be claimed as accessory to a tenement, and it must be of something which is necessary for the more convenient use or enjoyment of the tenement. Even a grant of an easement, such as that now claimed, would be bad as not being sufficiently definite.

Malcolm, in support of the rejoinders. A right of way over land may exist, subject to the right of the occupiers of the adjoining land to place goods thereon. The user must have been consistent with the rights and privileges of the public in passing over the land, or it could not have existed. It is claimed as a user by the occupiers of the land, and it is stated that they used the land consistently with the rights and privileges of the public. Therefore the two rights may in law co-exist. There is a dominant tenement, and the user is for the more convenient occupation of the premises in respect of the trades of the occupants. The case is also within the Prescription Act.

Couch, in reply, cited *Manning v. Wasdale* (5 A. & E. 758).

Cur. adv. vult.

[560] The judgment of the Court was now delivered by

CHANNELL, B. This was a special case for the opinion of the Court, argued before the Lord Chief Baron, my brother Bramwell and myself. I have now to deliver our judgment.

We are called upon, with reference to the facts stated in the case and the power to draw inferences therefrom, to decide in what way the verdict upon the several issues ought to be entered. We are also to give our judgment on the demurrers in the cause.

The plaintiff having accepted the money paid into Court in satisfaction of the causes of action mentioned in the second count the complaint in the declaration is confined to the first count, which is one of assault.

To this count for an assault four pleas have been pleaded. Upon the facts, as stated in the special case, it is very clear that the issue on the first and second of those pleas must be found for the plaintiff. The third and fourth pleas, and the several issues of fact and in law consequent upon them, are to be dealt with.

On the two last pleas issues have been joined.

In addition to the issue on the third plea, that plea is specially replied to. The replication thereto results in a rejoinder by way of confession and avoidance, on which issue is joined, and in a demurrer to the rejoinder.

The fourth plea is also specially replied to, and by as many as three several replications; which replications result, first, in traverses of the matter replied; secondly, in several rejoinders by way of confession and avoidance, on which issues by way of surrejoinder have been taken; and, lastly, in a demurrer to the rejoinders.

Notwithstanding the multiplicity of the pleadings, the case, as to the right of the plaintiff or defendant to such a [561] verdict as will decide the cause, may be very shortly stated.

If neither the third nor the fourth plea is proved in fact, or, being proved, the plea or pleas proved are got rid of by the verdict which upon the several issues consequent upon such plea or pleas ought to be entered, then the general verdict will be for the plaintiff for the damages agreed upon; and this though the defendant may upon some subordinate issues be entitled to have the verdict entered for him.

If, on the other hand, either the third or fourth plea is proved in fact, and not displaced by the verdict which we direct to be entered upon the subsequent issues arising out of such plea, or by our decision upon the demurrers, then the defendant

will be entitled to our judgment, though consistently therewith the plaintiff may yet be entitled on some of the issues to a verdict for him.

It may be convenient to see what are the main facts found by the special case. It must be taken that the corporation of Yarmouth are the owners of the soil of the locus in quo referred to in some of the pleadings, and described on the plan which accompanies the case, and that they have been so from the time of King John: that over the locus in quo there is, and at least from the time of Charles the Second has been, a common and public highway: that the acts done by the defendant amounted to an actual obstruction in point of fact of the existing highway. If so, the defendant is without defence founded on any mere ordinary user by him, as one of the public, of a way over the locus in quo. His defence, if any, is by reason of his occupation of land adjoining to the locus in quo giving him, as he contends, the right to burden the soil of the corporation of Yarmouth. As regards the way set up by [562] the pleadings, and said to have been obstructed, his defence is that such way was only dedicated to the public subject to the right of the owners of the adjoining premises to deposit goods there.

With respect to the right claimed by the defendant, the case finds that there has been a user in fact corresponding with the acts sought to be justified, when such acts did not amount to an actual obstruction of the use of the way by the public; that such user has been exercised as far back as living memory goes, under a claim of right (that is, not stealthily or clandestinely), and at least for twenty years, but not immemorially. These facts are, we think, clear upon the findings in the case.

Now, though it is found that for more than twenty years, and as far as living memory goes, but, as we have observed, not immemorially, parties who have claimed as of right an interest similar to that claimed by the defendant have exercised and used the easement now claimed, yet it is also found that the highway has existed, not only during all the time of living memory, but at least from the time of Charles the Second. It has been contended before us, by the defendant, that the right claimed by him may have been exercised, and ought to be taken as having been exercised, over the locus in quo, by parties occupiers of the respective premises in front of the way or adjoining thereto, before any dedication by the corporation of a way to the public; and that, if so, a right was acquired against the corporation as owners of the soil which their subsequent dedication to the public would not destroy.

But this view, viz. the fact of a right in the occupiers of the adjoining premises pre-existent to the dedication of the way to the public, is not, we think, made out, and it is for the defendant to make it out.

[563] The entries in the case do not, in our judgment, warrant us in drawing any such inference. We do not think that we ought to infer from the word "over-burdened," or from the other words of similar or nearly similar import to be found in the entries proved in the case, that the occupiers of the adjoining lands had really a right to burden the way, and were fined only for an excessive use of their right, but that at most these entries shew that when the way, as a way, was actually obstructed, then the parties offending were liable to be fined. In the present case we must, upon the facts found, assume that the acts complained of amounted to an obstruction of an existing highway and the use of it by the public as such, and therefore, unless we can see that the defendant has made out that a way clearly dedicated to the public was so dedicated subject to the right claimed by him, an inference which we decline to draw, the plaintiff will be entitled to the general verdict. The statutes referred to in the case do not seem to us to assist the defendant. The rights claimed by the defendant appear to be in violation of the rights of the public, to be gathered from those statutes.

There is no difficulty in holding in what way the verdict ought to be entered, so as to decide the cause. As regards one or two of the issues affecting only the question of costs, and as respects the demurrers, there may be room for some doubt.

Applying the facts as we collect them from the special case, and exercising the power conferred on us of drawing inferences, it seems to us that the verdict should be entered for the defendant on the issue joined on the defendant's fourth plea, but not on the issues joined on the special replications thereto; and that the verdict should also be entered for the defendant on the issue on the rejoinder to the plaintiff's last replication but one to the defendant's [564] fourth plea. On all the other issues in fact we direct a verdict for the plaintiff. As to the matters on which we direct the

verdict to be entered for the plaintiff, we think the case is concluded by the finding of the arbitrator, who under the order of *Nisi Prius* has settled the case.

As the pleas are, in effect, got rid of by our decision on the issues in fact, the question as regards the demurrers is only one of costs.

We think that it has not been made out that there was, in point of fact, such a dedication of a way as the defendant has contended for. In point of law, we are disposed to think that such a dedication might be made. (See the case of *Le Neve v. The Vestry of the Hamlet of Mile End Old Town* (8 E. & B. 1054), cited by the defendant.)

We think that the defendant is entitled to our judgment upon the demurrers which apply to the rejoinder to the first replication to the fourth plea.

Our judgment on the whole is, that a verdict be entered for the plaintiff for five guineas damages. This decision to be subject to the defendant's right to costs in respect of the demurrers referred to, and on the issues directed to be found for him.

Judgment accordingly.

[565] GEORGE COWLEY AND MARY, his Wife v. THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF SUNDERLAND. . Feb. 25, 1861.—The defendants, a body corporate, erected baths and washhouses under the provisions of the 9 & 10 Vict. c. 74. This Act vests the property in the baths and washhouses in the corporation, but their management in the town council. For the purpose of drying clothes, there was a wringing machine, which consisted of a cylinder into which the wet clothes were put, and which was made to revolve with great rapidity by steam power. This machine was originally constructed to be worked by hand by means of an ordinary wynch-handle. In applying steam power this handle was removed, but an iron rod to which it had been affixed was unnecessarily allowed to remain. The plaintiff, who had paid for permission to wash, was using this machine when the iron rod caught the sleeve of her gown, and she was dragged towards the machine and severely injured, without any negligence on her part. When it was proposed to apply steam power to the machine, the defendants were told of its danger. Held, that the defendants, by availing themselves of the provisions of the 9 & 10 Vict. c. 74, had undertaken a statutory duty which bound them to exercise ordinary care and diligence in providing machines reasonably safe for use, and that they, and not the town council, were liable for the injury sustained by the plaintiff.

[S. C. 30 L. J. Ex. 127; 9 W. R. 668; 4 L. T. 720.]

The declaration stated that the defendants, before and at the time of the committing of the grievances, &c., were the owners and proprietors of certain public baths and washhouses in Sunderland, established under the provisions of an act of parliament made and passed in the tenth year of the reign of her present Majesty, intituled, &c. (9 & 10 Vict. c. 74), and of certain engines, boilers and a wringing machine, moved by steam power supplied by the defendants, erected and set up therein; and which were respectively erected and set up by the defendants for the purpose, amongst other things, of their being used by persons to wash, wring and dry clothes therein, for hire and reward paid to the defendants in that behalf; yet the plaintiffs in fact say that, at the time of the committing of the grievances, &c., the said machinery, engines, boilers and wringing machine were so negligently, carelessly, insecurely and improperly constructed, erected and set up for the purpose aforesaid, and the defendants so negligently, carelessly and improperly conducted themselves in and about the premises, and in and about the management and supplying of the steam power aforesaid, that by reason of the premises and of the [566] improper construction and adaptation of such wringing machine as aforesaid, and of the improper application of such steam power as aforesaid, the said Mary, then being the wife of the plaintiff, and whilst she was lawfully using the same for the purpose aforesaid, and for hire and reward paid by her to the defendants in that behalf, and in the course of the lawful and proper use thereof, became and was caught and got entangled with the said wringing machine, and was greatly whirled and dragged about and received great bodily injury, &c.

Pleas. First: Not guilty. Second: That the said machinery, engine and boilers,

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and wringing machine, were not so negligently, carelessly, insecurely or improperly constructed, erected or set up as alleged. Issues thereon.

At the trial, before Wilde, B., at the last Durham Summer Assizes, it appeared that the defendants, the corporation of Sunderland, had erected public baths and washhouses in the High Street of that town, under the provisions of the 9 & 10 Vict. c. 74. On the 19th of January last the female plaintiff was washing there. She had paid four pence for permission to wash a certain time. Having washed some clothes, she placed them in a wringing machine. This machine consisted of a cylinder about three feet in diameter and four feet high, into which the wet clothes were placed, and it was made to revolve by steam power at the rate of fifty revolutions in a minute. The machine was originally constructed to be worked by hand by means of an ordinary wynch-handle affixed to a spindle. This handle had been removed, but a small iron rod to which it had been attached was allowed to remain. The female plaintiff was in the act of stopping the machine, when the iron rod caught the sleeve of her gown, and she was dragged towards the machine and severely injured. There was no one attending upon her at the time. When it was proposed to work this [567] machine by steam power, one of the town council, who was a practical builder and a member of the baths and washhouses committee, told the engineer of the corporation that it was dangerous to apply steam power to a wringing machine. There were other wringing machines in this washhouse, which were worked by hand; and in the other washhouses in Sunderland all such machines were so worked.

At the close of the plaintiffs' case, it was submitted on behalf of the defendants that they were not liable. The learned Judge reserved the point, and evidence was adduced on the part of the defendants to prove that the machine was not dangerous, and that the female plaintiff was careless in her use of it.

The learned Judge left it to the jury to say: first, whether the female plaintiff, in using the machine, was guilty of any negligence which contributed to the accident; secondly, whether the defendants were guilty of negligence in the construction of the machine, or in not having attendants to see to the use of it. The jury answered the first question in the negative, and the second in the affirmative, and found a verdict for the plaintiffs, with 50l. damages, leave being reserved to the defendants to move to enter the verdict for them.

Manisty, in the present term, obtained a rule nisi accordingly, on the ground that there was no evidence of any duty, or of the breach of any duty, or of any negligence by or on the part of the defendants; or why a new trial should not be had on the same ground; or why the judgment should not be arrested, on the ground that the declaration disclosed no ground of action against the defendants.

Price and Davison shewed cause, in last Michaelmas Term (Nov. 17). First, there was a breach of duty on the part of the defendants for which they are responsible. They [568] erected baths and washhouses under the provisions of the 9 & 10 Vict. c. 74, and, having the management and control of them, it was their duty, when they invited the public to use a machine worked by steam power, to take care that it was safe. A corporation is not exempt from any liability which attaches to an individual, if guilty of negligence; and it is clear that if this machine had been the property of an individual he would, under such circumstances, have been liable. [Martin, B. If an individual said, there is a wringing machine, you may use it, would he be responsible if the machine was not safe?] The defendants knew that the machine was dangerous, and therefore ought not to have invited the public to use it; *Gibbs v. The Trustees of the Liverpool Docks* (3 H. & N. 164). [Wilde, B. The declaration does not allege negligence.] Such an allegation, if traversed, would have raised an immaterial issue. In *Blakemore v. The Bristol and Exeter Railway Company* (8 E. & B. 1035), which was the case of a gratuitous lender of a chattel which he knew was in an unsafe condition, it was laid down that "the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured." The defendants ought not to have applied steam power to a machine intended to be worked by hand;

neither should they, knowing its dangerous condition, have left the machine unguarded. The case resembles that of a person who, having a gun which he knows is dangerous to [569] use, chooses to let it for hire. [Martin, B., referred to *Cornman v. The Eastern Counties Railway Company* (4 H. & N. 781).] In *Green v. The London General Omnibus Company* (7 C. B. N. S. 290), Erle, J., in delivering the judgment of the Court, said:—"The whole course of the authorities, from the case of *Yarborough v. The Bank of England* (16 East, 6) down to *Whitfield v. The South Eastern Railway Company* (E. B. & E. 115), which was in reality an action against *The Electric Telegraph Company*, shews that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual." [Bramwell, B. In *Cornman v. The Eastern Counties Railway Company* (4 H. & N. 781), the injury was caused by a weighing machine which had been in the same situation for five years, and there is no pretence for saying that such a machine is not a proper thing for a railway Company to have on the platform of their station. Here it was proved that it was dangerous to apply steam power to a wringing machine, and that the machine was in the first instance intended to be worked by hand.] *Manley v. The St. Helens Railway Company* (2 H. & N. 840) is also an authority in favour of the plaintiff. [Channell, B. There the Company had a beneficial interest in the tolls, and were therefore liable, as any proprietor of private property would be.] In *Gibbs v. The Trustees of the Liverpool Dock* (3 H. & N. 164) the defendants received no profits, but merely performed a public duty, and yet they were held responsible for negligence. Here the defendants are in the position of an individual, because they have availed themselves of the provisions of the 9 & 10 Vict. c. 74, to erect baths and washhouses; and they make [570] a charge for the use of them. Secondly. It will be argued that the council, not the defendants, are liable. But the 27th section vests the property in the baths and washhouses in the corporation. By the 29th section, the council shall not be personally "liable to the payment of any sum of money as or by way of compensation or satisfaction for or in respect of anything done or suffered in due pursuance of that Act." The action, however, is properly brought against the corporation, the council being only their servant, and the corporation are entitled to reimburse themselves out of the rates for any sum which they may be required to pay: *Ruck v. Williams* (3 H. & N. 308). [Wilde, B. By the 9 & 10 Vict. c. 74, the council are authorized to erect baths and washhouses, to make charges for the use of them, and to detain the clothes of persons refusing to pay the charges. The Act contains two schedules, the one relating to bye-laws, the other regulating the charges. Persons who choose to avail themselves of the provisions of this Act ought to take proper means of securing their machines, so that persons using them may not be injured, and if they neglect to do so, it may be that there is a liability arising from the Act.] There is an implied undertaking, on the part of the corporation, that the things which they provide for the use of the public may be used without danger. Suppose they constructed baths which were dangerous for boys, could they shelter themselves by saying the use of them was voluntary? They also argued that the declaration was good after verdict, the jury having found negligence.

Manisty (with whom was T. Jones), in support of the rule. First, there was no duty on the part of the defendants for the breach of which they are responsible. As regards this tort, there is a difference between the corpora-[571]-tion and town council. In non-corporate towns the Act is to be carried out by commissioners elected by the vestry; but in corporate towns the individuals who constitute the town council are vested with the same powers as those commissioners. The legislature has provided that no member of the council or commissioner shall be personally liable (sect. 29). [Wilde, B. The 32nd section makes the matter plain. It provides that whenever the council, or vestry, on the recommendation of the commissioners, determine that the baths shall be sold, the corporation shall convey them.] That is only a statutory mode of conveyance. [Wilde, B. The 20th section incorporates the commissioners, but there is no enactment incorporating the council, and by the 27th section the property in the baths is vested in the corporation.] It is submitted that in a case of this kind the commissioners would not be liable, and, if so, no action will lie against the council or corporation. It was never intended that the corporation should be responsible for the acts of the council. The legislature has invested the council with certain powers for the erection and management of baths and washhouses, and there is no

common law or statutory liability on the part of the corporation. Assuming that the corporation are in the position of individuals who are the owners of baths and washhouses, which the legislature has authorized them to erect, since they have no beneficial interest in the funds derived therefrom they are not responsible: *Metcalfe v. Hetherington* (11 Exch. 257). The only duty on the part of the corporation is to employ a competent engineer. Secondly. There was no evidence of negligence. The female plaintiff knew the construction of the machine and was aware of its danger. She voluntarily used it, and therefore cannot recover. Moreover it is consistent with the evidence that the injury was caused by her own negligence. He also argued that the declaration was bad in arrest of judgment, inasmuch as it did not disclose on the face of it any duty on the part of the defendants.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILDE, B. In this case the plaintiffs complained of the injury caused by the negligent construction of a machine set up by the defendants, and used in some public washhouses erected by them under the provisions of the 9 & 10 Vict. c. 74.

It appears that the wife of the plaintiff resorted to the washhouses in question, and paid four pence for the use of the machines and other conveniences of washing there for a given time. The machine in question, by which the injury was done, was a drying-machine. It consisted of a cylinder, into which the wet clothes were put, and made to revolve with great rapidity, and the water driven out by the operation of centrifugal force. The machine was originally constructed to be worked by an ordinary wynch-handle connected with the top of it, such handle being turned by the hand of the person using it, and there were a considerable number of these machines in the washhouse.

A proposition was made among the members of the corporation to introduce steam. There was evidence to shew that this was objected to by some competent persons as likely to prove dangerous. It was, however, adopted; and, at the time of the accident, the machine in question was turned by steam power.

In applying the steam power in place of the hand, the wynch-handle was taken off; but the rod on which it had [573] been fixed was allowed to remain. This rod was quite unnecessary and useless to the machine as worked by steam. It projected some distance over the edge of the top of the machine, and revolved with great rapidity while the machine was in action.

The plaintiff's wife, in using the drying machine, allowed a portion of her dress to touch this rod; it was caught by it, and she was drawn against the revolving rod, and considerably injured.

At the trial it was contended that she was guilty of negligence in the way she used the machine, but this was negatived by the jury.

The jury found that the machine was dangerously and negligently constructed, and that the accident with which the female plaintiff met was caused by such dangerous and negligent construction of the machine. A verdict passed for the plaintiffs, leave being reserved to the defendants to move this Court to enter a verdict for them.

It was argued by the defendants that the statute in question imposed no responsibility or liability whatever on the corporation, but only on the council to whom the erection and management of the washhouses were confided. But several clauses of the Act were pointed out during the argument which tended to negative this proposition. It is unnecessary to refer to them again in detail.

It is sufficient to say that, in our opinion, the legislature did not intend to withdraw from the corporation, to whom the washhouses belonged, the responsibility which might attach to any improper construction or management of them.

It was then argued that, as the plaintiff was a volunteer and chose to use the machine as it was, she could not recover.

[574] But we think this argument does not avail the defendants. The statute was passed for the benefit of the poor and more ignorant classes of the population. The corporation chose to avail themselves of their powers to erect these washhouses. In discharge of the statutory duty thus undertaken by them, we think they were bound to exercise ordinary care and diligence, and provide machines reasonably safe for use.

It is clear, from the evidence and the finding of the jury, that the projecting rod

which did the mischief was unnecessarily, carelessly and dangerously allowed by the defendants to remain after all use and purpose in it had ceased. It is also clear that this danger was one which the plaintiff might reasonably fail to perceive or appreciate, and the jury have, in substance, found that neither in the fact of using the machine at all, nor in the particular mode of using it by the plaintiff, was there any negligence. The accident was caused by the immediate negligence of the defendants, and on an occasion when the plaintiff was in no way to blame.

We think the plaintiffs' verdict ought to stand, and this rule be discharged.

Rule discharged.

[575] *TASKER v. SHEPHERD*. Feb. 25, 1861.—A declaration stated that by agreement in writing between B., since deceased, and the defendant, of the one part, and the plaintiff of the other part, B. and the defendant, who at the date of the agreement were carrying on business as stone merchants in co-partnership, appointed the plaintiff their sole London agent for a period of four years and a half, and the plaintiff in consideration of the premises agreed to accept the said appointment upon the terms (amongst others) that B. and the defendant should pay the plaintiff 2l. 10s. per cent. on all accounts received by them for stone sold by the plaintiff, or supplied by B. and the defendant to any person originally introduced to them by the plaintiff. Breach: that the defendant did not nor would employ the plaintiff as his sole agent for the whole period of four years and a half, and did not nor would execute certain orders for stone procured by the plaintiff in his said capacity of agent. On demurrer: Held, that the parties contracted with reference to the then existing partnership business, and that the contract was to employ the plaintiff for a period of four years and a half, subject to the condition that all parties so long lived. Per Channell, B., and Wilde, B. Martin, B. dubitante.—*Quære*, whether the case falls within the principle of those cases in which, the personal skill of the party being involved, the contract was put an end to by death.

[S. C. 30 L. J. Ex. 207; 9 W. R. 476; 4 L. T. 19. Distinguished, *Phillips v. Hull Alhambra Palace Company*, [1901] 1 Q. B. 63. Referred to, *Brace v. Calder*, [1895] 2 Q. B. 253; *Friend v. Young*, [1897] 2 Ch. 421.]

The declaration stated that by an agreement in writing made and entered into on the 17th June, 1857, between one Emanuel Bentley, since deceased, and the defendant, of the one part, and the plaintiff of the other part, the said Emanuel Bentley, now deceased, and the defendant, who at the date of the said agreement were carrying on business as stone merchants in co-partnership, appointed the plaintiff their sole London agent for a period of four years and a half from the date of the said agreement; and the plaintiff, in consideration of the premises, agreed to accept and undertake the said appointment and duty upon the terms following, videlicet, that the said Emanuel Bentley, now deceased, and the defendant should pay to the plaintiff the sum of two pounds and ten shillings per centum on all accounts received by them for stone sold or caused to be sold by the plaintiff, or supplied by the said Emanuel Bentley, now deceased, and the defendant to any person originally introduced to them by the plaintiff (deducting the boat freights to a certain place called Goole from the amount): that the plaintiff should pay the whole of his travelling expenses, and attend upon any business in London of the said Emanuel Bentley, now deceased, and the defendant, when required by them in writing: that the [576] said Emanuel Bentley, now deceased, and the defendant should pay all the expenses of carrying and shipping stone at certain places called Brighouse, Brookfoot or Halifax, and also the expenses of carriage to the railway station at Lightcliffe or Halifax, and should furnish the plaintiff with invoices for all stone shipped or trucked by them as soon as it was sent off: that the said Emanuel Bentley, now deceased, and the defendant should balance all business transactions with the plaintiff, and pay over the amount due to him for commission, on the 16th of June and the 16th of December in each year. And it was further stipulated and agreed that the said agreement should be held binding without reference to any legal technicalities. Averments: that the plaintiff has done and performed all matters and things on his part to have been done

and performed in order to entitle him to the due performance of the said agreement on the part of the said defendant, and all reasonable times have elapsed in that behalf. Breach : that the defendant has failed and made default in the performance of the said contract on his part, and did not nor would employ the plaintiff as his sole agent for the whole period of four years and a half from the date of the said agreement ; and did not nor would execute certain orders for stone procured by the plaintiff in his said capacity as agent as aforesaid ; and did not nor would furnish the plaintiff with invoices for all stone shipped or trucked as soon as it was sent off ; and did not nor would balance all business transactions on the 16th of June and the 16th of December in each year, or at any other time, but therein made default and broke the said contract and agreement on his part, whereby the plaintiff was and is greatly damaged and injured.

Demurrer and joinder therein.

[577] Cleasby argued, in support of the demurrer, in Hilary Term (Jan. 25). The declaration is bad on the ground that it shews no breach of contract. The agreement was made by the plaintiff with the defendant and his partner, and upon the death of the latter it terminated. [Martin, B. Assuming that the defendant was under no obligation to carry on the business after the death of his partner, still, if he shipped stone sold by the plaintiff, would he not be bound to render him an account of it?] That might be evidence of a new implied agreement with the plaintiff. By the death of one partner the contract of partnership is ipso facto dissolved : Gow on Partnership, p. 219, 3rd ed., *Vulliamy v. Noble* (3 Meriv. 614). The partnership being at an end, the surviving partner was under no obligation to carry on the business for the purpose of fulfilling the contract. [Martin, B. If a firm consisting of many partners hires a clerk for a year, and any one of the partners dies, is the contract at an end?] In the case of ordinary servants the servant is discharged by the death of the master : Williams on Executors, p. 727, 5th ed. [Martin, B. The wages are paid for a year's service ; therefore if the servant does not serve for a year he is entitled to nothing ; then suppose the master died on the 364th day of the service, is the servant to get nothing? Wilde, B., referred to *Jackson v. Bridge* (12 Mod. 650).] This subject was incidentally discussed in *Siboni v. Kirkman* (1 M. & W. 418, 423), where Parke, B., in the course of the argument, said, "Executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death : that is this, that they are not liable in those cases where personal skill or taste is required." If the contract is not of a personal nature, to be performed by [578] the testator only, the executor may enforce it : *Marshall v. Broadhurst* (1 C. & J. 403) ; and he is bound to perform it. *Wentworth v. Cock* (10 A. & E. 42). Here the contract was to do certain business which the act of God has rendered it impossible to perform. In order to ascertain whether the defendant is liable, it is necessary to see whether the contract was of such a nature that the obligation on the part of the plaintiff to perform it has ceased. Now, the plaintiff was not bound as London agent to any one but the partnership firm. He was under no obligation to act for either of the partners separately. The death of one partner might render the agency of little or no value, while his being alive might have formed part of the consideration for accepting the service. [Wilde, B. The strong argument in the defendant's favour is, that the plaintiff was to be paid according to the amount of business done. A man may be willing to undertake an agency, knowing the quantity of business transacted by a partnership firm, but it may not be worth his while to be agent for a single individual. Martin, B. The plaintiff agreed to act as the sole London agent of the copartnership for a period of four years and a half ; then does the death of one partner relieve him from that obligation? Arguing upon principle, I should say it does not, because the act of God does not discharge a person from the performance of his contract.] There is nothing in the agreement from which it can be inferred that the contract is to be performed if one partner dies. [Channell, B. The general rule is, that where a contract is personal an executor may sue for a breach of it in his testator's lifetime, the exception being a contract to marry, which is of such an extremely personal nature that an executor cannot sue for a breach of it unless there is some special damage to the testator's estate.] This agreement was entered into with reference to the existing [579] partnership, and it was never intended that it should be in force after the partnership was at an end. [Martin, B. Suppose a person contracts with three partners to serve them for four years, and at the end of

six months they dissolve partnership, are they relieved from their contract?] There the partnership is put an end to by the act of the partners themselves.

Simon, in support of the declaration. This is an absolute contract to serve for a period of four years and a half, and may be enforced notwithstanding the death of one partner. The law is thus stated in Gow on Partnership, p. 358 :—"The right of action must necessarily survive. . . . So with respect to joint contracts entered into by a firm, and from which a joint legal responsibility results, it can at law, after the death of one partner, be enforced against the survivor alone, and finally against the representatives of the last survivor; for the law considers partnership contracts, which are joint in form, as producing only a joint obligation, which on the death of one attaches exclusively upon the survivor." The defendant was bound to continue the employment of the plaintiff, and the plaintiff was bound to continue his services until the expiration of the four years. The defendant is liable as surviving partner, and he is entitled to contribution from the estate of his deceased partner. It makes no difference that the contract was with the partnership firm. In declaring against a surviving partner it is not necessary to notice the deceased partner: Chitty on Pleading, vol. 1, p. 58, 7th ed. And if, in this case, no mention had been made of the partnership or death of the one partner, the defendant could not have pleaded that he was in partnership with another person, and that the contract was determined by his death. In *Dobbin v. Foster* (1 Car. & K. 323) the [580] plaintiff was engaged by three partners as their foreman for twelve years. Before that period elapsed one partner retired, and the plaintiff continued in the service of the two others, who, having become bankrupts, dismissed him. Coltman, J., ruled that the plaintiff might sue the three partners on the original agreement.

Cleasby replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

CHANNELL, B. This was a case upon demurrer, argued before my brothers Martin, Wilde and myself. The question that arises is on the construction of the contract set forth in the declaration.

In the argument it was suggested that the case fell within the principle of those cases in which, the personal skill of the parties being involved, the contract was put an end to by his death. It may be so: we express no opinion upon that. Our judgment is founded upon a different ground, and upon a ground which arises anterior to the question whether the executor of the deceased party is liable for the performance of the contract.

We mean the question, "What did the parties contract should be done?"

The meaning of the contract itself is one question—the parties against whom it may be enforced is another.

Now the contract in this case is sued upon as a contract that the surviving defendant would employ the plaintiff as agent in the business he might carry on by himself after the death of his partner. And accordingly the breach stated in the declaration is that the defendant (alone) did not employ the plaintiff "as his sole agent," &c.

[581] It is not that the defendant failed to employ the plaintiff as the agent of the "firm,"—treating the contract as an absolute agreement on the part of the defendant that the firm should last for four years and employ the plaintiff during that time, but that the defendant failed either to carry on business separately after the other party's death, or, carrying on business, failed to employ the plaintiff.

Probably the latter was intended, though there is no distinct averment that the defendant did ship any stone, or do any business, after the death of his partner.

Such being the breach, we are of opinion that the declaration is bad on the ground that there was no such contract.

We think the contract had reference to a certain existing partnership business only.

Any business carried on after the death of one partner might be a totally different one. It might be much smaller and less lucrative to the plaintiff. And he might well object to act as agent for a much more limited concern at the rate of remuneration for which he was content to serve the original firm.

And as we find no mention in the contract of any other than the partnership business; as we see no trace of the parties having looked to or contemplated any other, we conclude that they were contracting only in reference to the partnership business,

and that consequently there is nothing to bind the parties on either side to an agency for any other than such business.

This is sufficient to dispose of the case. But as an amendment in the declaration by extending the breach to the non-employment of the plaintiff in the partnership business for the full term of four years would raise the broader question, whether the defendant had contracted absolutely for the continuance of the partnership, we think it right to give our opinion upon that point also.

[582] After fully considering the contract and the probable intention of the parties, to be collected from the various terms of the agreement, we come to the conclusion that the contract was intended to be for a period of four years and a half, subject to the condition that all the parties so long lived.

We do not believe, on reading the contract, that the parties contemplated the continuance of the agency by the executor after the death of the agent, or by the surviving partner after the death of either member of the firm.

We think the agreement of the parties had relation to the existing state of things, which they presumed would continue for four years, and in reference to which presumption alone they contracted.

We are somewhat fortified in this view by the case of *Beswick v. Swindells* (3 A. & E. 868, 882), in which the Court of error, affirming the judgment of the Court below, so regarded the intention of the parties upon an analogous, though not similar, undertaking.

We are therefore of opinion that judgment should be entered for the defendant.

My brother Martin does not entirely concur in this judgment, which is to be taken as the judgment of my brother Wilde and myself.

Judgment for defendant.

[583] JOHN HENRY HUTCHINSON v. BARROW. Feb. 25, 1861.—In April 1854 a testator devised as follows: "I give and devise all that my messuage or dwelling-house with the buildings and lands belonging thereto now occupied by me, situate at W. (containing about twenty acres), together with the close of land called the Hall Close (containing about fourteen acres and a half), now occupied by E. W. as tenant thereof, and also the three cottages and garden cottage at W. aforesaid (except as to the cottage now occupied by my servant F. B., being one of the above three cottages) with the orchard and piece of ground behind and adjoining thereto, containing about one acre and a half, which I hereby give and devise to the said F. B. and to S. his wife successively during their lives after the decease of my wife M. H. and subject to such estates for life, unto and to the use of my said wife, her heirs and assigns for ever." Previous to the year 1847 a close, called "Townend Close," consisting of about six acres, formed part of a farm belonging to the testator at W. In the year 1847 a railway was commenced, which was completed before the will was made, and which divided the Townend Close, separating a part containing 2 a. 0 r. 26 p. (which was claimed in this action), and another piece, called "The Potato Patch," containing 2 r. 35 p., from the remainder of the old Townend Close. After the formation of the railway and before the making of the will the testator took the Potato Patch into his own occupation, and continued to hold it until his death in June 1856. In the Spring of 1856, he took the close in question into his occupation and continued to hold it until his death, but up to this time it had been occupied by a tenant with the rest of the farm. Held: First, that the word "now" had reference to the date of the will, and that the Townend Close in question would not pass under it independently of the 7 Wm. 4 and 1 Vict. c. 26.—Secondly, that there was a manifest intention that the will should not speak and take effect from the death of the testator, and consequently the close in question did not pass under the 20th section of the 7 Wm. 4 and 1 Vict. c. 26.

[S. C. 30 L. J. Ex. 280; 9 W. R. 538; 4 L. T. 554.]

This was an action of ejectment to recover possession of a close called the "Townend Close," containing two acres and twenty perches, situate at Welham, in the parish of Clarbrough, in the county of Nottingham. By consent of the parties,

and order of a Judge, the following case was stated for the opinion of this Court, without pleadings. Henry Clarke Hutchinson, of Welham aforesaid, by his will bearing date the 10th April, 1854, and duly executed to pass real estate, gave and devised as follows:—

“I give and devise—All that my message or dwelling-house, with the buildings and lands belonging thereto, now occupied by me, situate at Welham aforesaid (containing about twenty acres), together with the close of land called the Hall Close (containing about fourteen acres and a half), now occupied by Edward Wright as tenant thereof, and also the three cottages and garden cottage at Welham aforesaid (except as to the cottage now occupied by my servant Francis Brown, being one of the above three cottages) [584] with the orchard and piece of ground behind and adjoining thereto, containing about one acre and a half, which I hereby give and devise to the said Francis Brown and to Sarah his wife, successively, during their lives after the decease of my wife Mary Billyard Hutchinson, and subject to such estates for life, unto and to the use of my said wife, her heirs and assigns for ever.”

After a bequest of personalty to his wife, the testator by his said will devised and bequeathed all other his real and personal estate whatsoever and wheresoever to trustees, their heirs, executors, administrators, and assigns: upon trust as to his said real estate for his wife for life, with remainder (except as to an estate called Bolham) to the use (subject to certain annuities) of the plaintiff, his heirs and assigns for ever.

The testator died on the 4th of June, 1856, without having revoked or altered his said will.

Mary Billyard Hutchinson, the wife of the testator, survived her husband, and by a codicil to her will, duly executed for passing real estate, gave and devised the said close, called the “Townend Close,” to the defendant, his heirs and assigns for ever.

The wife of the said testator had no right or title to dispose of the said close called the “Townend Close” by her will, unless the same passed to her under the said will of her husband by the devise to her in fee.

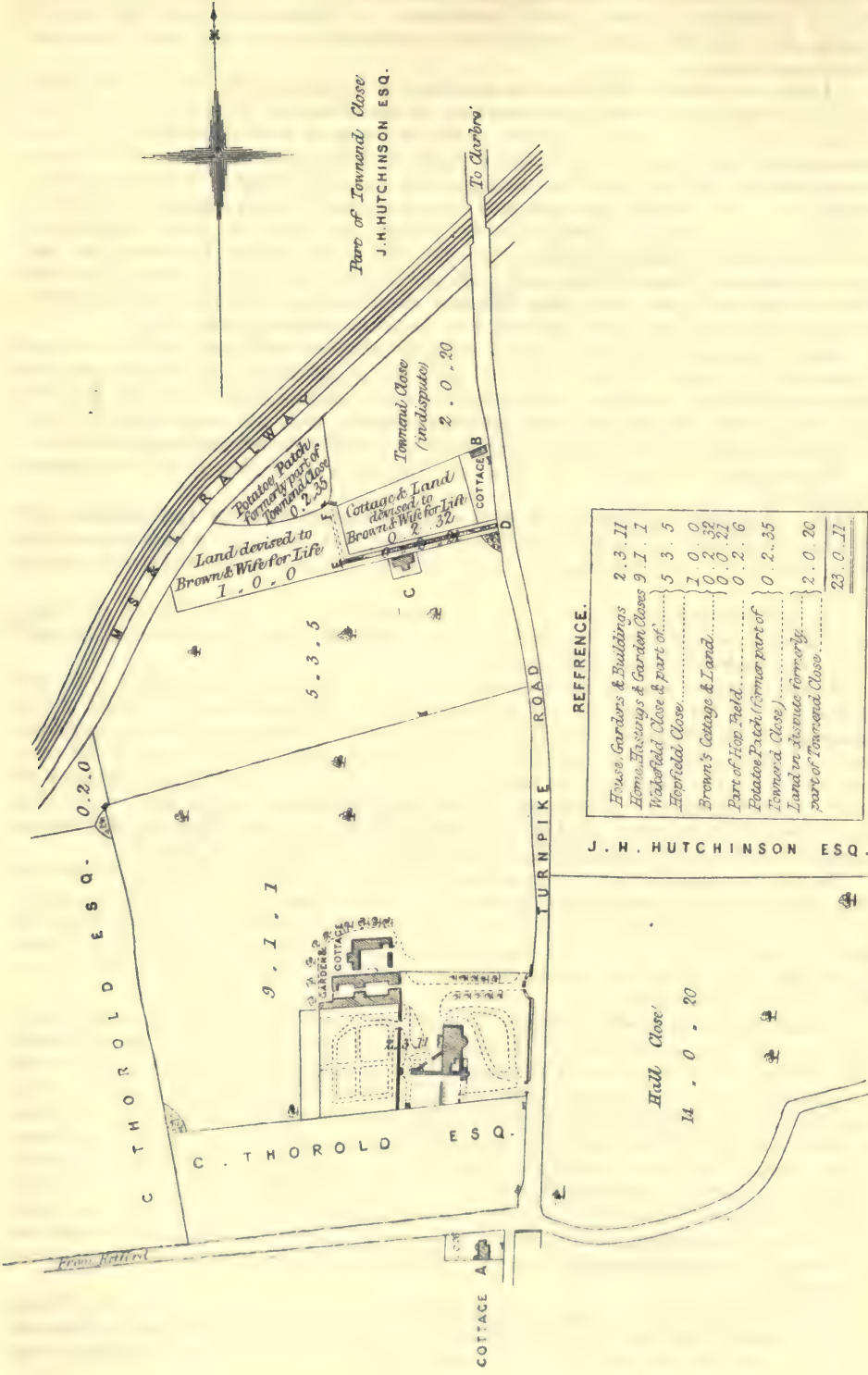
At the date and time of the execution of his said will, and from thence until and at the time of his death, the said Henry Clarke Hutchinson was the owner of the message or dwelling-house, buildings, cottages and lands situate at Welham aforesaid, which are delineated on the plan which accompanies and is to form part of this case, and containing the quantities particularized on the plan. At the time of his death he was in the occupation of all the particulars [585] delineated on the plan, except the Hall Close, the cottage marked A and the 26 perches of land adjoining, the cottage marked B and the 32 perches of land adjoining, and the cottage marked C.

At the date and time of the execution of his said will he was in the occupation of the same particulars, except the Townend Close in dispute. This close, containing 2 acres and 20 perches, and the Potato Patch adjoining, containing 2 roods and 35 perches, were, previously to the year 1847, part of a close called Townend Close, containing 6 acres or thereabouts, which formed part of a farm belonging to the testator at Welham aforesaid.

In the year 1847 the Manchester, Sheffield and Lincolnshire Railway was laid out, and soon afterwards constructed. It was completed before the testator made his will. This railway cut in two the old Townend Close, leaving one portion, consisting of the Potato Patch and the Townend Close in dispute, on one side of the railway. The said Henry Clarke Hutchinson, on the formation of the railway, and before the date or execution of his will, took the Potato Patch into his own occupation, and continued in the occupation thereof until the time of his death; but the Townend Close in dispute continued to be occupied, with the rest of the said farm, by a tenant of the testator down to the Spring of the year 1856, when the testator took the said close into his own occupation, and from that time until and at the time of his death he continued to occupy the said close with the said other premises so in his occupation as aforesaid.

The railway runs on a high embankment, and there can be no road to the Potato Patch except through the Townend Close in dispute or the land devised by the said testator's will to the said Francis Brown and his wife, successively, during their lives.

[586] The testator occupied the Potato Patch by means of a gravelled cart road, shewn on the plan accompanying this case, leading from the turnpike road, at the



REFERENCE.

House, Gardens & Buildings	2.3.11
Homes, Meadows & Garden Closes	9.1.1
Wickfield Close & part of	5.3.5
Hopfield Close	1.0.0
Brown's Cottage & Land	0.2.32
Part of Hop Field	0.0.21
Relative Patch (former part of	0.2.6
Townend Close)	0.2.35
Land in dispute formerly	2.0.20
part of Townend Close	23.0.11

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point marked D on the said plan, past the said Francis Brown's house to the point marked E, and thence at right angles over the grass to the point marked F. The testator never occupied the Potato Patch by a road over the Townend Close, but always by the road above described. When the testator took the Townend Close into his occupation he had a gate opened into it at the point marked F on the said plan, and occupied that close by the same road as the Potato Patch.

Before and at the date and time of the execution of his said will, and from thence until and at the time of his death, the said testator was seised in his demesne as of fee (amongst other hereditaments and premises) of the said close called the Townend Close, and the said other hereditaments and premises hereinbefore mentioned.

The question for the opinion of the Court is, whether the said close called the Townend Close, containing 2 a. 0 r. 20 p., passed under the said will of Henry Clarke Hutchinson by the devise in fee to his said wife.

If the Court shall be of opinion that it did, then judgment is to be entered for the defendant, with costs of suit. If the Court shall be of opinion that it did not, then judgment is to be entered for the plaintiff, with costs of suit.

Kemplay argued for the plaintiff in Hilary Term (Jan. 21). The question is, whether the Townend Close passed by the testator's will to his wife in fee; if not, she had no power to devise it. The 24th section of the 7 Wm. 4 & 1 Vict. c. 26 enacts "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." That section must be viewed in connection with the third, which enables a testator to dispose of all the real and personal estate to which he may be entitled at the time of his death. If the will in question had been made prior to the 7 Wm. 4 & 1 Vict. c. 26, it is clear that the Townend Close would not have passed under it. At the date of the will the testator occupied the Potato Patch, and the Townend Close was in the occupation of a tenant. *Doe d. Parkin v. Parkin* (5 Taunt. 321), *Doe d. Renow v. Ashley* (10 Q. B. 663) and *The Attorney General v. Bury* (Eq. Cas. Abr. 201) are authorities that the word "now" in a will means at the time of its execution. Then has the 7 Wm. 4 & 1 Vict. c. 26 made any difference in this respect? It is submitted that it has not, because the will shews a clear intention that the Townend Close should not pass, for there is a specific bequest of the lands belonging to the testator's dwelling-house and then in his occupation. No doubt, by the combined effect of the 3rd and 24th sections, a general devise of real estate will operate on all property of that description to which the testator may happen to be entitled at his decease; but it is different with a specific bequest. In that case the true rule of construction is, first, to see what the words of the will comprise, and then to transfer its operation to the property of the testator as it existed at his death: Jarman on Wills, vol. 1, pp. 270, 271, 2nd ed. That construction was put upon the statute by Sir J. Knight Bruce, V. C., in *Emuss v. Smith* (2 De Gex & S. 722), and is warranted by the observations of Sir W. P. Wood in *Douglas v. Douglas* (1 Kay, 405). No doubt, where the gift is general in its terms, it will pass all property which belonged to the testator at his death: [587] *Doe d. York v. Walker* (12 M. & W. 591); but where the bequest is specific the established rules of construction are not affected by the 7 Wm. 4 & 1 Vict. c. 26. Thus, in *Cole v. Scott* (16 Sim. 259), the testator, by his will, dated the 29th April, 1843, after a devise of "the house in which I now reside," and also devising "the residue and remainder of my messuages &c. whereof I am now seised or possessed," bequeathed all such manors, farms, &c., as well freehold as copyhold and leasehold, as are now vested in me, or, as to the said leasehold premises, as shall be vested in me at the time of my death as a trustee or mortgagee; and it was held that a freehold estate purchased by the testator after the date of his will did not pass. That decision was affirmed, on appeal (1 M. & G. 518, 528), by Lord Cottenham, C., who, in delivering judgment, said: "The question is whether, in the terms the testator has used, he has not used the word 'now' with reference to the time he was making his will. I think it quite clear that he has. I find this will with a date to it, shewing therefore the period when it was executed, and I find that in it the testator gives 'all the estates of which I am now seised or possessed.' The word 'now' has no meaning in itself, and if there is no date by which to construe it, some period must be fixed upon to which it can refer. Here, however, the date does appear, and the word now can only have reference to the time specified in the will, that time being the date of the will, namely, the 29th of April, 1843. It appears, therefore, to me just the same

as if the testator had said 'all the freehold and leasehold estates of which I am on this 29th of April, 1843, seised and entitled.' If those had been the words, of course there could not have been a doubt; but the words used are, in effect, the same. What is the difference whether the date is repeated, or [589] whether the word now shews that the date is referred to?" So, here, the testator manifestly used the word "now" with reference to the date of the will, and it shews his intention that the will shall not take effect as if executed immediately before his death. *Hepburn v. Skirving* (4 Jur. N. S. 651) is also an authority in support of this view.

Field, for the defendant. First, the Townend Close would pass under this devise independently of the 7 Wm. 4 & 1 Vict. c. 26. The testator at the date of his will occupied the Potato Patch, which formed a portion of the old Townend Close, which was dissevered by the railway. The testator intended to devise all the land formerly belonging to the Potato Patch. The words "now occupied by me" may be rejected as a *falsa demonstratio*. Secondly, the Townend Close passes under the will by virtue of the 7 Wm. 4 & 1 Vict. c. 26. The question is one of construction, and no sufficient intention appears by the will that it shall not speak and take effect as if executed immediately before the death of the testator. The word "now" does not shew such an intention. In using the words "lands now occupied by me," the testator meant no more than "lands which I occupy or possess." After-acquired land would have passed under that devise. [Martin, B. Suppose a testator devised to his wife "all the land in my occupation," and afterwards let to a tenant from year to year, a farm which he then had in hand, would the wife lose that farm? Channell, B. Suppose a devise of "all my farm and the three fields belonging thereto and occupied therewith," and that after the date of the will the testator purchased a fourth field which he occupied with the farm, would that field pass? Pollock, C. B. If a testator had a mansion surrounded by land on which cottages were built, [590] and he devised "all that land now in my occupation," would the cottages pass?] They would, unless a contrary intention appeared from other parts of the will. *Cole v. Scott* (1 Mac. & G. 518) is distinguishable, because there the devise was, "all such manors, farms, &c., as well freehold as copyhold and leasehold, as are now vested in me, or, as to the said leasehold premises, as shall be vested in me at the time of my death;" the latter words clearly shewing that the testator used the word "now" with reference to the date of his will. In *Douglas v. Douglas* (1 Kay, 400), Sir W. P. Wood, V. C., in his judgment, said: "In *Doe d. York v. Walker* (12 M. & W. 591) the gift was of 'all the estates of which I am seised in the parish of Bowden,' and that case in fact determined that, where a testator describes property 'of which I am seised,' that is nothing more than the expression 'all my estates;' and unless there is something definite, as in *Cole v. Scott* (1 Mac. & G. 518), to shew that the testator intended to refer to property in his possession at the date of the will, such a gift would pass everything which answered the general description at the death of the testator." In *Hepburn v. Skirving* (4 Jur. N. S. 651), Sir J. Stuart, V. C., observed that the language of Lord Cottenham, in *Cole v. Scott*, "as to the force and effect of the words 'now seised,' and particularly as to the word 'now,' seems consistent with the decision in *Doe v. Walker* (12 M. & W. 591), as it amounts to this—that if it appears from the context that the testator manifestly uses the words 'now seised' with reference to the date of making and of executing his will, there is sufficient evidence of his intention that his will should not, as to the estates so described, speak as if it had been executed immediately before his death." Here the testator has not manifestly used the word "now" with reference to the date of his will.

[591] Kemplay, in reply, referred to *Doe d. Parkin v. Parkin* (5 Taunt. 321) and *O'Toole v. Browne* (3 E. & B. 572).

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B. The question in this case is, whether a close, called the Townend Close, containing 2 a. 0 r. 20 p. passed under the will of Henry Clarke Hutchinson by a devise in fee to his wife.

Previous to the year 1847 a close, called Townend Close, consisting of about six acres, formed part of a farm belonging to the testator at Welham in Nottinghamshire. In the year 1847 a railway was commenced, which was completed before the will was made, which cut through the Townend Close separating the part in dispute and another piece called the Potato Patch, containing 0 a. 2 r. 35 p. from the remainder of the old Townend Close. These two closes are coloured pink and green on the plan which

accompanies the case. After the formation of the railway, and before the making of his will, the testator took the Potato Patch into his own occupation and continued to hold it until his death. The date of the will is the 10th of April, 1854. In the Spring of 1856 he took the close in question into his occupation and continued to hold it until his death, but up to this time it had been in the occupation of a tenant of the testator, and had been occupied by him with the rest of the farm before mentioned. At the time of the making his will the testator occupied the messuage, dwelling-house, buildings and lands shewn on the plan, south-east of the railway and west of the turn-pike road, except the Townend Close now in question. All the land there situated measures 23 a. 0 r. 11 p. Excluding the close in ques-[592]-tion, the land measures 20 a. 3 r. 31 p.; and excluding the close in question and the Potato Patch it measures 20 a. 0 r. 36 p. The road used by the testator to the Potato Patch is shewn on the plan marked yellow; and after he took the close in question into his own occupation in the Spring of 1856, he used the same road to enter this close at the gate F.

The testator died on the 4th June, 1856. The words of the devise are as follows:—
“I give and devise all that my messuage or dwelling-house, with the buildings and lands belonging thereto, now occupied by me, situate at Welham aforesaid (containing about twenty acres), together with the close of land called The Hall Close (containing about fourteen acres and a half), now occupied by Edward Wright as tenant thereof, and also the three cottages and garden cottage at Welham aforesaid (except as to the cottage now occupied by my servant Francis Brown, being one of the above three cottages, with the orchard and piece of ground behind and adjoining thereto, containing about one acre and a half, which I hereby give and devise to the said Francis Brown and to Sarah his wife successively during their lives, after the decease of my wife Mary Billyard Hutchinson and subject to such estates for life) unto and to the use of my said wife, her heirs and assigns for ever.”

It was contended on behalf of the defendant, first, that the close in question passed to the testator's wife, upon the true construction of the devise, independent of the Statute of Wills, 7 Wm. 4 & 1 Vict. c. 26, and if not, then, secondly, that it passed by virtue of that statute.

We think it clear that the first proposition cannot be maintained. The lands to pass by the devise are lands belonging to the messuage or dwelling-house with the buildings “now” (which before the statute undoubtedly meant at the time of the making the will) occupied by the [593] testator. The close in question answers no part of this description. It did not belong to the messuage or dwelling-house and buildings of the testator, it belonged to the farm of the tenant who was then in the occupation and possession of it. Nor was it occupied by the testator.

Secondly, it was contended that by virtue of the 24th section of the statute it passed to the testator's wife. That section enacts that every will shall be so construed, with reference to both real and personal estate, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will. In our opinion a contrary intention does appear by this will. We think it was the intention of the testator, as expressed in this devise, to state his will to be, that the lands to be taken by his wife were as described by the then existing state of circumstances, and that the word “now” merely expresses the date as if he had said, “On the 10th of April, 1854.”

In Jarman on Wills, vol. 1, p. 261, to which we were referred in the argument, the operation of the statute is discussed with great learning and ability. There is a case there referred to, *Cole v. Scott* (16 Sim. 259; 1 Mac. & G. 518), in which “now” is considered by Lord Chancellor Cottenham to mean the date of the will, and on considering the words of this will it is to us clear that “now” is to be read as if, instead thereof, the testator had put the actual date, and we think there is nothing in the will which will enable us to add the property in dispute to the house which is undoubtedly the subject of the devise.

Judgment for the plaintiff.

[594] WALKER v. GODE. Feb. 25, 1861.—In ejectment the plaintiff proved that S. was the tenant of the premises when he became the owner, and had paid rent to him for many years; that she quitted and was succeeded by H.; that N. succeeded H. and paid rent. In the beginning of September 1858, the defendant and N. severally called on the plaintiff and asked if he would accept the defendant as

tenant. On each occasion the plaintiff said he would. On the 7th of September the defendant took possession, and in October of the same year paid the rent to Michaelmas 1858, for which the plaintiff gave a receipt as for rent due from N. The plaintiff received the rent at Christmas 1858, and gave a receipt for it to the defendant as for rent due from him. In March, 1859, the plaintiff gave to the defendant notice to quit at Michaelmas or otherwise at the end of the year of the tenancy which should expire after the end of one half year from the time of his being served with that notice. On the 17th of December, 1859, the plaintiff's agent served a notice on the defendant to quit at Midsummer. The defendant said the plaintiff might have the house if he paid the valuation of the fixtures and goodwill. Held, that it was a question for the jury, and not for the Judge, to be determined by a consideration of all the facts, at what time the tenancy commenced; that there was evidence of a tenancy ending at Michaelmas, and that it was a misdirection to withdraw from the jury all the facts, except the conduct of the defendant when the notice to quit at Midsummer was served on him. Martin, B., dissentiente.

[S. C. 30 L. J. Ex. 172; 4 L. T. 16. Approved, *Oakley v. Monck*, 1865, 3 H. & C. 714.]

This was an action of ejectment to recover possession of a public house called "The Shovel."

At the trial, before Martin, B., at the Middlesex sittings in Michaelmas Term, the plaintiff proved that one Mary Staples was tenant of "The Shovel" at the time when he became owner of it, and had paid rent to him for fifteen or sixteen years. One Humphreys succeeded her. Newman succeeded Humphreys, and paid rent to the plaintiff. About the end of September, 1858, the defendant called on the plaintiff and asked the plaintiff if he would accept him as tenant. The plaintiff said he had no objection. Newman afterwards called on the plaintiff and asked him if he would take the defendant as tenant. The plaintiff said he would, at the same rent which Newman had given. On the 7th of September the defendant took possession of the premises. On the 19th of October the plaintiff received from the defendant a quarter's rent, due at Michaelmas, and gave a receipt for it as for rent due from Newman. The plaintiff received the rent due at Christmas, 1858, and gave the defendant a receipt for it. On the 24th of March, 1859, the plaintiff gave the defendant notice to quit at Michaelmas, 1859, "provided your tenancy originally commenced at that time of the year, or otherwise &c. at [595] the end of the year of your tenancy which shall expire after the end of one half year from the time of your being served with this notice." The plaintiff, however, continued to receive rent until Midsummer, 1860. One Richards, a witness, proved that on the 17th of December, 1859, he served a notice, signed by the plaintiff, requiring the defendant to quit the premises at Midsummer, 1860, when the defendant said that the plaintiff might have the house if he paid him the valuation of the fixtures and goodwill. The defendant and his witnesses proved that the defendant had paid about 300l. to Newman for the goodwill and fixtures, and that he told the plaintiff of this arrangement and asked him for an agreement for a term of years. The plaintiff would not grant a lease, but told the defendant that if he paid his rent regularly he would not disturb him during his life. At the conclusion of the defendant's case his counsel insisted that the tenancy was shewn to have begun at Michaelmas, 1858, or a few days before.

The learned Judge told the jury that the case depended on the evidence of Richards; that there was nothing to shake it in any way; and that the only question was whether the jury, from the defendant's conversation with Richards, would infer that the tenancy began at Midsummer. The jury having found a verdict for the plaintiff,

Huddleston, in Hilary Term (Jan. 12), obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury in telling them that the case depended only on the evidence of Richards, and that there was nothing in the defendant's evidence to alter that, and that there was evidence to shew that the tenancy expired at Michaelmas.

Day shewed cause in the same term (Jan. 24). The [596] only material evidence was that on the 17th of December the plaintiff gave the defendant notice to quit the premises at Midsummer. The defendant said, in effect, "I will go out if Mr. Walker pays me the money I paid to Newman." This was evidence which the jury might

treat as an admission that the tenancy had been determined by the notice: *Doe d. Baker v. Woombswell* (2 Camp. 559). [Wilde, B. The rule was not granted on the ground that the language of the defendant when served with the notice was not evidence to that effect. Martin, B., referred to *Doe d. Clarges v. Forster* (13 East, 405).]

Huddleston, in support of the rule. Where a tenant from year to year quits the premises in the middle of a quarter, and another comes in, if the incoming tenant pays the rent up to quarter day, the rule is that the tenancy is considered to commence from the day up to which he pays the rent: *Doe d. Holcomb v. Johnson* (6 Esp. 10). Upon that principle, the defendant's tenancy must be taken to have commenced at Michaelmas, and therefore not to have been duly determined by a notice to quit expiring at Midsummer. Though the defendant may not have objected to the insufficiency of the notice to quit at the time he received it, his omission to do so did not preclude him from objecting to its insufficiency at the trial: *Oakapple d. Green v. Copous* (4 T. R. 361). It was a question of fact, which should have been left to the jury, whether there was a new taking when Newman gave up possession and the defendant came in.

Cur. adv. vult.

The learned Judges differing in opinion, the following judgments were now delivered.

[597] WILDE, B. I am of opinion that this rule must be made absolute. And I wish to state clearly, at the outset, that I do not decide the case upon any determination of law, or opinion of my own, as to when the tenancy in question began or ended, but simply upon the ground that the time at which the tenancy began was a question for the jury and not for the Judge, and ought to have been left to them with all the evidence which bore upon it.

The question then is, whether the learned Judge who tried the cause was justified in withdrawing from the consideration of the jury all the facts of the case except the conduct of the defendant when the notice to quit at Midsummer was served on him.

The propriety of so doing must be determined by considering what was the issue to be tried, and whether the evidence withdrawn had any tendency to prove or disprove it. The plaintiff was bound to make out a Midsummer tenancy. The defendant denied a Midsummer tenancy and suggested a Michaelmas tenancy; and the question to be tried by the jury was, what was the agreement between the parties as to the nature of the tenancy and the time at which it should commence.

The evidence withdrawn wholly from the consideration of the jury consisted: First, of the account given by the plaintiff, by the defendant, and by Newman—that is, by all three of the parties concerned—as to what passed between them when the defendant was accepted as tenant.

Secondly, of two receipts for rent, the first of which treated Newman as tenant up to Michaelmas, and the second of which treated the defendant as tenant after that time.

Thirdly, of a notice to quit given by the plaintiff to expire at Michaelmas, thus treating the tenancy as terminating at that period.

Now I think it is impossible to say that none of these [598] facts had any tendency to shew what the agreement was to which the parties had come. I do not say they established a Michaelmas tenancy, but I feel assured that they should have been submitted to the jury as a portion of the facts from which they might collect what the real agreement had been. They were clearly fit to be contrasted with the defendant's conduct when served with the notice, which formed the very slight and only evidence of a Midsummer holding. It was indeed argued that the defendant's tenancy was only a continuation of Newman's, which had been a continuation of the tenancy of those who had occupied before him.

This does not avail the plaintiff, for several reasons. First, whether there was this continuous tenancy or not was a question for the jury, and the above evidence should equally have been left to them upon that question. Secondly, there was no evidence at all beyond the expression "succeeded" that the several occupiers did continue the same holding in the manner suggested, and the meaning of that expression by the parties who used it was also for the jury, if there was anything in it. And, thirdly, there was not a particle of evidence to shew when the tenancy of Newman or any of the preceding occupiers had commenced, and consequently none to shew when such a tenancy terminated. For these reasons I think the mode in which the question was left to the jury was erroneous, and there must be a new trial.

BRAMWELL, B. I think this rule should be made absolute. The question is whether there was any evidence that the year of the defendant's tenancy did not end at Michaelmas. If there was it ought to have been left to the jury. I think there was such evidence. Mrs. Staples had been tenant to the plaintiff of the premises in question from year to year. She was succeeded by Humphreys. He was succeeded by [599] Newman. When the year of any of these tenancies would have expired was not shewn. During the quarter ending Michaelmas 1858, the defendant succeeded Newman and occupied the premises. Before or after the quarter day at Michaelmas, (which is immaterial and a little uncertain, though I think it was clearly before,) the defendant applied to the plaintiff to take him as tenant and the plaintiff agreed to do so. The defendant arranged with Newman, and entered and continued to occupy. He paid the plaintiff the rent due at Michaelmas, having received it in part from Newman, and took a receipt from the plaintiff as for rent due from Newman. The subsequent rent he paid, and took receipts for it in his own name. The plaintiff gave the defendant six months' notice to quit at Midsummer 1860. Now what took place when the defendant entered may have been an assignment of Newman's interest, invalid for not being under seal, or a surrender of Newman's interest and a new demise to defendant, valid according to *Nickells v. Atherstone* (10 Q. B. 944) and confirmed by *Davison v. Gent* (1 H. & N. 744), or invalid as far as relates to Newman's interest, but still a binding bargain between plaintiff and defendant that the defendant's tenancy to the plaintiff should begin and end at Michaelmas. If the evidence tended to prove any one of these things as much as any other it was worthless, because the tenancy of the former tenants may have been terminable at Midsummer. But I think it went to shew a new taking by the defendant of the plaintiff (valid at least as between them) from Michaelmas. It is much more convenient to suppose such a condition of things than a continuance of the preceding annual tenancy and an invalid assignment of it; (and see *Buckworth v. Simpson* (5 Tyr. 344, 354; S. C. 1 C. M. & R. 834), per Parke, B.): Therefore I think there was evidence of a tenancy ending at Michaelmas and not at Midsummer.

[600] MARTIN, B. I regret the difference of opinion which exists in this case, because I fear the judgment of the majority of the Court will create a new source of litigation in very many cases and a question for the jury, which would frequently be a temptation rather to decide upon feeling and prejudice than on reason and truth, a matter always to be regretted and if possible avoided. The question upon which I have the misfortune to differ from my brother Bramwell is, whether there was evidence which ought to have been submitted to the jury, that there was a new demise by the plaintiff to the defendant of the public house in question commencing at Michaelmas 1858. He thinks there was. I think there was not.

The facts were these:—Many years ago a public house had been demised from year to year at a rack rent, and there was no evidence except what was derived from the conduct of the defendant when he was served with the notice to quit as to the time of the commencement of the original tenancy. About twenty years ago a Mrs. Staples was in the occupation of it. She continued tenant for fifteen or sixteen years, and was succeeded by a person called Humphreys. A person called Newman succeeded him, and was the tenant in occupation in 1858. In the Autumn of that year, (and I agree with my brother Bramwell that the great probability is that it was before Michaelmas Day, indeed before the 7th of September,) the defendant called upon the plaintiff and asked him if he would accept him (the defendant) as tenant; the plaintiff said he had no objection. Some time afterwards Newman called upon the plaintiff and asked him if he would accept the defendant as tenant at the same rent, and the plaintiff said he would. On the 7th of September the plaintiff entered into possession. On the 19th of October the plaintiff went to the house for his Michaelmas rent; he had taken with him a receipt filled up. The defendant paid the rent, and the plaintiff gave him a receipt in [601] the name of Newman, and refused to give a written agreement or lease. In point of fact Newman had supplied the funds for paying the rent up to the 7th of September, and the defendant paid for the subsequent period of the quarter. Some time after Christmas the plaintiff called for the rent then due, which the defendant paid, and the plaintiff gave him a receipt in his own name. In March, 1859, the plaintiff served the defendant with a notice to quit on the 29th September then next, "provided the tenancy originally commenced at that time of the year or otherwise at the

end of the tenancy which should expire next after the end of one half year from the time of the service of the notice." The plaintiff received the rent for Christmas 1859, and gave a second notice to quit at Michaelmas 1860. Upon the evidence of what passed at the time of the service of this notice, in accordance with *Doe d. Clarges v. Forster* (13 East, 405) and *Doe d. Baker v. Woombwell* (2 Campb. 559), and other cases, I left the question to the jury whether the original tenancy had commenced at Midsummer; they found it had, and the verdict was entered for the plaintiff.

I thought then, and continue to think, that there was no other question for the jury in the cause. There were four occasions, and four only, upon which anything occurred between the parties. The first was on the agreement by the plaintiff to accept the defendant as tenant in the place or instead of Newman, and in my opinion this was the agreement or contract which, upon the defendant entering into possession, created the new tenancy. I will state hereafter what I consider this contract to have been; for the present it is sufficient to say that there was no evidence from what then occurred of a new tenancy to commence at Michaelmas 1858. The second occasion was on the 19th October, when the Michaelmas rent was paid. I think nothing then occurred or was supposed by either party to [602] have occurred to make a new contract or create a new tenancy. The third occasion was when the plaintiff received the Christmas rent. Nothing then passed except the payment of the rent and giving a receipt in the defendant's name, and no presumption can arise from it, for all which had occurred previously was known. The fourth occasion was the service of the notice to quit in March 1859, which was in the form given in the law books when the commencement of the tenancy is unknown, and affords no evidence upon the point in question. As I have already said, I consider the rights of the parties to depend upon what occurred when the plaintiff assented to the proposals of Newman and the defendant to accept the latter as tenant. It seems to me plain upon the evidence that neither of them intended to make, or ever supposed they had made, any contract afterwards. What then occurred was what happens in innumerable instances. A tenant from year to year agrees with another to sell him his interest, and goodwill, and they go to the landlord and ask him to accept the new man as his tenant, to which he agrees. This and nothing more was what occurred in the present instance, and it is the ordinary transaction. The new man afterwards enters into possession. There is generally a valuation, as was here, and the old tenant is debited in it with an apportionment of the rent from the preceding quarter day to the day of his leaving. Afterwards the landlord or tenant, as the case may be, is desirous to determine the tenancy and to give a notice to quit; and the question is, what period upon the above facts is to be deemed as the commencement of the new tenancy for the purpose of this notice? It perhaps would have been better when the Courts of law introduced the tenancy from year to year to have determined that a half year's notice to quit, ending upon any day on which rent was payable, would have been sufficient; but it has been [603] long settled that the notice must be to quit at the end of the year from the day of the year when the tenancy commenced. There are two periods which, as it seems to me, may with some reason be contended as the true period, one the commencement of the original tenancy; the other the day of the new tenant entering into possession, which in this case was the 7th of September; for my own part I cannot see the ground for supposing it to be the next ensuing quarter day. I think the substance of the transaction is a proposal by the old tenant and the proposed new tenant to the landlord, that the latter should accept the proposed new tenant in the place of or instead of the old one, that is, to substitute him in lieu of the old one, and that he should be in the same position as to the tenancy,—which would comprehend its duration, including the time of its commencement, the rent and all other terms. This I think is the real and true contract arising upon or to be implied from the transaction, and it is eminently convenient that it should be so. The commencement of the original tenancy is generally known, and in the great majority of instances is upon a quarter day—the day when the new tenant enters into possession is probably wholly unknown to the landlord, it is quite as frequently in the middle of a quarter as at the end of one: and if the landlord were required by law to give a notice to quit, as upon a day ending the day of the year next before that upon which the new tenant entered into possession, in the great majority of instances he would be required to do a thing which would be to him impossible; and as in very many instances the day of entry is not a rent day, another extreme incon-

venience would arise, that the tenancy would end on a day in the middle of a quarter, which at the best would lead to an apportionment of the rent, but most probably to the loss altogether to the landlord of the rent from the preceding quarter day. The point in differ-[604]-ence between my brother Bramwell and myself is as to the contract arising from the circumstances proved. The cases of *Nikells v. Atherstone* (10 Q. B. 944) and *Davison v. Gent* (1 H. & N. 744) have no bearing upon it. The judgment of Baron Parke also, in *Buckworth v. Simpson* (5 Tyr. 344, 354; S. C. 1 C. M. & R. 834), has no direct bearing one way or the other; but I should collect that his general view on the subject concurs with mine.

For these reasons I cannot concur with my brother Bramwell that there was evidence to be submitted to the jury that there was a tenancy commencing at Michaelmas, 1858.

I differ from my brother Wilde upon two points. First, I think, upon the undisputed evidence in the cause, it was matter of law and for the Judge to lay down, that the notice to quit was to be given with reference to the commencement of the original tenancy. Secondly, upon the question of fact, viz., whether the tenancy did commence at Midsummer, I think all the evidence bearing upon it was submitted to the jury, and that the other evidence referred to was irrelevant, and, instead of having a tendency to aid them in arriving at a true conclusion, had a tendency to mislead them.

Rule absolute.

[605] IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

BARKWORTH AND OTHERS, Assignees of the Estate and Effects of Harrison and Others, Bankrupts v. ELLERMAN. Feb. 4, 1861.—The defendant, a merchant at Hull, kept an account with the Hull bank, upon the terms that they should procure P. and Co., their London agent, to accept on their credit bills drawn by the foreign correspondents of the defendant against their consignments to him, and of which P. and Co. were advised by the Hull bank. The defendant paid the Hull bank a quarter per cent. on the amount of the acceptances, and they paid P. and Co. a fixed annual sum for transacting their London business. When a bill was accepted by P. and Co., the Hull bank debited the defendant with the amount, and they charged him interest from the time the bill was due. The Hull bank became bankrupt, and P. and Co. paid all bills accepted by them which were due after the bankruptcy. Held, in the Exchequer Chamber (reversing the decision of the Court of Exchequer), that the assignees of the Hull bank, and not P. and Co., were entitled to recover from the defendant the amount of such bills.

[S. C. 7 Jur. (N. S.) 829; 9 W. R. 377.]

This was an appeal from the decision of the Court of Exchequer in refusing (a) to grant a rule to shew cause why a nonsuit should not be set aside and a verdict entered for the plaintiffs for 162l. 17s. 10d., pursuant to leave reserved at the trial.

The first count of the declaration stated that the bankrupts, before they became bankrupt and at the time of the making of the several contracts hereinafter in this declaration mentioned, carried on the business of bankers at Hull under the firm of Harrison, Watson and Co., and Price, Marryat and Co. carried on the business of bankers in London, and were the London agents of Harrison, Watson and Co.; and the defendant was a customer of Harrison, Watson and Co., and kept a banking account with them [606] at Hull; and thereupon, in consideration that Harrison, Watson and Co., at the request of the defendant, would procure Price, Marryat and Co., on the credit of them, Harrison, Watson and Co., to accept a bill of exchange dated the 9th day of July A.D. 1857, and drawn by Enoch, Ernst and Heineman upon Price, Marryat and Co. for the sum of 68l. 4s. 7d., payable three months after the date thereof to Enoch, Ernst and Heineman or their order, the defendant promised

(a) Easter Term, May 5, 1859. Not reported, the Court on refusing the rule having stated that they would give their reasons on a subsequent day, but none were given.

Harrison, Watson and Co. that when the said bill became due he, the defendant, would pay to Harrison, Watson and Co. the amount of the said bill, and would also pay to them a certain commission, to wit, a commission of a quarter per cent. on the amount of the said bill. Averments: that Harrison, Watson and Co. did, before they became bankrupt, confiding in the said promise of the defendant, procure Price, Marryat and Co. to accept the said bill of exchange on the credit of them, Harrison, Watson and Co., and that afterwards, and after Harrison, Watson and Co. became bankrupt, the said bill became due and was duly paid by Price, Marryat and Co.; of all which the defendant afterwards had notice, and was requested by them, the plaintiffs, as assignees as aforesaid, to pay to them the amount of the said bill and the said commission; and a reasonable time for the defendant to have made such payment had at the commencement of this suit elapsed: Yet the defendant has not paid the amount of the said bill or the commission, but has wholly refused so to do. Then followed seven similar counts relating to other bills.

Pleas, to first count. First: non assumpsit.

Secondly. That Harrison, Watson and Co. did not procure Price, Marryat and Co. to accept the bill of exchange on the credit of Harrison, Watson and Co., as alleged.

Thirdly. That the promise of the defendant was not broken, as alleged.

[607] Fourthly. That the bill of exchange was not by Harrison, Watson and Co. procured to be accepted by Price, Marryat and Co. on the sole credit of Harrison, Watson and Co., but the said bill was by Harrison, Watson and Co. procured to be accepted by Price, Marryat and Co. for the accommodation of the defendant, and on the credit and for the account of the defendant as well as on the credit of Harrison, Watson and Co., and so that the defendant should become, and became and was, liable to be called on and compelled by Price, Marryat and Co. to repay them the whole or such part of the amount of the said bill as should remain unpaid to them. And the defendant says that, after the said bill had become due and had been paid by Price, Marryat and Co., and whilst the whole amount thereof remained due and wholly unpaid to them, Price, Marryat and Co. called on and compelled the defendant to pay to them the amount of the said bill so remaining unpaid to them as aforesaid. And the defendant says that, before the bankruptcy of Harrison, Watson and Co., he, the defendant, satisfied and discharged the commission in the first count mentioned by payment.

There were similar pleas to the other counts, and issue was taken on all the pleas.

The cause was tried before Pollock, C. B., at the London sittings after Hilary Term, 1859, when the following evidence was given on the part of the plaintiffs.

On the 24th of September, 1857, a petition for adjudication of bankruptcy was filed in the Court of Bankruptcy for the Leeds district against Harrison, Watson and Co., and they were, on the 30th September, 1857, adjudicated bankrupt, and the plaintiffs appointed assignees of their estate and effects. The bankrupts had previously carried on business at Kingston upon Hull as bankers, and Price, Marryat and Co. were their London correspondents or [608] agents. Before Harrison, Watson and Co. became bankrupt the several bills in the declaration mentioned had been accepted by Price, Marryat and Co. The bill mentioned in the first count was as follows:—

"Enoch, Ernst and Heineman."

"12 Oct^r."

"Hamburgh, 9 July 1857.

"£68, 4 7 Ster^s."

"At three months after date pay this first of exchange, second not paid, to the order of ourselves,

(530)

Sixty-eight pounds four shillings seven pence Ster^s. value in ourselves, which place to account J. E. & Co., to wait advice from Hull.

"Acc^d PRICE & CO.,

"ENOCH, ERNST & HEINEMANN.

"To Sir Chas. Price & Co., London.

"o/a J. E. & Co., (a) Hull.

"No. 6936."

(a) These words (meaning "on account of J. Ellerman and Co.") were written on the bill by Price and Co.

All the bills became due after the bankruptcy, and were paid when due by Sir Charles Price and Co. It was admitted that the balance due to the plaintiffs, if entitled to recover the amount of the bills paid by Sir Charles Price and Co., was 1621l. 17s. 10d.

The examination of Ellerman, the defendant, before the Bankruptcy Commissioner, was given in evidence, and was (in substance) as follows :—

“I am a merchant at Hull, and have been so for eighteen years past. I kept a banking account with the bankrupts, which I opened about 1845. Our agreement was, if I overdraw my account in cash I was to be charged 5l. per cent. interest, and was to be allowed 3l. per cent. for any [609] money I might have from time to time to the credit of my account. I was to pay the bankrupts a quarter per cent. commission on the entire account, and if I did any business in London I was to pay them an additional quarter per cent. During the transaction of my business it frequently became necessary that my foreign correspondents should draw on Sir Charles Price and Co. for any consignments made to me by such foreign correspondents. On hearing from my foreign correspondents that they had made consignments to me and drawn on Sir Charles Price and Co. against such consignments, I requested the bankrupts to instruct Sir Charles Price and Co. to accept such drafts. My instructions were, I believe, always in writing. In some cases, at the commencement of my business, and in fact throughout my transactions with the bankrupts, I paid the bankrupts money to cover such drafts. The bills of lading of the cargoes in respect of which the bills were drawn were sent to me direct, my correspondents being chiefly my personal friends. It was my invariable rule to request the bankrupts to instruct Price and Co. to accept such drafts. I do not remember in any instance having requested Sir Charles Price and Co. to accept bills on my account, except, I believe, I once wrote to them when at Hamburg, saying, if a certain bill was presented to them for acceptance and they had not received instructions from Harrison, Watson and Co. to accept, if they would please hold it over for a day until they received instructions from the bankrupts. I am not aware I ever had any other communication with Sir Charles Price and Co. until the suspension of payment by the bankrupts, nor to the best of my belief did I ever receive any communication from Sir Charles Price and Co. on the subject of any bills so accepted, except through my bankers, the bankrupts. The bills I requested the bankrupts to instruct Sir Charles [610] Price and Co. to accept were invariably placed by the bankrupts to the debit of my account with them. On these bills I paid the bankrupts an extra quarter per cent. commission, or one half per cent. in the whole. I continued to bank with the bankrupts up the 24th September, 1857, when they suspended payment. The account made up since the bankruptcy of Harrison, Watson and Co. shewed a balance against me of 1621l. 17s. 10d. I do not still owe that money. I have paid it to Sir Charles Price and Co., they having claimed it and given me a bond of indemnity for so doing. I have received a letter from Sir Charles Price and Co., dated the 30th September, 1857, of which the following is a copy :—

“Messrs. J. Ellerman & Co.

“3 King William St.,

“30th Sept. 1857.

“Gentn.,—In consequence of the lamented stoppage of our mutual friends Messrs. Harrison, Watson & Co., we consider it our duty to hand you the annexed statement of drafts which by their directions we have accepted on your behalf, and for the due retirement of which at maturity we shall feel obliged if you will make the necessary provision here.—We are, &c.,

“PRICE, MARRYAT & Co.”

(Then followed a statement of the drafts, which included the bill drawn by Enoch, Ernst and Heineman, on the 9th July, 1857.)

“Henry Pease was examined on the part of the plaintiffs, and said :—I was a member of the late firm of Harrison, Watson & Co. I was a banker at Hull for many years. Sir Charles Price & Co. were our London correspondents. For many years past the defendant had an account with us. He was in the habit of requesting our firm to instruct our London correspondents, Sir Charles Price & Co., to accept bills drawn by his foreign correspondents. That practice con-[611]-tinued for many years. The charge we made the defendant for obtaining these acceptances was an extra 5s. per cent. We charged him 5s. per cent. on his general account. On all acceptances that were accepted by Price & Co. there was 5s. extra ; that is, half a per

cent., a quarter per cent. on the general account, and an extra quarter per cent. on the acceptances of Sir Charles Price & Co.: that was added to the defendant's account every year, and was known by him and paid by him. We paid Sir Charles Price & Co. a fixed sum of 600l. a year for doing business, and then there were extra charges for foreign postage, and so on. Sir Charles Price & Co. did not charge us anything extra for giving these acceptances. It has happened that a bill was drawn upon them for a larger amount than we had advised them to accept, and they would inform us that a bill was drawn for such and such an amount and would request to know whether they might accept it or not, and then we advised them. They never accepted bills without our advice on our account: if they did it was at their own risk. I never knew Sir Charles Price & Co. have any dealings with the defendant except through ourselves. We debited the defendant with the acceptances of Sir C. Price in his account with us at the time the bills were accepted, and at the same time Sir Charles Price & Co. were credited in our books with the amount. When the last of these bills was accepted by Sir Charles Price & Co., I have no doubt that our account was in credit with their firm; I mean in credit with respect of cash, not acceptances. I have no doubt that our credit account was not overdrawn. There were bills running to a much greater amount than the cash account would pay. The bills accepted by Sir Charles Price & Co. for the defendant did not pass through our hands till they were returned paid: they came to us at the end of the month as vouchers for the amount that Sir Charles Price & [612] Co. had paid. As to the correspondence between the defendant's correspondents and Sir Charles Price & Co., we sometimes had advice from Price & Co. that such and such a person had drawn, but beyond that we knew nothing about them." Cross-examined.—"The bills were debited to the defendant the day they were accepted. Interest was charged of course from the day they became due. It is not unusual to debit a customer with a bill on the day on which it is accepted. We debit him with it on the day it is accepted. We become answerable as soon as it is accepted; we do not make it an item on which to charge interest except from the day on which it becomes due. The date is entered in the book when it is due. Although debited in the book it is debited as a bill, but it is not cash until it becomes due. It is cash so far as this, that we are answerable the day it is accepted." (Looking at the pass-book.) "This is the way in which it is debited. There is a bill drawn, 'Mare & Co.:' draft on Price & Co., 11th September, at three months, due December 14, for 510l. The interest is carried to his debit at the end of the year, and is calculated from the day on which the bill becomes due, and it is then made cash in our books." The case then set out a great deal of correspondence between the parties with respect to these and other bills. After the bankruptcy, Harrison, Watson & Co. wrote to Sir Charles Price & Co. as follows:—

"Hull, 16th Nov. 1857.

"Gentlemen,—We shall be obliged by your sending us a list of all the drafts accepted by you, falling due after the 23rd Sept., on our account.—We are, &c.,

"HARRISON, WATSON & Co."

To which the following answer was returned.

[613] "Messrs. Harrison, Watson & Co.

"London, 17th Nov. 1857.

"Gentlemen,—In reply to your favor of the 16th instant, we beg to inform you that on the 10th ultimo we forwarded a statement of the drafts accepted on your account, distinguishing those drawn by yourselves from those which we had accepted on behalf of your friends.—We are, &c.,

"PRICE, MARRYAT & Co."

On this evidence the Lord Chief Baron directed a nonsuit, but reserved leave to the plaintiffs to move to enter a verdict for 1621l. 17s. 10d., if the Court should be of opinion that they were entitled to recover.

The question for the opinion of the Court is, ought the Court of Exchequer to have granted a rule pursuant to the leave reserved and to have made the rule absolute?

J. Brown (Crompton Hutton with him) now moved for a rule to shew cause (a)

(a) Before Wightman, J., Williams, J., Willes, J., Byles, J., Crompton, J., Keating J., and Hill, J.

why the nonsuit should not be set aside and a verdict entered for the plaintiffs for 1621l. 17s. 10d. The plaintiffs are entitled to recover the amount claimed. The defendant, a merchant at Hull, received from his correspondents abroad goods for which he paid by the acceptances of Price & Co. bankers in London. The defendant had no direct communication with Price & Co., but he got Harrison, Watson & Co., his bankers at Hull, to procure their acceptances. For this accommodation the defendant paid Harrison, Watson & Co. a quarter per cent. on the amount of the bills, in addition to the ordinary per centage paid to a banker by his customer; and Harrison, Watson & Co. paid Price & Co. 600l. a year for accepting and paying their bills. In 1857, Harrison, Watson & Co. became [614] bankrupt, and Price & Co. paid the bills which they had accepted on account of the defendant. The money so paid is a debt due from the bankrupts to Price & Co. and which they might prove under the bankruptcy, and also a debt due from the defendant to the bankrupts. The defendant, instead of paying the plaintiffs, the assignees, has paid Price & Co., under an indemnity, not the full amount of the bills, but the amount due on his account with the bankrupts. [Wightman, J. When Price & Co. paid the bills, could they have sued the defendant on the ground that they accepted the bills on his account?] There was no privity between the defendant and Price & Co.; but only between the defendant and the bankrupts, and the bankrupts and Price & Co. These were in no sense accommodation bills. The defendant, instead of getting the acceptance of his banker gets the acceptance of a London banker procured by his banker. The defendant in effect says, "If you, the Hull bank, will get your London agent to accept my bills I will pay you the amount." That is not a contract of indemnity. Immediately a bill was accepted by Price & Co., it was debited by the Hull bank to the defendant in his account, but the interest was not charged until the bill became due. [Crompton, J. Price & Co. were bound to accept in consideration of the 600l. a year paid to them by Harrison, Watson & Co. The transaction was the means by which Harrison, Watson & Co. supplied the defendants with money.] In no instance did the defendant send money to Price & Co. to meet the bills.

Per Curiam. You are entitled to a rule to shew cause.

Lush (Price with him) shewed cause. This is only a contract by the defendant to indemnify the Hull bank against any loss resulting from these bills, which are accommodation [615] bills; and inasmuch as the bankrupts' estate has suffered no loss, the plaintiffs are not entitled to recover. The Hull bank were the defendant's agent to procure the acceptance of Price & Co. [Williams, J. You must establish that the bankrupts had a double character, viz., as agents for the defendant and also responsible to Price & Co. Wightman, J. Who was liable to pay Price & Co. when they paid the bills?] They might have maintained an action against the defendant on an implied promise to indemnify them. The plaintiffs do not claim nominal damages only; therefore the question is, whether they are entitled to recover from the defendant the full amount of these bills which the Hull bank has never paid. The contract is this—if you, the Hull bank, will get your London agent to accept bills for me, I will indemnify you against any loss. There is no evidence of an absolute contract by the defendant, that if the Hull bank would procure their London agent to accept bills for him he would pay the Hull bank the amount of the bills when they became due. Suppose the defendant had gone into the market and purchased the bills, if the contract is that contended for by the plaintiffs the defendant would have to pay their amount twice over. [Byles, J. Would not the amount of the bills appear on the debit side of the defendant's account with the Hull bank. If so, was not the contract that the defendant would pay the Hull bank when they paid the amount of the bills? Wightman, J. Assuming that the defendant had not paid any one, who could have sued him?] Price & Co. might have claimed against the Hull bank, and, if they paid, they might have sued the defendant on an implied contract of indemnity. If the defendant had paid the Hull bank before they paid Price & Co., he would have made a payment which he was under no obligation to make. Suppose the defendant had changed his banker, and had agreed to indemnify Price & Co. when [616] the bills became due, what claim could the Hull bank have had against him? If the other side is right, the plaintiffs would be entitled to recover even though the defendant had paid Price & Co., or had taken up the bills. [Williams, J. If the defendant is only liable to indemnify the Hull bank, he will have had the whole value of the bills and paid no one. Suppose the contract had

been in writing in these terms :—"I, the defendant, agree with you, the Hull bank, that if you will procure your London agent to accept bills drawn by my correspondent I will hold you harmless against any loss." Then, suppose that Price & Co. had only received from the Hull bank one penny in the pound, could the plaintiffs have recovered more from the defendant?] Assuming that the contract was to pay the Hull bank, it would only continue in force so long as all parties remained in statu quo. There was a privity between Price & Co. and the defendants, for every bill has the words, "which place to account of Ellerman & Co." Price & Co. received their instructions from the Hull bank as agent for the defendant. The defendant would have had no defence to an action by Price & Co. for the amount of the bills. [Crompton, J. There is not the slightest privity between Price & Co. and the defendant. The consideration for the acceptance is the money paid to Price & Co. by the Hull bank.]

J. Brown was not called upon to support the rule.

WIGHTMAN, J. We are all agreed that our judgment must be for the plaintiffs. The evidence does not satisfy us, and ought not to have satisfied a jury, that there was any privity between Price & Co. and the defendant. The transaction was between the defendant and the Hull bank, who were to procure their London agent to accept the bills; and when they were accepted and paid it was, so far as the defend-[617]-ant was concerned, on the credit given to him by the Hull bank, not by their London agent. Price & Co., in writing to Harrison, Watson & Co., after the bankruptcy, say, "We forward a statement of the drafts accepted on your account," and in truth the acceptance of the drafts was on account of the Hull bank. In that view it seems to us that the plaintiffs, the assignees of Harrison, Watson & Co., have a right to maintain this action.

Rule absolute accordingly.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

FIELD v. LELEAN. Feb. 5, 1861.—Upon the sale, by one broker to another, of shares in a mine, they respectively signed bought and sold notes, the former of which was as follows :—"Bought, T. F. 250/5120ths shares in Wheal Charlotte, at 2l. 5s. per share, 562l. 10s., for payment, half in two months, and half in four months. In an action for not accepting the shares: Held, that evidence was admissible of a custom among brokers in mining shares, that, in contracts relating to the sale and purchase of such shares, the delivery takes place at the time appointed for payment.

[S. C. 30 L. J. Ex. 168; 7 Jur. (N. S.) 918; 9 W. R. 387; 4 L. T. 121. Referred to, *Mahalen v. Dublin and Chapelizod Distillery Company*, 1877, Ir. R. 11 C. L. 83.]

Error on a bill of exceptions. The declaration stated that the plaintiff, on the 18th June, 1859, at the request of the defendant, bargained with the defendant to sell and sold to him, and the defendant then agreed to buy and bought of the plaintiff, 550 shares in a certain mine and mining association, called and known by the name of "The Wheal Charlotte Mine," in the parish of Pellamethnoe, in the county of Cornwall, at and for the price of 2l. 5s. per share, the whole price of the said 250 shares amounting to a large sum of money, to wit, 562l. 10s.; the said shares to be delivered to the defendant and paid for by him, one half in two months and the other half in four months from the day and year aforesaid; and in consideration thereof, and that [618] the plaintiff at the request of the defendant, had then promised the defendant to deliver to him the said shares as aforesaid, the defendant then promised the plaintiff to accept and receive the same of and from the plaintiff, and then to pay the plaintiff for the same in the manner in that behalf aforesaid. And the plaintiff says that although the said period of two months from the day and year aforesaid had elapsed before the commencement of this suit, and he, the plaintiff, within that period, was ready and willing to deliver the said shares to the defendant on the said terms and according to the said agreement, and although he, the plaintiff, did all things necessary on his part to entitle him to have the same accepted by the defendant on the terms aforesaid, and the time for so accepting the same has elapsed, yet the

defendant made default in accepting the same and in paying the price thereof, according to the terms and true intent and meaning of the said agreement, and the plaintiff hath thereby incurred expense and sustained loss in keeping the said shares and in re-selling the same.

Pleas (inter alia). First, non-assumpsit. Secondly: that the plaintiff was not ready or willing to deliver the said shares as alleged. Issues thereon.

At the trial, before Pollock, C. B., at the London Sittings after Michaelmas Term, 1859, the plaintiff gave in evidence the bought and sold notes. The bought note, which was signed by the defendant, was as follows:—

“4 Cushion Court, Old Broad St., London,

“June 18, 1859.

“Bought, Thomas Field, Esqr., 250/5120ths shares in Wheal Charlotte, at 2l. 5s. per share, 562l. 10s. 0d. (Five hundred and sixty-two pounds ten shillings), for payment half in two and half in four months.

“WILLIAM LELEAN.”

(The case then set out the sold note which was in the same terms.)

[619] The plaintiff further proved that the Wheal Charlotte Mine was a mine conducted on the cost-book principle, and that the defendant and the plaintiff were both of them brokers in mining shares. The counsel for the plaintiff further offered to prove, by parol evidence, a usage or custom among brokers in mining shares that, in contracts relating to the sale and purchase of such shares as the contract above mentioned, the delivery of the shares takes place concurrently with and at the time agreed upon between the vendor and purchaser for the payment for the shares to the vendor by the purchaser; and that the purchaser cannot demand to have the said shares delivered to him by the vendor before the time of payment for the shares agreed upon between the vendor and the purchaser. Whereupon the counsel for the defendant submitted that the evidence as to the usage or custom so offered to be given to the plaintiff was not good or admissible in law upon the said first and second issues or either of them, and that the said issues ought to be found for the defendant.

The Lord Chief Baron thereupon held and affirmed that the evidence as to the usage or custom, so offered to be given by the plaintiff as aforesaid, was not good or admissible in law. Whereupon the jury found a verdict for the defendant. The counsel for the plaintiff having tendered a bill of exceptions to the above ruling, the case was argued in Trinity Vacation, 1860,^(a) by

Montague Smith (Coleridge with him), for the plaintiff. The contract being silent as to the time for the delivery of the shares, evidence of the custom was admissible for the purpose of shewing that the delivery and payment were to be contemporaneous. [Willes, J. In some cases the payment is made before the shares are delivered.] As a general rule evidence of usage is admissible where it merely seeks to add an incident to the contract, but does not control, nor is inconsistent with it. This custom is not inconsistent with the contract, and to incorporate it is merely to carry out the intention of the parties. [Wightman, J. Suppose there was no evidence of usage, when would the shares be deliverable?] Within a reasonable time. It is difficult to reconcile all the cases on this subject. [Blackburn, J. You must contend that *Spartali v. Benecke* (10 C. B. 212) was wrongly decided.] The judgment of the Court in that case proceeded on the ground that the usage would, in effect, advance the time of payment stated in the contract, and was therefore inconsistent with it. The error in that case lies in supposing that evidence of usage is only admissible when the contract is ambiguous in its terms. In *Brown v. Byrne* (3 E. & B. 703), the bill of lading expressly stated the rate of freight payable, yet it was held that evidence was admissible of a custom by which the shipowner, on payment, was bound to allow three months' discount. The principle on which the doctrine proceeds is, that the parties must be taken to have contracted with reference to the custom or usage. There are two branches of the rule: one relates to the language used, and evidence is admissible to explain its mercantile or trade meaning; the other has reference to known usages which prevail as to the subject-matter of certain contracts, and in that

(a) June 19. Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., Blackburn, J., and Keating, J.

case such incidents may be annexed, provided they are not repugnant to, or inconsistent with the written contract. The French law agrees with our own in annexing incidents to contracts. [Willes, J., referred to *Toullier, de Droit Civil*, vol. 6, chap. 3, sect. 5, pp. 304, 314, 319. Wightman, J. *Syers v. Jonas* (2 Exch. 111) is an [621] express authority that where the contract is silent evidence is admissible, not merely to explain the terms used, but to annex customary incidents. Blackburn, J. That doctrine was affirmed in *Humfrey v. Dale* (7 E. & B. 266).] In *Parker v. Ibbetson* (4 C. B. N. S. 346) evidence was admitted to prove that, by the custom of a particular trade, a yearly hiring was determinable by a month's notice at any time; and it was left to the jury to say, first, whether such a custom existed; and secondly, whether the contract was made with reference to the custom. The jury found that the custom was proved, but that the hiring was a special hiring, to which the custom did not apply. [Wightman, J. In the judgment in *Spartali v. Benecke* (10 C. B. 212, 226), there is a mistake with reference to *Syers v. Jonas* (2 Exch. 111): it is said, "the evidence was received, upon the ground that the incident sought to be annexed was not inconsistent with the contract;" but the evidence was rejected. Perhaps it means, "the evidence was held to be admissible, upon the ground," &c.] In *Lucas v. Bristow* (E. B. & E. 907), the plaintiffs sold to the defendant "fifty tons best palm oil, expected to arrive, &c., at 40l. 10s. per ton: wet, dirty, and inferior oil, if any, at a fair allowance." The oil on arrival, contained only one-fifth of the "best" oil; and, in an action for not accepting it, it was held that evidence was admissible to shew that, according to mercantile usage, the contract was satisfied if the oil delivered contained a substantial portion of "best" oil; and that such evidence was for the jury. [Wightman, J. In that case there was an uncertainty on the face of the contract. Wet, dirty, and inferior oil was to be taken at an allowance, and it was uncertain how much of the "best," and how much wet, dirty, and inferior oil would be in each cargo. Therefore [622] there was ambiguity enough to admit evidence of what proportion of good and inferior oil would satisfy the contract.] In *Humfrey v. Dale* (7 E. & B. 266, 274) evidence was admitted of a custom in the oil trade, that when a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser. Lord Campbell, C. J., in delivering the judgment of the Court, said:—"Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed is not material. In either point of view, it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument." [Blackburn, J. The difficulty is to tell how much omission in a written contract will make the incident repugnant or inconsistent with it. Byles, J. The word "silent," which is used in some of the cases, is an equivocal word: it may mean not expressed but implied; or it may mean neither expressed nor implied.] In the case of *The Schooner Reeside* (2 Sumner, Rep. Circ. Ct. U. S. 569), Story, J., said:—"The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied. . . . But a written, and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow [623] mere presumptions and implications properly arising, in the absence of any positive expression of intention, to control, vary or contradict the most formal and deliberate written declarations of the parties." [Blackburn, J., referred to 1 Smith's Lead. Cas. p. 462.] In the case of the hiring of a domestic servant, the incident is annexed of "a month's warning or a month's wages." [Blackburn, J. A contract to hold from Lady Day in Northumberland, and the like contract in Cornwall, though in the same terms, might operate very differently if the custom in either county was applied to them.] In *Spartali v. Benecke* (10 C. B. 212), the contract was for the sale of specific goods at an agreed price to be paid on a future day, and therefore the Court considered that the vendor did not mean to retain his lien. [Keating, J. The usage there set up contradicted the terms of the contract as to the time of payment. Williams, J. I under-

stand the Court to say that *Syers v. Jonas* laid down the general law, but they decided the case of *Spartali v. Benecke* on its particular merits. There the contract was for specific goods; here the contract would be satisfied by the delivery of any shares in that mine.]

Mathew, for the defendant. There is a distinction between a contract which is silent, and a contract which, by its language, impliedly excludes a particular usage or custom. This contract is not silent, and, according to its true construction, the shares are to be delivered within a reasonable time, and to be paid for at the times mentioned. The delivery and payment are not to be cotemporaneous. The rule is positive, that evidence is inadmissible to contradict the express terms of a contract or its implied meaning: 1 Smith's Lead. Cas. 462. The law on this subject was laid down in *Hutton v. Warren* (1 M. & W. 466), and [624] adopted in *Spartali v. Benecke* (10 C. B. 202). [Blackburn, J. Evidence of usage is never adduced for the purpose of annexing an incident to a contract, unless in order to vary it. According to the rule as sometimes laid down, evidence of usage would never be admissible except when it was not wanted.] In a marine policy of insurance there is an implied warranty of seaworthiness, and evidence would be inadmissible to contradict it. So, in the case of a demise of land, evidence could not be given that by local usage the lessor was precluded from distraining for rent. *Spartali v. Benecke* did not turn on the fact that the contract was for the sale of specific goods: whether the goods are specified or unascertained makes no difference. That decision proceeded on the ground that the usage was inconsistent with the contract, since its effect would be to give the vendor a lien on the goods, when by the terms of the contract he had waived it. In *Ford v. Yates* (2 Man. & G. 549), where the contract imported a sale for ready money, it was held that evidence was inadmissible to shew that, by the usual course of dealing between the parties, the goods were sold on a credit of six months. [Blackburn, J. That was not the case of a custom of trade, but merely of the terms of dealing between two individuals. A long course of dealing between several persons is equivalent to a custom. Wightman, J. Suppose, in this case, for a long course of dealing the payment had always been cotemporaneous with the delivery, would evidence of that have been admissible?] In *Brown v. Byrne* (3 E. & B. 703) and *Lucas v. Bristow* (E. B. & E. 907) the evidence was admitted, under the other branch of the rule, to explain an ambiguity in the language of the contract, not to annex an incident to it. In *Parker v. Ibbetson* (4 C. B. N. S. 346) the contract was made in a particular trade, and therefore, according to the ordinary rule, all customs which regulated that trade were tacitly incorporated into the contract, unless excluded. Upon the face of this contract credit is expressly given to the vendee, but by implication no credit is to be given if this custom is admissible. If the contract had contained no mention of payment, by implication of law the vendor would have had a lien on the shares, but the introduction of the stipulation as to the time of payment destroys the right of lien: *How v. Kirchner* (11 Moore, P. C. 21), *Kirchner v. Venns* (12 Moore, P. C. 361). Stipulations implied by law from the language of a written instrument are as binding as the express terms of the instrument, and as incapable of being controlled by custom; and it is clear that an express stipulation will exclude a custom: *Roberts v. Barker* (1 C. & M. 808). [Williams, J. The ground of that decision is that the parties, having made an express stipulation, did not mean to be governed by the custom. Here the custom must be considered as included in the contract, not as an independent matter.] *Webb v. Plummer* (2 B. & Ald. 746) is another instance of a custom being excluded by the terms of the instrument. [Williams, J. This question has arisen in cases where the contract is required to be in writing; then, if this custom is introduced as part of the contract, how is the contract in writing? Blackburn, J. That point was considered by the Court of Exchequer Chamber in *Dale v. Humfrey* (E. B. & E. 1004), and the majority of the Judges held that the custom was part of the written memorandum, though not expressed in it.] Also in *Clarke v. Royston* (13 M. & W. 752) the custom of the country was excluded by the terms of the contract.

Montague Smith, in reply, cited *Taylor v. Shray* (2 C. B. N. S. 175, 197).

The judgment of the Court was now delivered by

[626] WIGHTMAN, J. We are of opinion that in this case evidence of the custom was admissible. The plaintiff and the defendant were brokers in mining shares, and the bought and sold notes constituted the written contract between

them. The sold note, of which the bought note is a copy, was, in terms, as follows:—"Sold, William Lelane, Esqr., 250/5120ths shares in Wheal Charlotte, at 2l. 5s. per share, 562l. 10s.; for payment, half in two and half in four months." The written contract, as proved by the bought and sold notes, provides expressly for the time for payment for the shares, but is wholly silent as to the time for the delivery of them; and, if nothing more appeared, the defendant would have been entitled to require the plaintiff to deliver them to him forthwith, or within a reasonable time, and before payment; but the plaintiff proposed to prove by parol evidence a custom amongst brokers in mining shares (of which the plaintiff and defendant must be presumed to be cognizant, that the vendor was not bound to deliver the shares without cotemporaneous payment; and the question is, whether such evidence was admissible in this case.

The Court of Common Pleas in the case of *Spartali v. Benecke* (10 C. B. 212) mentions two instances in which evidence of usage is admissible in the case of written contracts; the first where, by usage, certain words are used in a mercantile contract in a sense differing from their ordinary meaning; and the second, where the usage annexes certain incidents to contracts upon which they are silent. It is said for the plaintiff that the present case falls within the second of these instances, the written contract being silent as to the time for delivery, though it specifies the time for payment, and the custom proposed to be annexed to the written contract would not alter the terms of it as expressed, nor be repugnant to or inconsistent with them. It was observed by [627] Lord Campbell, in the case of *Humfrey v. Dale* (7 E. & B. 266), that in a certain sense every material incident which is added to a written contract varies it, and makes it different from what it appeared to be, and so far is inconsistent with it; and if such variance were a ground of objection, it would be difficult in any case to introduce evidence of custom where there is a written contract.

The judgment of the Court of Common Pleas in the case of *Spartali v. Benecke*, in which the circumstances were hardly distinguishable from the present, is no doubt directly against the admissibility of evidence of usage in this case; but that decision proceeds on what appears to me to be the mistaken ground, that the effect of the introduction of a custom as to the time of delivery of the thing sold would be to alter or vary the time fixed for payment by the written contract, whereas the time for payment would not be altered, and the custom would only affect the time for delivery, with respect to which the written contract is silent. The case of *Syers v. Jonas* (2 Exch. 111) was cited in *Spartali v. Benecke*, and its authority not disputed as to the admissibility of evidence of custom to annex incidents to written contracts which are not expressly or impliedly excluded by the written terms. Several other cases to the same effect were cited upon the argument of this case, one of the latest being that of *Humfrey v. Dale* before referred to, in which the law upon this point is clearly laid down; and upon consideration of these authorities we are of opinion the evidence tendered ought to have been received, and that the plaintiff is entitled to judgment for a trial de novo.

WILLIAMS, J. I agree with the judgment which has just been delivered by my brother Wightman. But I wish to add a few words as to the case of *Spartali v. Benecke* on which my [628] learned brother has made some comment. It may be observed that in that case, although the written instrument of sale was, mutatis mutandis, the same, substantially, as in the present, the usage relied on was different. In the present case, it is simply that the delivery is to take place at the appointed time for payment and not before. In *Spartali v. Benecke* the usage relied on was that delivery might, at the option of the buyer, be required at any time before the appointed day for payment, but in no case without present payment of the price. And therefore it was, I apprehend, that Wilde, C. J., in his judgment treated the usage as varying the time for payment expressed in the statement of the contract, inasmuch as, according to that usage, the delivery intended by the contract might take place so as to give the seller a right to call for payment before the time specified for it in the written instrument. But according to the usage sought to be proved in the present case, no delivery can be required, or is intended to take place, before that time shall have arrived. If *Spartali v. Benecke* cannot be distinguished in this way, I agree in thinking that it ought to be overruled as being a misapplication of the principle on which the Court in that case, as in almost all the others on this subject, professed to act, viz., that evidence of

commercial usage is admissible for the purpose of annexing incidents to contracts, unless it introduces something repugnant or inconsistent with the terms of the written instrument. In the present case I can find no such repugnancy or inconsistency, and therefore I think the evidence ought to have been admitted.

Judgment of trial de novo.

[629] MEMORANDA.

In the present Vacation Her Majesty, by letters patent, granted to George Hayes, Serjeant at Law, precedence at the Bar, next after Archibald John Stephens, Esquire, one of Her Majesty's Counsel.

In the same Vacation the following gentlemen were appointed Her Majesty's Counsel:—William Dugmore, of Lincoln's Inn, Esquire; William Anthony Collins, of Lincoln's Inn, Esquire; Anthony Cleasby, of the Inner Temple, Esquire; Henry Warwick Cole, of the Inner Temple, Esquire; John Fraser Macqueen, of Lincoln's Inn, Esquire; Thomas Chambers, of the Middle Temple, Esquire; Edwin Plumer Price, of the Inner Temple, Esquire; Josiah William Smith, of Lincoln's Inn, Esquire; Richard Baggallay, of Lincoln's Inn, Esquire; Henry Mills, of the Middle Temple, Esquire; The Honorable Adolphus Frederick Octavius Liddell, of the Inner Temple; William Baliol Brett, of Lincoln's Inn, Esquire; John Burgess Karslake, of the Middle Temple, Esquire; William Digby Seymour, of the Middle Temple, Esquire; John Duke Coleridge, of the Middle Temple, Esquire; the Honorable George Denman, of Lincoln's Inn, and George Mellish, of the Inner Temple, Esquire.

Thomas Wheeler, of the Middle Temple, Doctor of Laws, was called to the degree of the coif, and gave rings with the motto "non sine labore."

[630] EXCHEQUER REPORTS. EASTER TERM, 24 VICT.

FOX AND ANOTHER v. NOTT. April 25, 1861.—The defendant shipped at Liverpool on board the plaintiffs' vessel certain goods, and the master signed a bill of lading which stated that the goods were shipped by the defendant "as agent," and were to be delivered at the port of Colombo "unto order or assigns, he or they paying freight for the goods." Before the shipment, the plaintiffs advanced to E., on whose account the goods were shipped, 400l., upon an undertaking by E. that he would indorse to them as a security a bill of lading of the goods, wherein the freight should be payable by E. in this country. The defendant indorsed the bill of lading to E., who indorsed it to the plaintiffs as a security for the said advance and a further advance made upon an estimate between the plaintiffs and E. of the value of the goods freight free. E. not having paid the freight: Held, First, that the defendant was liable under the bill of lading to pay the freight to the plaintiffs.—Secondly, that the 18 & 19 Vict. c. 111, did not vest the property in the goods in the plaintiffs, as indorsees of the bill of lading, so as to deprive them of their right to sue the defendant for the freight.

[S. C. 30 L. J. Ex. 259; 7 Jur. (N. S.) 663. Referred to, *Bateman v. Green*, 1867, Ir. R. 2 C. L. 166. Explained, *The Figlia Maggiore*, 1868, L. R. 2 Adm. & Ec. 111; *The Freedom*, 1871, L. R. 3 P. C. 599. Dicta adopted, *Sewell v. Burdick*, 1884, 10 A. C. 86.]

Action for money payable by the defendant to the plaintiff for freight.

Plea. That the freight claimed in the declaration is freight for the conveyance of goods in a ship called the "Eglantine," on the voyage mentioned in the bill of lading hereinafter mentioned, of which said ship, at the time of the shipment on board thereof of the said goods as hereinafter mentioned, one John Stewart was the master, and the plaintiffs were the charterers. And the defendant further saith that, before and at the time of the said shipment and of the signing and delivery to him of the said bill of lading as hereinafter mentioned, he carried on business, by and under the style of W. H. Nott and Company; and that he caused the said goods to be shipped on board the said ship, for the said voyage, for and on account of one J. Edwards, whose agent he then was in that behalf, and who, at the time of the said shipment, and from thence until the in-[631]-dorsement to the plaintiffs of the said bill of lading as

hereinafter mentioned, was the owner of the said goods; and that the said master, then being the agent in that behalf of the plaintiffs, received the said goods on board the said ship for and on behalf of the plaintiffs, to be carried by the plaintiffs on the said voyage, and on so receiving the same signed and delivered to the defendant a bill of lading for the said goods in the words and figures following, that is to say:—

“Shipped in good order and condition by W. H. Nott & Co., as agents, in and upon the good ship or vessel called the ‘Eglantine,’ whereof J. Stewart is master for this present voyage, now lying in the port of Liverpool, and bound for Colombo, Ceylon, four hundred and ninety-five bars, and three hundred and seventy-five bundles of iron, and nine hundred and fifty-four bundles of hoop iron, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of Colombo (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto order or to its assigns, he or they paying freight for the said goods here at the rate of forty shillings per ton of two hundred weight, with primage and average accustomed. In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading all of this tenor and date, one of which being accomplished the rest to stand void.

W.R.F. C//495 bars,	
375 bdls.,	
954 bdls. hoops,	
Weighing 83 tons	
@ 40s./	£166 0 0
Primage . . .	8 6 0
	£174 6 0

“Dated in Liverpool, this 4th day of May, 1860.

“Weight and contents unknown.”

(Signed)

“JOHN STEWART.”

Of all which said premises the plaintiffs, at the time of the indorsement to them of the said bill of lading as hereinafter mentioned, had notice. And the defendant further saith [632] that after he had received the said bill of lading as aforesaid he indorsed and delivered the same to the said J. Edwards: that before the shipment of the said goods as aforesaid, the plaintiffs then being the charterers of the said ship as aforesaid, did, at the request of the said J. Edwards, make to him an advance of 400l., on the undertaking by the said J. Edwards, that he the said J. Edwards, being about to ship certain goods in the said ship, would indorse and make over to the plaintiffs a bill of lading for the said goods wherein the freight should be made payable in this country, and that the said freight should be paid by the said J. Edwards, and the said bill of lading should then be held by the plaintiffs as security for the said advance: that the shipment of the said goods in the said bill of lading mentioned was made at Liverpool in pursuance of the said agreement and undertaking and that after the said shipment, and before the said freight became payable according to the terms of the said bill of lading, and after the defendant had indorsed the said bill of lading to the said J. Edwards as aforesaid, the said J. Edwards indorsed the said bill of lading to the plaintiffs in pursuance of the agreement and undertaking aforesaid and as security for the said advance and a still further advance then made by them upon the same security; by reason of which said indorsements the property in the said goods passed to and vested in the plaintiffs, who continued the owners of the said goods from thence until and at the time of the said freight becoming payable. And the defendant further saith that the said bill of lading was so signed and delivered to him as aforesaid after the passing of the statute made and passed in the nineteenth year of the reign of Queen Victoria, intituled “An Act to amend the Laws relating to Bills of Lading:” and that the said freight claimed by the plaintiffs is the freight mentioned in the said bill of lading, and that the same accrued [633] due under and by virtue of the said bill of lading and not otherwise.

Replication. That the said second advance in the plea mentioned was made upon the estimate between the plaintiffs and the said J. Edwards of the value of the said goods as freight paid, and that the arrangement as to the shipment of the said goods and the terms for the carriage of the same was made only between the defendant and the agents of the plaintiffs at Liverpool, the said agents of the plaintiffs having then only a general authority from the plaintiffs to act in regard to the agreeing about the shipment of goods for freight; and the plaintiffs were not aware of the employment of the defendant by the said J. Edwards as his agent in the said shipment before the receipt by the plaintiffs of the indorsed bill of lading.

Demurrer and joinder therein.

Kemplay, in support of the demurrer. The plea affords a good answer to the action, and the replication is no answer to the plea. Before the shipment of the goods the plaintiffs made an advance to Edwards of 400l., upon his undertaking that, being about to ship certain goods, he would indorse to the plaintiffs, as a security, a bill of lading wherein the freight should be payable in this country by Edwards. Edwards employed the defendant to ship the goods, and the master signed a bill of lading, by which it appeared that the defendant shipped the goods "as agent." A second advance was made by the plaintiffs to Edwards, and he indorsed the bill of lading to them as a security for both advances. Now, assuming that the defendant, not having disclosed his principal, would *prima facie* be liable to pay the freight, yet Edwards was also liable and would be bound to indemnify the defendant; and the plaintiffs, when the bill of lading was indorsed to them, had notice that [634] the defendant was agent only, and they made the advances to Edwards upon an undertaking that the freight should be paid by him. [Martin, B. If a person contracts with another to pay him a sum of money on a certain day, is it any answer to say that the latter made a bargain the day before with a third person to pay the money? A man who ships goods under a bill of lading is absolutely liable to pay the freight. The plaintiffs made the advances on the undertaking that the goods were to be delivered to them free of freight. Bramwell, B. Edwards undertook to indorse the bill of lading to the plaintiffs as a security for the advances: the bill of lading was given to the defendant, and before he indorsed it to Edwards he ought to have demanded the freight.] It is inequitable to call on the agent to pay when the plaintiffs have the undertaking of the principal, who is bound to indemnify the agent. [Wilde, B. The defendant having made an express contract to pay, why should not the plaintiffs have the benefit of that also?] Moreover, the bill of lading was indorsed to the plaintiffs before the freight became payable, and it is submitted that, by the 18 & 19 Vict. c. 111, the defendant is not liable. By the 1st section of that Act, "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." The defendant's liability, if any, arises from the bill of lading, which was indorsed by Edwards, the legal owner of the goods, to the plaintiffs, and by force of the statute the property in the goods then vested in the plaintiffs, and they became subject to the same rights and liabilities as if the contract had been origi-[635]-nally made by them. [Martin, B. That is not true in every sense: the property does not vest in the way it would by bargain and sale.] The effect of the statute is to render the transferee of a bill of lading liable for freight, just as if the contract had been made with himself. Therefore the plaintiffs, being liable for the freight, must be considered as having paid themselves. [Wilde, B. The meaning of the legislature is that, if a person thinks fit to take a transfer of a bill of lading, he shall be responsible for the freight, but in return he gets a right to sue the owner of the goods.] The legislature, in effect, says that, if a person chooses to become the owner of goods at sea under a contract of carriage, he shall stand in the same situation as the shipper. If the bill of lading had been indorsed to a third person the plaintiffs might have sued him, and they are now in this position. [Martin, B. The statute has no application to this case. It says that every indorsee of a bill of lading "shall be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." So that the case is the same as if the contract had been made with the person to whom the bill of lading is assigned; but how can a man make a contract with himself?] The indorsement of the bill of lading transferred to the plaintiffs the liability of the defendant to pay the freight. [Wilde, B. The 2nd section says, "Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement." The statute gives a right to sue the indorsee, but does not extinguish the right to sue the original shipper of the goods.]

[636] Broun, contra. The plea is bad, for the facts stated in it do not shew any

discharge of the defendant's contract. Upon the face of the bill of lading the defendant is liable to pay the freight, and the plaintiffs made the advances upon the additional security of Edwards and upon an estimate of the value of the goods as if the freight had been paid. (He was then stopped by the Court.)

POLLOCK, C. B. We are all of opinion that the plaintiffs are entitled to judgment. It is contended that the defendant is not liable, on two grounds. The case has been ingeniously argued, but all that the statute says is this—that if a person becomes indorsee of a bill of lading, by which the property in the goods passes to him, he shall take upon himself the contract of the shipper. The indorsee of the bill of lading may be sued under the statute, because by taking the goods he also takes the liability to pay the freight. The statute creates a new liability, but it does not exonerate the person who has entered into an express contract. The argument of Mr. Kemplay amounts to this—the plaintiffs took an indorsement of the bill of lading: if the indorsement had been made to a third person the plaintiffs might have sued him; consequently they are entitled to sue themselves and pay themselves, and therefore we ought to consider that they have been paid and that the defendant is no longer liable. I can conceive a state of things of which that might be the result; but it is not so here, especially as the replication shews that the second advance was made upon the faith of the freight being paid.

MARTIN, B. I also think that the plea is bad. The transaction disclosed by the plea will be better understood by taking the latter part of the plea first. Edwards, being about to ship certain goods on board a vessel of the plain-[637]-tiffs, applied to them for an advance of 400*l.*, which they agreed to make upon an undertaking that the bill of lading should be indorsed to them as a security and that Edwards should pay the freight. Edwards employed the defendant to ship the goods at Liverpool, and he shipped them under a bill of lading by which he personally contracted to pay the freight. That being so, the bill of lading is indorsed to the plaintiffs, and they make advances in pursuance of their agreement with Edwards. Edwards does not pay the freight, and the plaintiffs have not got what they bargained for, since they have not received the goods freight free as a security for the advances. Then what is there in law or equity to deprive the plaintiffs of the express contract of the defendant to pay the freight? If they had received the money from Edwards the case might have been different, but, as they have never received the money, the undertaking of Edwards has never been performed, and they are entitled to recover the freight from the defendant.

With respect to the statute 18 & 19 Vict. c. 111, I am of opinion that it does not apply. The statement in the plea, of the property in the goods having passed to the plaintiff, is merely a conclusion of law. After stating the facts, the plea goes on to say, "by reason of which said indorsements the property in the said goods passed to and vested in the plaintiffs, who continued the owners of the said goods from thence until and at the time of the said freight becoming payable." That is merely an inference drawn from the previous circumstances, not a statement that the property vested within the meaning of the 18 & 19 Vict. c. 111. That statute means an actual vesting of the property as by bargain and sale, because it begins by a recital that "by the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to [638] the indorsee"—not that in every case it does pass, and then the first section relates to transactions in which the property has passed. For these reasons I think the plea bad.

BRAMWELL, B. I am also of opinion that the plaintiffs are entitled to judgment, but not without some doubt, because I am by no means sure that upon these pleadings we are in possession of the actual facts. The plea states that goods were shipped by the defendant on board a ship of which the plaintiffs were owners, deliverable to the order of the defendant, he paying freight for the goods. Therefore, if the matter had stood there the defendant would have been clearly liable to pay the plaintiffs. Then the narrative proceeds thus—that in truth the defendant was only the agent of Edwards, and that before the shipment an arrangement was made between the plaintiffs and Edwards that they should make him an advance on the security of the bill of lading: that the plaintiffs made him two advances, and he indorsed the bill of lading to them, by reason whereof the property in the goods vested in the plaintiffs. I understand that the plaintiffs were not aware when they made the advances to Edwards that the freight was not paid, and, if so, I think they are entitled to recover.

The plaintiffs say to Edwards, if you will ship goods on board our ship and indorse to us the bill of lading whereby we can have the benefit of the goods without paying the freight, we will make you advances. If, when Edwards brought the bill of lading to the plaintiffs, he had said "you must pay the freight" no doubt the plaintiffs would either have made less advances or have deducted the amount of the freight, or have taken care that it was paid before they advanced any money. The plaintiffs, however, take the bill of lading upon a representation that they shall have the goods freight free. They might well say to Edwards [639] "we know the defendant is your agent, but we do not know what arrangement there is between you and him. He may have charged you the amount, or in a variety of ways he may have become liable, as between you and him, to pay the freight." The plaintiffs made the advances under the belief that the defendant was liable to pay the freight, and, instead of advancing what the goods would bear minus the freight, they advanced the whole. That being so, neither in law nor in equity can it be said that the defendant is not liable. My judgment proceeds on the ground that the plaintiffs, when they made the advances to Edwards, dealt with him upon the footing that the defendant was liable to pay the freight.

According to my judgment, the 18 & 19 Vict. c. 111 has no bearing on this case.

WILDE, B. I am also of opinion that the plaintiffs are entitled to judgment. The result of the facts disclosed by the record is this, that Edwards received advances from the plaintiffs upon the security of the goods shipped on board their ship, and it was understood that the goods were to be freight free, and that if the defendant did not discharge the freight Edwards was to become a debtor to the plaintiffs for the amount, so that the bill of lading would be a security for the whole value of the goods as if the freight was paid. Reading the plea alone, it must be taken that the plaintiffs knew that the defendant was the agent of Edwards, but that is denied by the replication; therefore the goods were shipped by the defendant without any knowledge on the part of the plaintiffs that he was the agent of Edwards. The next step in the transaction is, that the plaintiffs made an advance to Edwards upon the security of the bill of lading by which the defendant contracted to pay the freight, and upon an undertaking by Edwards that he would pay [640] the freight. Another advance was made upon an estimate of the goods as freight free, and then the plaintiffs are informed that the shipment was made by the defendant as agent for Edwards. Under these circumstances, what is there to deprive the plaintiffs of their right to sue the defendant for the freight? There is certainly nothing in the statute. The plaintiffs have got the bill of lading, not with the freight paid but with responsible persons to pay it. Notwithstanding the ingenious argument of Mr. Kemplay, I agree with my brother Martin that the Act applies only to an absolute transfer of the goods, and was never intended to deprive a person who made advances on the security of the bill of lading of the benefit of the original contract of the shipper to pay the freight. The second section expressly provides that nothing in the Act shall prejudice or affect any right to claim freight against the original shipper or owner. Suppose Edwards had himself shipped the goods and afterwards transferred the bill of lading to a third person, there would have been two liabilities, that of Edwards as shipper, and that of such third person as transferee. Here the original liability of the shipper has never been extinguished. It is said that the defendant incurred the liability for Edwards, and the rights and liabilities of Edwards have vested in the plaintiffs. But the defendant is liable as shipper, and that liability has never vested in the plaintiffs. Upon that ground, as well as upon the grounds stated by my learned brothers, I think that there is no reason, either legal or equitable, why the plaintiffs should not have the full benefit of their contract with the defendant.

Judgment for the plaintiffs.

[641] *SCOPE v. PADDISON*. April 30, 1861.—The 58th section of the Common Law Procedure Act, 1852, which enacts that "a plaintiff shall be deemed out of Court, unless he declare within one year after the writ of summons is returnable," does not apply to the action of ejectment.

[S. C. 31 L. J. Ex. 244 ; 4 L. T. 254.]

This was an action of ejectment to recover possession of certain premises in Lincolnshire. The writ issued on the 14th of September, 1859, and an appearance

was entered on the 21st of the same month. No proceedings had been taken since September, 1859, till the 27th of February, 1861, when the plaintiff gave the defendant notice of his intention to proceed, pursuant to the 176th Practice Rule of Hilary Term, 1853.(a) The plaintiff afterwards applied to Martin, B., at chambers, for an order to examine, *vivâ voce*, a witness who was a hundred years old, which application was opposed by the defendant on the ground that, as no proceedings had been taken for a year, the plaintiff was out of Court. The learned Judge having referred the parties to the Court,

Hayes, Serjt., in the present term (April 18), obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to examine the witness *vivâ voce*.

Field now shewed cause. Under the practice in ejectment prior to the Common Law Procedure Act, 1852, the declaration was served on the tenant in possession, and if he did not in due time make himself a party to the action by entering into the consent rule to confess lease, entry and ouster, the lessor of the plaintiff was entitled to move for judgment against the casual ejector. That motion, however, [642] could not be made after the expiration of two terms after the service of the declaration, for he was then out of Court. In other actions if the plaintiff did not declare within a year and a day he was out of Court. That was not in consequence of any rule on the subject, but depended on the practice of the Court. The legislature has now made that the law which was before the general practice. By the 58th section of the Common Law Procedure Act, 1852: "A plaintiff shall be deemed out of Court unless he declare within a year after the writ of summons is returnable." The language is general, and includes actions of ejectment. If it had been intended to exclude ejectment it would have been expressly mentioned, as in the 41st section, which provides that: "Causes of action of whatsoever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment." An ejectment is now commenced by writ: sect. 168; and after appearance entered the issue may at once be set up by the claimant: sect. 178; and if he omit to do so for a year he is out of Court. [Martin, B. If no appearance is entered within sixteen days the plaintiff may sign judgment; when does the power to sign judgment cease?] There must be some limit; it never could have been intended to allow the claimant an indefinite time to proceed.

Hayes, Serjt., in support of the rule. The 58th section of the Common Law Procedure Act, 1852, has reference to ordinary actions. It cannot apply to ejectment, because in that action there is no declaration, and it is not commenced by writ of summons. The 202nd section affords an answer to the suggestion that the proceedings may be pending an indefinite time. It says: "If after appearance entered the claimant, without going to trial, allow the time allowed for going to trial by the practice of the Court in [643] ordinary cases after issue joined, to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and if the claimant afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the Court or a Judge, the defendant may sign judgment &c., and recover the costs of defence." He was then stopped by the Court.

POLLOCK, C. B. We are all of opinion that the rule ought to be absolute.

MARTIN, B. If the matter had rested with me I own that I should have been disposed to think that the 58th section applied.

BRAMWELL, B. There is no doubt the rule ought to be absolute. The statute does not prescribe any time for making up the issue, but it provides against inconvenience in that respect by the 202nd section, which enables the defendant to sign judgment for not proceeding to trial after twenty days' notice. Joinder in issue need not be within the year in any other action; then why should it be in ejectment? Upon the ground that this is a new mode of proceeding, viz., a proceeding to trial

(a) Reg. Gen. Hil. T. 1853, r. 176. "In all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed shall give a calendar month's notice to the other party of his intention to proceed."

with no intermediate step between the appearance to the writ and issue, it seems to me that any old rule saying when the plaintiff shall declare cannot be applied to it.

WILDE, B., concurred.

Rule absolute.

[644] PEGLER v. THE MONMOUTHSHIRE RAILWAY AND CANAL COMPANY. April 25, 1861.—A railway Company were required, by their special Act, to carry as common carriers for hire, and to afford to all persons, conveying or sending goods upon their railway every reasonable convenience and facility for loading and unloading goods. The Act also authorized the Company, for carriage of goods, to demand a toll not exceeding three pence per ton per mile. Held, that the Company were not entitled to charge an additional sum for services performed, accommodation afforded, and expense and risk incurred in and about the receiving, loading, unloading and delivering the goods.

[S. C. 30 L. J. Ex. 249; 9 W. R. 597; 4 L. T. 331.]

This action was brought to recover the sum of 12s. 6d., as money had and received by the defendants for the use of the plaintiff. The defendants pleaded that they never were indebted.

The cause came on to be tried, before Hill, J., at the last Monmouthshire Summer Assizes, when a verdict was found for the plaintiff for the sum of 12s. 6d., subject to the opinion of the Court upon the following case:—

The defendants are the owners of a railway from the town of Newport to the town of Pontypool, in the county of Monmouth, under the provisions of the "Newport and Pontypool Railway Act, 1845," and are common carriers of passengers and goods upon the said railway. The plaintiff is a grocer, carrying on business in the town of Pontypool. On the 24th and 25th of November, 1859, 100 sacks of flour, weighing altogether twelve tons and a half, and addressed to the plaintiff at the railway station, Pontypool, were taken to the goods station of the defendants' railway at Newport, and were there delivered to, and received by, the defendants as common carriers, to be carried by them upon their railway to Pontypool, and there delivered to the plaintiff. The flour was brought to the station at Newport by the plaintiff's agents, and was received by the defendants' servants there, who assisted in unloading the same, and then wheeled it, in defendants' platform trucks, along their platform and loaded it into the defendants' trucks. These trucks were first shunted from the siding at Newport Station to the loading shed there; and, after being loaded with [645] the flour were again shunted to the proper siding for forming the goods train going to Pontypool. The flour was then carried by the defendants, as common carriers, from the station at Newport to the defendants' goods station at Pontypool. On arrival at the said station, the trucks containing the flour were shunted to the defendants' goods shed there, and the flour was there delivered to the plaintiff, and by his servants, assisted by the servants of the defendants, unloaded immediately from the defendants' trucks into the carts of the plaintiff, and conveyed in such carts to the plaintiff's place of business. The distance from the station at Newport to the station at Pontypool is nine miles and a half; and, after the delivery of the flour at Pontypool, the defendants demanded from the plaintiff, for and in respect of the carriage thereof, from Newport to Pontypool, the sum of 2l. 10s. This amount was made up of a toll charge at the rate of three pence per ton, per mile, and a sum of 12s. 6d. claimed as a terminal charge, in respect of services performed, conveniences provided, and expenses incurred, in and about the receiving and delivering of the flour at the defendants' stations.

The services, conveniences and expenses, in respect of which the defendants claim the right to demand this terminal charge, are—the receiving of the flour by their porters and servants, when brought to their station at Newport, and the weighing and invoicing of the same and loading it on their trucks, and for the use of their stations, yards, sheds, and platforms at Newport and Pontypool, and the gas light, and all other conveniences necessarily connected with such stations, sheds, and platforms, for the purpose of receiving, and loading and unloading goods, and which are erected and are maintained by them for the purpose of carrying on the business of carriers under the provisions of their said Act; and also for the making of proper

entries of the receiving and delivering of the flour, by the defend-^[646]ants' clerks and agents, in books kept for that purpose; and also for the risk incidental to the loading, carrying, and unloading.

By the 104th section of "The Newport and Pontypool Railway Act, 1845," which provides for the tolls to be demanded by the defendants for the use of the railway, as amended by section 34 of "The Monmouthshire Railway and Canal Act, 1853," the defendants were empowered to demand for the use of the railway, in respect of the tonnage of flour conveyed upon the same, where locomotive power and trucks were provided by the Company, a sum not exceeding three pence per ton per mile; and by section 105 of "The Newport and Pontypool Railway Act, 1845," it is enacted that the following provisions and regulations shall be applicable to the fixing of the tolls mentioned in the 104th section, and also to the tolls payable for locomotive power, that is to say, for articles or persons conveyed on the railway for a less distance than four miles, the Company may demand, in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading and unloading and further, "that for a fraction of a mile beyond four miles, or beyond any greater number of miles, the Company may demand tolls on merchandize for such fraction in proportion to the numbers of quarters of a mile contained therein; and, if there be a portion of a quarter of a mile, such fraction shall be deemed a quarter of a mile," and that "for a fraction of a ton the Company may demand toll according to the number of quarters of a ton in such fraction; and, if there be a fraction of a quarter of a ton, such fraction shall be deemed a quarter of a ton."

The plaintiff disputed the right of the defendants to demand, for the carriage and conveyance by them as common carriers of the said flour, and the receiving and delivering of them as aforesaid, more than the tolls chargeable under the aforesaid sections for the use of the railway in respect ^[647] of the tonnage of flour conveyed along the same, and the tolls payable for providing trucks and locomotive power for such conveyance, and refused to pay the sum of 12s. 6d. demanded as a terminal charge. The plaintiff afterwards paid the whole sum under a protest, and brought the present action to recover back the said sum of 12s. 6d.

The defendants' special Acts are to be considered as forming part of this case.

It is agreed that, if the defendants are entitled to charge any sum for a terminal charge in respect of the matter hereinbefore mentioned, the sum of 12s. 6d. is a reasonable charge.

The question for the opinion of the Court is, whether or not the defendants were entitled to demand from the plaintiff the payment of the said sum of 12s. 6d. over and above the tolls mentioned in the above sections of their special acts of parliament.

If the Court shall be of opinion the defendants were not entitled to make such charge, then the verdict is to stand, and final judgment is to be entered for the plaintiff.

If the Court should be of a contrary opinion, then the verdict is to be set aside, and a verdict and final judgment entered for the defendants.

J. Brown (Pigott, Serjt., with him), for the plaintiff. The defendants are not entitled to make this "terminal" charge of 12s. 6d., in addition to the tolls authorized to be taken by their special Acts. The "Newport and Pontypool Railway Act, 1845" (8 & 9 Vict. c. clxix.), by section 1 incorporates the Railway Clauses Consolidation Act, 1845. By section 128 (a) the Company are required to carry, ^[648] as common

(a) Section 128. "That the Company shall and they are hereby required to carry, as common carriers for hire, on their existing railways, within three years after the passing of this Act, and also on the railway when and as soon as the same shall be open for traffic, by means of locomotive steam-engines or other moving power, in their own carriages and in the carriages of other persons, all passengers, animals and goods which may be brought to their railways, and which they may be required to convey thereon; and the Company shall afford to all persons conveying or sending goods upon their railways every reasonable convenience and facility for loading and unloading goods upon and from the carriages, whether their own or those of the Company, at the several stations or other places for delivery or receiving such goods, without giving any preference or priority to one person over another in the time or manner of loading, unloading, receiving, conveying or delivering such goods." This section was repealed by "The Monmouthshire Railway and Canal Act, 1852," 15 & 16 Vict.

carriers for hire, on their railways, passengers, animals and goods, and to afford all persons sending goods upon their railways every reasonable convenience and facility for loading and unloading goods at the several stations. The 104th section prescribes the amount of the tolls which the Company are authorized to demand for the use of their railway. By the interpretation clause (sect. 146) "the word toll shall include any charge or payment for any passenger, animal, or goods upon any canal [649] or railway, whether for the use of the canal or railway, or for the moving power, or for the use of carriages." The toll allowed to be taken by section 104 of the Newport and Pontypool Railway Act, 1845, as amended by the 34th section of the Monmouthshire Railway and Canal Act, 1853 (16 & 17 Vict. c. cxv.), for the conveyance of flour on the railway, is two pence per ton per mile, and one halfpenny per ton per mile in respect of locomotive power. By the 134th section the Company may demand, in addition, one halfpenny per ton per mile for the use of locomotive power. By the 105th section, which contains provisions and regulations as to the fixing of tolls, "For articles or persons conveyed on the railway for a less distance than four miles, the Company may demand, in addition to the prescribed tolls for conveyance, a reasonable charge for the expence of stopping, loading and unloading." That provision shews that in other cases the Company are not to make any additional charge. Moreover, by the 92nd section of the "Railways Clauses Consolidation Act, 1845," it is expressly declared that "it shall not be lawful for the Company at any time to demand or take a greater amount of toll, or make any greater charge for the carriage of passengers or goods, than they are by this and the special Act authorized to demand." It is said that this charge is not for the carriage of the goods, but for terminal service incidental to the carriage; but it is not possible to carry heavy goods without loading and unloading them in trucks. In *Parker v. The Great Western Railway Company* (11 C. B. 545), it was held, that where the Company acted as carriers, they were not entitled to charge for loading and unloading, in addition to the rate for carriage. There (page 569) Jervis, C. J., said: "Where parties use their own trucks and ask the Company to load them, they are entitled to charge for so doing." [650] And Maule, J., said: "It may be that the customer may wish the Company to load and unload, or to weigh and warehouse the goods; for that the Company are empowered to make an extra charge; but the rate for carriage includes the taking the goods into the hands of the Company, and loading them on, and unloading them, from the trucks." In *Parker v. The Great Western Railway Company* (6 E. & B. 77), the Company were allowed to charge a higher rate for particular parcels, because their special Act authorized them to do so. The greater portion of the service now charged for is for the benefit of the Company; the rest is incidental to the carriage of the goods. There is no contract which entitles the Company to make their charge, and the Act has given them no statutory right.

Phipson (Gray with him), for the defendants. The defendants are entitled to make this charge of 12s. 6d. when they act as common carriers. The tolls mentioned in the 8 & 9 Vict. c. clxix. are for the use of the railway by persons as freighters. All persons may carry goods on the railway in their own carriages, in which case, by section 104, the tonnage is two pence per mile, but, if conveyed in carriages belonging to the

c. cxvii., s. 1, and, by section 5, it was enacted:—"That the Company shall and they are hereby required to continue to carry, as common carriers for hire, on such of their existing roads as are or have already been adapted for locomotive engines and carriages, &c., by means of locomotive steam-engines or other moving power, in their own carriages, all passengers and those goods, wares, merchandise, matters and things, for which, by 'The Newport and Pontypool Railway Act, 1845,' the Company are entitled to demand tolls not exceeding one halfpenny per ton per mile in respect of carriages if provided by them; and also to convey in the carriages of other persons all passengers, animals and goods which may be brought to their said tramroads or railways, and which they may be lawfully required to convey thereon; and the Company shall afford to all persons conveying or sending goods upon their railways every reasonable convenience and facility for loading and unloading goods upon and from the carriages, whether their own or those of the Company, at the several stations or other places for delivering or receiving such goods, without giving any preference or priority to one person over another in the time or manner of loading, unloading, receiving, conveying, or delivering such goods."

Company, they are entitled to charge in addition one halfpenny per ton per mile. The 93rd, 94th and 95th sections of the 8 & 9 Vict. c. 20 apply to this toll, which is a tonnage rate payable for the use of the railway. The 104th section of the 8 & 9 Vict. c. clxix. expressly says "that the Company may demand the following tolls for the use of the railway." The intention was, that any person might use the railway as a highway on payment of the tolls. The 110th section recites "that the Company, at the request of the freighters on their existing railways, have agreed to improve such railways [651] so as to adapt them for the passage of locomotive steam engines, and also to become carriers on such railways," &c. It then enacts that the Company shall, within three years, adapt their railways for the convenient passage of locomotive steam engines for the carriage of goods, and provide carriages and locomotive steam engines, and erect stations, &c. [Wilde, B. By the 86th section of the 8 & 9 Vict. c. 20 the Company may carry and convey on their railway passengers and goods, "and make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special Acts authorized to be taken by them."] The meaning is that the Company shall not make charges exceeding the tolls prescribed by the special Act, in respect of carrying as common carriers. [Wilde, B. The 90th section of the 8 & 9 Vict. c. 20 enables the Company to vary the tolls by the special Act authorized to be taken.] That has reference to tolls properly so called, and to which the 93rd, 94th and 95th sections apply. The 90th section is not required with reference to carriers charges, because provision is made for them by the 86th section. [Bramwell, B., referred to the 106th section (a) of the 8 & 9 Vict. c. clxix.] That clause relates to the Company as carriers. Having complied with the requisitions of the Act, by providing locomotive power and erecting stations, &c., the Company are entitled to charge for these services which are incidental to their business as common carriers. It could never have been intended that they should be compelled to carry, and yet be restricted to the tolls for the use of the railway. By the 128th section the Company are required to carry as [652] common carriers within three years after the passing of their Act. Now, if the railway was completed in one year, they would be entitled to the tolls prescribed by the Act; then are they to have no remuneration for the increased expense and risk when, at the end of three years, they become common carriers? There is nothing in the Acts to prohibit them from charging, in addition to the toll, a reasonable sum for the services rendered and accommodation afforded by them as common carriers.

J. Brown, in reply. If the construction contended for by the defendants be correct, all railway Companies whose Acts are framed in this way are without any limitation of charge when they act as common carriers. He was then stopped by the Court.

POLLOCK, C. B. We are all of opinion that this charge ought not to have been made. The question is, whether the Company are entitled to charge in respect of the services mentioned in the case, and for which they claim what are called "terminal charges." I am of opinion that they cannot. It appears by the case that, on the 24th and 25th of November, 1859, 100 sacks of flour, weighing altogether twelve tons and a half, and addressed to the plaintiff at the railway station, Pontypool, were taken to the goods station of the defendants' railway at Newport, and were there delivered to, and received by, the defendants as common carriers, to be carried by them upon their railway to Pontypool, and there delivered to the plaintiff. The flour was brought to the station at Newport by the plaintiff's agents, and was received by the defendants' servants there, who assisted in unloading the same, and then wheeled it, on the defendants' platform trucks, along their platform, and loaded it into the defendants' trucks. For these services the [653] Company have no right to charge anything more than the tolls authorized by their Acts. They might as well charge for the expense of making the railway, or any other cost. Therefore I think the plaintiff is entitled to our judgment.

MARTIN, B. I am of the same opinion. Except the charge for "making proper entries of the receiving and delivering the flour by the defendants' clerks and agents, in books kept for that purpose" (which is obviously for the benefit of themselves),

(a) Section 106. "And with respect to small packages and single articles of great weight, be it enacted, that notwithstanding the rate of tolls hereby prescribed the Company may lawfully demand the tolls following" (that is to say), &c.

all that they seek to charge for was done by them as common carriers, and for the purpose of affording a reasonable facility of loading and unloading the goods. But the 128th section requires them to carry as common carriers for hire, by locomotive engines, passengers and goods, and to afford all persons sending goods upon their railways every reasonable convenience and facility for loading and unloading them; so that a positive duty is imposed upon them in this respect. Then, by the interpretation clause, the word "toll" shall include any charge or payment for any passenger or goods conveyed upon the railway, whether for the use of the railway, or for moving power, or for the use of carriages. What could the legislature do more than provide that the word "toll" shall have this general meaning—that it shall include the charges for everything a carrier does? Here is a Company who are bound to carry on their railway, and are required to charge one sum for the use of the railway, locomotive power and carriages. It is said, that for the reasonable facilities they afford they may charge what they like, for that is what the contention comes to. But, it seems to me that the meaning of the Act of Parliament is, that the Company may make a bargain with the public for the convenience and accommodation they afford; but, if there is [654] no bargain, they are bound to carry at the rate per ton per mile fixed by their Act.

BRAMWELL, B. I am of the same opinion. Mr. Phipson's argument is, that the tolls prescribed by the Act do not apply when the Company act as common carriers, and that they may provide a railway, locomotive power and carriages, and yet not be common carriers. That is an ingenious argument, and perhaps it might be so if the Company thought fit to make such an arrangement. They might say, "Here is the railway, locomotive engines and trucks; you must drive them yourself, we will undertake no responsibility." However, they did not do so, but took the plaintiff's goods without any such stipulation. Now, it is manifest to my mind that the 128th section requires, not only that the Company shall be common carriers for hire, but upon payment of the tolls mentioned in the Act, otherwise it would be nugatory. To say that the Company shall be carriers, at whatever rate they choose to charge, is saying nothing, because, if they did not like to carry, they might charge any amount they pleased, and so prevent the public from employing them. The meaning of the 128th section is, that they shall be carriers on the terms prescribed, and entitled to charge at the rate mentioned, and no more. Therefore, it seems to me that the Company, having made no previous bargain with plaintiff for a further sum, are not entitled to it. Possibly the Company may ultimately succeed in making the public pay more, because they may say, "We will carry your goods, but will do nothing to help you: you must bring your goods to the trucks, and then we will carry them, and, when they are unloaded, we will afford you no facility for taking them away." In such case, it may be that the owner of the goods would say, "I will pay something for the accommodation." But that must be [655] by way of bargain: in the absence of any bargain, the statutory tolls apply when the Company act as common carriers.

WILDE, B. I am also of opinion that the Company are restricted to the "tolls" specified in their special Act. The argument of Mr. Phipson is, that the tolls do not apply where the Company act as common carriers; and, indeed, he was obliged to take that line of argument, because the general Act, 8 & 9 Vict. c. 20, s. 86, expressly provides that it shall be lawful for the Company to carry and convey goods offered to them for that purpose, "and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special Act authorized to be taken by them." Looking at the special Act, it is obvious that the tolls therein specified do apply, whether the Company carry for other people as freighters, or by themselves as carriers. First, there is no limitation to the word "tolls"; and, secondly, in the 106th section the word "tolls" is used with reference to the carriage of small packages, and beyond all doubt to the carrying of them by the Company. I was struck with the remark of my brother Bramwell, that, if the tolls did not apply to the Company as common carriers, it would be idle to enact that they shall be common carriers, because, if they did not like to carry, they might charge what they pleased, and so prevent the public from employing them. Therefore, I think that the tolls mentioned in the special Act do apply to goods carried by the Company as common carriers; and consequently, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

[656] LEMERE v. ELLIOTT. May 7, 1861.—In order to support an account stated there must be an admission of a debt due. Therefore where the defendant verbally agreed to purchase of the plaintiff the lease and goodwill of his premises, and, on being asked for a deposit, gave an I. O. U. for 25l., but afterwards refused to complete the purchase: Held, that the I. O. U. was not evidence of an account stated.

[S. C. 30 L. J. Ex. 350; 7 Jur. (N. S.) 1206; 4 L. T. 304.]

Action for money payable by the defendant to the plaintiff on an account stated.
Plea—Never indebted.

The cause was tried before Channell, B., without a jury, at the Middlesex Sittings in the present term, when the following facts appeared. In May 1860 the plaintiff, who carried on business as an oil and colourman in High Street, Shoreditch, verbally agreed with the defendant, who had been a publican, to sell him the lease and goodwill of his premises. It was arranged that the defendant should give the plaintiff 185l. for the lease, goodwill and fixtures, and a sum not to exceed 250l. on valuation of stock in trade. The valuation was to be made, and a written agreement entered into, on completion of the bargain on the 21st June following. In the meantime the plaintiff was to introduce the defendant to his out-door customers by driving him about with him, and to allow the defendant to serve in his shop behind the counter; also to introduce him to his wholesale customers and instruct him in the business. There were certain rooms on the first and second floor of the premises which the plaintiff had let to weekly tenants, and notice to quit was to be given, but nothing was said by whom. The plaintiff drove out the defendant several times, and introduced him to the out-door and wholesale customers; and the defendant served behind the counter and was instructed in the business. When the terms were agreed to, the plaintiff required a deposit of 25l. The defendant said he had not so much with him, but would give an I. O. U. for the amount, and he gave [657] the I. O. U. upon which this action was brought. The tenants quitted before the 21st of June, in consequence of a notice given by the defendant. On the 27th July the defendant refused to complete the contract, and in October the plaintiff sold the business to another person.

The learned Judge nonsuited the plaintiff, on the ground that, if a question of law, he decided there was no account stated; if not a question of law, but a question for him on the evidence, sitting as a jury, then he said no account stated was proved. But if, supposing a jury present, he ought to have directed them that they ought to find an account stated, then the plaintiff was to have leave to move to enter a verdict for 25l.

Phipson now moved to enter the verdict for the plaintiff. There was evidence of an account stated. [Channell, B. An "account stated" means an account stated of a debt due from the defendant to the plaintiff. Here the I. O. U. was merely given as a security for a deposit. Martin, B. There was no account stated, because there was no debt due from the defendant to the plaintiff.] An I. O. U. is an acknowledgment on the face of it of an existing debt; and though at the time it is given no debt has accrued, if there is a subsequent consideration, it is to that extent a good account stated. Here the consideration was the introducing the defendant to the plaintiff's customers, and instructing him in the business. If a person gave an I. O. U. for goods which were afterwards supplied to him, the I. O. U. would be evidence of an account stated; and if the amount exceeded the consideration, the holder would be a trustee for the excess. [Martin, B. The old form of a count on an account stated was this:—"And whereas the said C. D. afterwards, to wit, on &c., accounted with the said A. B. of and concerning divers sums of money from the said C. D. to the said A. B. before that time due and [658] owing, and then in arrear and unpaid. And upon that account the said C. D. was then and there found to be in arrear and indebted to the said A. B. in the sum of £ " &c. Wilde, B. In *Porter v. Cooper* (1 C. M. & R. 387, 394) Parke, B., said, "I agree with what has fallen from my brother Alderson in the course of the discussion, that in the later cases the Courts have deviated far from what was the original meaning of an account stated. I take the rule to be this: that if there is an admission of a sum of money being due, for which an action will lie, that will be evidence to go to the jury on the count for

an account stated."] A mere admission of a debt is sufficient to support an account stated. In *Cocking v. Ward* (1 C. B. 858) it was held that, though no action for the consideration will lie on a verbal agreement for the transfer of land, notwithstanding the transfer has been effected and nothing remains to be done but to pay the consideration, yet, when after the transfer the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered in a count on an account stated. If the rule stated by Parke, B., in *Porter v. Cooper* (1 C. M. & R. 387, 394) be correct, no action would lie in *Cocking v. Ward*. There Tindal, C. J., in delivering the judgment of the Court, said: "In *Knowles v. Michel* (13 East, 249), the ground of the original debt was a sale to the defendant of standing trees, which the defendant afterwards procured to be felled and taken away; and the objection was that the plaintiff could not recover on the original contract for standing trees which formed part of the realty: but it was held, nevertheless, that the acknowledgment of the price to be paid for the trees, after they were felled and applied to the use of the defendant, was sufficient to sustain the count on the account stated; Lord Ellenborough saying, that if there were an acknowledgment by the defendant of a debt due [659] to the plaintiff upon any account, it was sufficient to enable him to recover on an account stated."

POLLOCK, C. B. We are of opinion that there ought to be no rule. The holder of an I. O. U. cannot be considered in the same position as the payee of a promissory note. Though a promissory note cannot be sued upon if made without consideration, yet, if consideration be afterwards given, it may be made available to that amount. An I. O. U. professes to be the result of an account stated in respect of a debt due; and it is important not to make fiction supply the place of truth, and say that an account has been stated in respect of a debt, when in reality there was none.

MARTIN, B. I am also of opinion that there ought to be no rule. An account stated is that mentioned in the old form of declaration to which I have referred. No doubt, what is said by Parke, B., in *Porter v. Cooper* (1 C. M. & R. 387, 394) is the essence of it, viz., that there must be an admission of a debt due. In *Whitehead v. Howard* (5 Moore, 105) it was also said that there must be a real existing debt due. Here there was no debt whatever. Supposing there was a part performance of the agreement, that is nothing more than an executory contract, to be performed by the sale of the house and business; and so long as it remains unexecuted there is no consideration for an account stated.

WILDE, B. I am of the same opinion. There was no sum admitted to be due for which an action would lie; and upon the substance of the transaction there was no debt to support an account stated.

CHANNELL, B. I am of the same opinion as I was at the trial.
Rule refused.

[660] DARRELL v. EVANS AND OTHERS. April 26, 1861.—The defendant having negotiated with the plaintiff, a hop-grower, for the purchase, by sample, of some hops, went with him to his factor, when the defendant agreed to buy the hops, and in the presence of both parties, the factor wrote out bought and sold notes, the former of which contained the name of the defendant, and was delivered by the factor to him. The date of the notes was altered by the factor, at the request of the defendant, in order to give him further time for payment. The hops were afterwards weighed in the presence of the plaintiff and defendant, when a dispute arose as to their weight and condition, and the defendant refused to accept them. Held, that the factor was not the agent of the defendant to bind him by signing his name to the contract, and therefore there was no sufficient memorandum or note in writing within the 17th section of the Statute of Frauds.

[S. C. nomine *Durrell v. Evans*, 30 L. J. Ex. 254; 7 Jur. (N. S.) 585; 9 W. R. 638; 4 L. T. 254: reversed 1862, 1 H. & C. 174.]

Action for not accepting hops sold by the plaintiff to the defendant.
Plea. Non assumpsit.

At the trial before Pollock, C. B., at the London Sittings after last Michaelmas Term, the following facts appeared:—The plaintiff, who was a hop-grower, in Surrey, having some hops to sell, sent a sample of them to Messrs. Noakes, his hop-factors, in

the borough of Southwark. One of the defendants went there and inspected the sample, and inquired the price. On the 19th of October, 1860, the same defendant met the plaintiff in London, and after some conversation about the purchase of the hops went with him to Messrs. Noakes. There the plaintiff agreed to sell the defendants thirty-three pockets of hops, according to sample, at 16l. 16s. per cwt., and one of the Messrs. Noakes wrote in their book bought and sold notes as follows:—

Bags.	Pokts.	Sold to Messrs. Evans.	Bags.	Pokts.	Messrs. Evans,
	33	T. Darrell — Ryarsh and Addington £16 16		33	Bought of T. F. and W. Noakes.
		20th Octr. ~~19~~ /1860			T. Darrell.
					Ryarsh } £16 16
					and Addington }
					20
					Octr. ~~19~~ /1860

[661] Messrs. Noakes tore off the bought note and gave it, in the presence of the plaintiff, to the defendant; the sold note was given to the plaintiff. The date of the notes was altered by Messrs. Noakes, at the request of the defendant, from Friday the 19th to Saturday the 20th of October, it being the custom in the hop trade to pay on the Saturday next after the purchase, so that by the alteration the defendant obtained a week's time for payment. The samples and an invoice were afterwards sent to the defendants. On the 23rd of October the hops were sent to the factor, according to usage, to be weighed. The plaintiff, and also one of the defendants was present during some portions of the weighing. One of Messrs. Noakes's warehousemen weighed for the plaintiff, and one of the defendant's men weighed for them. A dispute arose about the weight of the hops, and the defendant said they were wet or damp, and refused to accept them. The market value of the hops afterwards fell, so that on the 3rd of November, the day for payment, the hops were not worth more than 8l. a cwt.

It was submitted, on behalf of the defendants, that there was no note or memorandum in writing signed by the defendants or their agent lawfully authorized, as required by the 17th section of the Statute of Frauds, 29 Car. 2, c. 3. A verdict was entered for the plaintiff for 420l., leave being reserved to the defendants to move to enter a nonsuit.

Lush, in the following term, obtained a rule nisi accordingly; against which

T. Jones and Waddy shewed cause. The signature of the defendant's name on the bought note by Messrs. Noakes is sufficient to satisfy the requisites of the 17th section of the Statute of Frauds. [Pollock, C. B. A broker is the agent of both buyer and seller; a factor is the agent of the seller [662] only.] The defendants treated Messrs. Noakes as their agent for the purpose of making a valid contract. The date of the note was altered by Messrs. Noakes at the request of the defendants. The samples and invoice were sent to the defendants, and, up to the time of weighing, both parties acted on the faith of this being a valid contract. In *Schneider v. Norris* (2 M. & Sel. 286) a bill of parcels in which the vendor's name was printed, and that of the vendee written by the vendor, was held a sufficient memorandum within the statute. So, where the vendee wrote in his own book a note of the contract, which contained his name and was signed by the vendor's agent, that was held sufficient: *Johnson v. Dodgson* (2 M. & W. 653). The rule, that one contracting party cannot be an agent for the purpose of binding the other by his signature, is confined to cases where the party acting as agent for the other is not only a principal but a party upon the record: *Farebrother v. Simmons* (5 B. & Ald. 333). But no case has decided that, where the party who signs the note is not a principal but the agent of one of the contracting parties, his signature will not bind the other party. *Farebrother v. Simmons* (5 B. & Ald. 333), which was decided on the authority of *Wright v. Dannah* (2 Camp.

203) is commented on in *Bird v. Boulter* (4 B. & Adol. 443), where it was held that the auctioneer's clerk, who wrote the name of the buyer in the sale book with his assent, was his agent for the purpose of charging him with the contract. There Littledale, J., said: "It is indeed irregular that the real buyer or seller should make the other party his agent to sign a memorandum under the statute; but when that is done through a third person the objection is removed." [Wilde, B. You must establish that the factor, at the time he wrote the defendants' name, affected to write it for the [663] defendants.] The circumstance of the party who signed being a factor will not prevent a jury from coming to the conclusion that he signed as agent for the defendants. The conduct of the defendant shews that he considered Messrs. Noakes his agent for the purpose of drawing up the contract. [Martin, B. It has been decided, whether rightly or wrongly, that the person signing need not be an agent to make the contract, but only to sign it.] There is no foundation for the distinction between a broker and a factor when signing a contract. Neither a broker nor an auctioneer is necessarily agent for both contracting parties; that depends on the facts of each particular case: *Bartlett v. Purnell* (4 A. & E. 792). Pollock, C. B., referred to *Graham v. Musson* (7 Scott, 769).] That case is distinguishable, because there the name of the buyer did not appear on the note, but the seller's agent signed his own name, and there was no evidence that he was authorized to sign it as agent for the buyer. Coltman, J., there observed that "if the seller's agent had signed the buyer's name, without any expression of dissent by him, the case would have been brought very near *Bird v. Boulter*" (4 B. & Adol. 443). [Wilde, B. Suppose a person goes into a shop and purchases goods above the value of 10l., and says to the shopman, "make out an invoice of the goods," and he does so, and hands it to the purchaser, how does that amount to an authority to sign his name as agent? This case is no more than that.] In *Mews v. Carr* (1 H. & N. 484) the memorandum was signed by the auctioneer for his own guidance, and was never intended to be handed over to the other party as a note of the contract. Even assuming that Messrs. Noakes had not sufficient authority, at the time, to bind the defendants by signing their names to the contract, the subsequent ratification of their [664] act rendered them agents lawfully authorized within the meaning of the statute: *Maclean v. Dunn* (4 Bing. 722). [Wilde, B. The person whose act is ratified must have acted for the principal, without authority: here you must establish that what was done by Messrs. Noakes was done on behalf of the defendants.] An authority may be presumed from subsequent acts of assent or acquiescence, and a small matter will be evidence of such assent: Paley on Principal and Agent, p. 171, 3d ed.

Hawkins and Harrison appeared in support of the rule, but were not called upon to argue.

BRAMWELL, B. We are all of opinion that the rule must be absolute. There is no doubt about the law with respect to the true construction of the 17th section of the Statute of Frauds, which enacts "that no contract for the sale of any goods, wares, or merchandize, for the price of 10l. sterling or upwards, shall be allowed to be good, except the buyer shall," first, "accept part of the goods so sold, and actually receive the same; or," secondly, "shall give something as earnest to bind the bargain or in part payment; or," thirdly, "unless some memorandum or note in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized." The difficulty arises from the application of the statute to the facts of each transaction. The enactment has been much praised, but everything appears to be done to avoid making a binding contract within it. Many authorities have been cited; but no one has gone to the extent of deciding that a document like this is a memorandum signed by an agent lawfully authorized.

The facts are these:—The plaintiff had, in the country, [665] some hops for sale, and he sent a sample of them to his factor in London. One of the defendants went there, and inspected that sample, and inquired the price. That defendant afterwards met the plaintiff, and, having conversed about the hops and the price, went with him to the factor's, where the sample was, and agreed to purchase 33 pockets of the hops at 16l. 16s. per cwt. By the custom of the hop-market the factor acts for the seller, and what he does is on behalf of the seller alone. In this case the factor made out a note of the bargain, dated the 19th of October, the day of the transaction, but the defendant requested him to alter it to the 20th. No doubt, the factor might have asked the defendant, who was present, to sign the note, which would have ratified

the contract, but he did not; and the defendant signed nothing. This bad system, by which the seller is bound and the buyer is not, appears to prevail in the hop-market, and, I understand, the like custom prevails in the corn-market. The defendant might have said to the factor, "Sign this note on our behalf;" and, if he had done so, his firm would have been bound: or, though the defendant did not give express instructions, he might, by his acts or conduct, have shewn an intention to be bound. Here, however, the defendants never authorized the factor to sign for them; nor is there anything to shew an intention on their part to be bound by his signature. I agree with the observation of my brother Wilde, in the course of the argument, that this is like the case of a person going into a shop, and, having bought a quantity of goods, saying, "Make me out an invoice of the goods; do not make the price payable immediately, but in a week;" or where, the invoice being made out, he directs some alteration. The defendants had no notion of conferring an authority on the factor to act for them, nor had the factor the slightest idea that he was authorized to act on [666] the defendants' behalf. For these reasons, I am of opinion that the Lord Chief Baron was right at the trial, and the rule must be absolute.

MARTIN, B. I did not hear the whole of the argument, and therefore decline saying anything.

WILDE, B. I am also of opinion that the ruling of the Lord Chief Baron was correct. In order to constitute a binding contract, within the 17th section of the Statute of Frauds, there must be a memorandum signed at the time, either by the buyer himself or an agent authorized on his behalf. The question then is whether this document which is not signed by the defendants, is a memorandum signed by an agent on their behalf. It is competent for the seller's agent to act for the purchaser; and, in that case, a note signed by him would bind the purchaser. Whether or no this note was handed to the defendant who was present and looked at it, does not seem to me material, because we may assume that he was satisfied with it as altered. The question is, whether he was satisfied with it as a note signed on behalf of the defendants. There is no evidence that he was. The case is the same as if the defendants had asked for an invoice of the goods, and it had been given to them.

POLLOCK, C. B. I entirely concur. At the trial, I thought it the best course to reserve the point, and, when the matter comes to be examined, it amounts to this: that the defendants interfered with the note as drawn up, and it was altered accordingly. We cannot, from that, infer that they gave the factor an authority to sign the contract on their behalf; and a person cannot adopt and ratify an act which was not originally done on his behalf. This note [667] was not signed on behalf of the defendants, for a factor is the agent of the seller, not the buyer. I must say that the present case is not one of the most favourable instances of the benefit of the 17th section of the Statute of Frauds; but, while it remains in force, its requisites must be complied with, and Judges ought not to seek for equivalents. The statute requires that the party to be charged, or his agent duly authorized, shall sign the note. I admit that he need not be an agent to make the contract, but he must be an agent to sign it.

Rule discharged.

WALLER AND ANOTHER v. THE MAYOR, ALDERMEN AND BURGESSES OF THE CITY OF MANCHESTER. April 30, 1861.—By the "Manchester Corporation Waterworks Act, 1847," subject to the restrictions and provisions in that Act contained, the corporation were empowered to construct a reservoir and intercept the waters of the river Etherow for the purposes of the Act. By section 45, they were not to divert the water of the Etherow until a reservoir should be completed and filled with water. By section 46, they were required to discharge out of the said reservoir sixty cubic feet per second for twelve hours of every working day. By the "Manchester Corporation Waterworks Amendment Act, 1848," sect. 12, in lieu of sixty cubic feet, seventy-five cubic feet per second were to be discharged. By section 15, in case of any failure, neglect or default by or in consequence of which the quantity of water required by that Act to flow or be discharged over the gauge should not so flow, the corporation were to forfeit 50l., by way of penalty, to the occupiers of certain mills. And by section 17, it was enacted that it should not be lawful for the corporation to use or appropriate any water flowing

to the river Etherow until they should have secured and commenced to discharge the stipulated quantity of seventy-five feet per second.—The corporation made a reservoir which from engineering difficulties was never completed, as required by the Act of 1847, or with the additions imposed by the Act of 1848, so as to be filled with water or capable of being filled with water; and water had not been discharged therefrom in the quantity and manner required by the Acts, or in any larger quantity; but in 1857 they diverted the water of the Etherow for the supply of the inhabitants within the limits of the Acts, and since that time have discharged certain quantities of water from the reservoir during twelve hours of every day.—In 1860 the plaintiff, a millowner on the Etherow, brought an action against the corporation. The declaration contained counts for wrongfully diverting the waters of the Etherow, and also counts for not discharging a quantity of water equal to seventy-five cubic feet per second for twelve hours of every working day. The defendants paid money into Court as to the former counts, and to the latter pleaded that they had not completed the reservoir and works mentioned in the Act, so as to make it their duty to discharge water at the rate specified. Held, that the plea was good; that the defendants were not estopped from setting up the non-completion of the reservoir, and that the plaintiffs were only entitled to damages for the loss of the natural flow of the waters of the Etherow, and not for the non-discharge from the reservoir of the seventy-five cubic feet per second.

[S. C. 30 L. J. Ex. 293; 7 Jur. (N. S.) 635.]

The first count of the declaration stated, that before and at the time of the committing of the grievances, &c., the [668] plaintiffs were lawfully possessed of certain mills, &c., and by reason of the possession thereof, the plaintiffs before and at the time of the committing of the said grievances, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit of the water of a stream which had been used to run and flow, and at and during the said times ought to have run and flowed, and still of right ought to run and flow, to the said premises of the plaintiffs for supplying the same with water: Yet the defendants wrongfully and injuriously made and placed certain dams, weirs, &c., across and by the sides of and in the banks of the stream and higher up the same than the plaintiffs' premises, and wrongfully, &c., kept and continued the same, and thereby wrongfully, &c., stopped, diverted, and drew off, and penned and dammed back, the water of the stream, and prevented the same from flowing down to the said mills, &c.

Second count. That, before and at the times of the passing and coming into operation of the "Manchester Corporation Waterworks Act, 1847," and the "Manchester Corporation Waterworks Amendment Act, 1848," and the days and times of committing the grievances hereinbefore mentioned, the plaintiffs were lawfully possessed of certain mills, &c., and by reason of the premises of right ought to have had and enjoyed, and still of right ought so to do, the benefit of the waters of, and the waters flowing and passing into the river Etherow, and mentioned in the 45th section of the said Act of 1847, which had been used to run and flow, and still of right ought to run and flow to the said premises of the plaintiffs for supplying the same with water: Yet the defendants, after the passing and coming into operation of the "Manchester Corporation Waterworks Act, 1847," and of the "Manchester Corporation Waterworks Amendment Act, 1848," did, on very many days and times before this suit, wrongfully, unlawfully and injuriously, and contrary to the provisions of the said 45th section and other the provisions [669] of the said Acts, use, divert, interfere with, detain and appropriate for the supply of the inhabitants within the limits of the said Acts, certain water which, at the time of the passing of the said Acts, did flow and pass, and which but for the passing of the said Acts would have flowed and passed into the said river Etherow, and being certain of its waters mentioned in the said 45th section; although, on the said days or times or any of them, the reservoir by the said Acts required to be completed before using, diverting, interfering with, detaining or appropriating the said waters for the purpose aforesaid, had not been so completed, nor had the same been filled with water, and water had not been and was not discharged therefrom in the quantity and manner in that behalf provided by the said Acts, nor in any other quantity and manner by the said statutes or otherwise made lawful or sufficient, contrary to the provisions of the said statutes, and

thereby on the said days and times of committing the said grievances, the water of the said river and waters which at the time of passing the said Acts did flow and pass, and which but for the wrongful acts aforesaid would have flowed and passed into the said river and down to the plaintiffs' said premises, were prevented from so flowing, &c.

Third count. That, before and at the times of committing the grievances in this count mentioned, the plaintiffs were lawfully possessed of mills, &c., situate on and immediately adjoining the river Etherow, and being some of the mills and works on the river Etherow in the preamble of the 12th section of the "Manchester Corporation Waterworks Amendment Act, 1848," referred to; that after the passing and coming into operation of the said Acts of 1847 and 1848, the defendants at all times became and were empowered to carry the said Acts and the provisions thereof into execution, and the defendants under colour of the said Acts used, [670] diverted, interfered with, detained and appropriated certain of the waters of the said river Etherow, and, under colour of performance of and obedience to the provisions of the 45th and 46th sections of the said Act of 1847, and the provisions of the said Acts of 1847 and 1848, in that behalf applicable, made a certain reservoir for the supply of the mills and works on the said river Etherow; and all things happened and took place necessary to make it to be, and it became and was, at and during the times of committing the grievances, &c., the duty of the defendants to cause a quantity of water equal to seventy-five cubic feet per second, for twelve hours of every working day, to be discharged through or over a gauge, at or near a weir across the said river Etherow, as by the 12th section of the said Act of 1848 is provided. Breach: that, although the occupiers of the seven mills and works in the same section mentioned, or a majority of them, did, according to the provisions of the said Acts determine the rate, manner, times and proportions at which such discharge should be made and before and at the times of the committing of the said grievances, the said determination was in force, and the defendant had notice thereof, yet the defendants, for and during very many days, and on very many times before this suit, violated the said provisions of the said Acts, and their duty in that behalf, and neglected to cause and did not cause the said prescribed quantity of water to be discharged, nor was the same discharged as required by the 12th section of the said Act of 1848, according to the said determination, and the said quantity of water was by the defaults and acts of the defendants prevented from being so discharged, contrary to the provisions of the said statutes and the duty of the defendants; the said grievances not in whole or in part consisting in or being occasioned by the drawing or letting off the water of the reservoirs or reservoir for the purpose of [671] repairing or keeping the same in repair, or other lawful purpose, &c.

Fourth count. That at the time &c. the plaintiffs were possessed of mills, &c., situate on the river Etherow, in the preamble of the 12th section of the said Act of 1848 referred to; that, after the passing and coming into operation of the said Acts of 1847 and 1848, the defendants at all times became and were empowered to carry the said Acts and provisions thereof into execution. And the defendants, under colour of the said Acts, used, diverted, interfered with, detained and appropriated for the supply of the inhabitants within the limits of the said Acts, certain of the waters of the river Etherow; and under colour of performance of, and obedience to, the provisions of the 45th and 46th sections of the Act of 1847, and the provisions of the Acts of 1847 and 1848 in that behalf applicable, made certain reservoirs for the supply of the mills and works on the said river Etherow; and all things happened and took place necessary to make it to be, and it became and was, at and during the times of committing the grievances hereinafter mentioned, &c., the duty of the defendants to cause a quantity of water equal to seventy-five cubic feet per second, for twelve hours of every working day, to be discharged, as by the said 12th section of the said Act of 1848 provided. Breach: that the occupiers of the said seven mills in the same section mentioned, or a majority of them, did not make or come to any such determination as in the said 12th section of the Act of 1848 is mentioned, of which the defendants had notice, yet the defendants violated the provisions of the said Acts, and neglected to cause, and did not cause, the prescribed quantity of water to be discharged, nor was the same discharged, as required by the 12th section of the Act of 1848, on default of such determination by the said occupiers, &c.

[672] Pleas (inter alia). First, as to the first and second counts, payment into Court of 1s. Secondly, as to the third and fourth counts: not guilty. Fifthly, as to

the same counts, that the defendants have not made and completed the reservoir and works by the said acts of parliament required, so as to make it the duty of the defendants to cause a quantity of water equal to seventy-five cubic feet of water per second, for twelve hours of every working day, to be discharged. Seventhly, to the same counts, leave and licence.

The plaintiffs replied to the first plea, that the money brought into Court was not sufficient to satisfy the plaintiffs' claim, and took issue on the other pleas.

They also demurred to the fifth plea, and the defendants joined in demurrer.

The issues in fact came on for trial, when by consent a verdict was returned for the plaintiffs, subject to a special case, in substance as follows:—

The plaintiffs are the lessees and occupiers of land and a water mill and works near Glossop, on the river Etherow, known as the Bank Wood Mill; wherein, before the diversions complained of, they carried on the business of cotton spinners.

The river Etherow commences its course at Woodhead, above the plaintiffs' mill.

During the time mentioned in the pleadings (except so far as the working was prevented by the diversions) the said mill was worked by the plaintiffs, by day and by night, by means of the water of the river.

Before the plaintiffs became the occupiers, and before and at the time of the passing of the Act of 1847, a water mill and works, situate on the site of the said mill and works of the plaintiffs, had been in like manner, to the extent which the natural flow of the river which was constantly varying, permitted, worked by means of the water of the river which then flowed uninterruptedly by day and by night.

In 1849 the plaintiffs became the lessees of the said works, and made alterations, and erected additional water wheels and machinery to enable them to make use of the daily supply secured by the Acts of 1847 and 1848.

By the Manchester Corporation Waterworks Act, 1847,(a) [674] the mayor, alder-

(a) 10 & 11 Vict. c. ciii. "An Act to enable the mayor, aldermen and burgesses of the borough of Manchester, in the county of Lancaster, to construct waterworks for supplying the said boroughs, and several places on the line of the said intended works, with water and for other purposes."

Section 35 enacts, "That, subject to the restrictions and provisions in this Act and in the Act incorporated herewith contained, it shall be lawful for the mayor, &c., to make, construct and maintain (inter alia a reservoir at Woodhead) for the purpose of collecting and storing up the waters of certain springs, brooks, rivulets, streams," &c.

Sect. 36. "That, subject as aforesaid, it shall be lawful for the mayor, &c., from time to time, to take and store up in the said reservoirs, so to be constructed as aforesaid, &c., the waters" of the river Etherow, &c., "and from time to time to draw off and use the waters so stored up for the purposes of this Act," &c.

Sect. 45. "That the mayor, &c., shall not use, divert, interfere with, detain or appropriate, for the supply of the inhabitants within the limits of this Act, any of the waters which now flow or pass, or which but for the passing of this Act would have flowed or passed into the river Etherow, unless and until the reservoir delineated on the said plans and described thereon, called 'The Compensation Reservoir,' shall be completed and filled with water, and water be discharged therefrom in the quantity and manner hereinafter provided."

Sect. 46. "That the mayor, &c., shall and they are hereby required to discharge from and out of the said Compensation Reservoir on each and every working day, for the supply of the mills and works on the said river Etherow, a quantity of water equal to sixty cubic feet per second for twelve hours of every working day, commencing, continuing and terminating at and during such hours as shall from time to time be determined by the occupiers of the several mills and works hereinafter mentioned."

By sect. 47, gauges and other works are to be constructed for the purposes of ascertaining the actual quantity of water passing out of the Compensation Reservoir.

By sect. 48, the occupiers of the said mills are to have access to the gauges.

By sect. 49, the occupiers of seven named mills are empowered to meet and determine the hours and rate of discharge.

Section 50 imposes a penalty, "in case of any failure, neglect or default, by or in

men, and burgesses of Manchester (whose title was afterwards, by charter, changed to that of the mayor, aldermen, and citizens of the city of Manchester), were authorized to make certain reservoirs upon the river Etherow.

The mills and waterworks specified in the 49th section of the Act of 1847 did not include the plaintiffs' mills, or those of various other millowners on the river Etherow. By the Manchester Corporation Waterworks Amendment Act, 1848,^(a) [675] it was provided that the provisions of the Act of 1847, except where altered or repugnant, should extend to that Act. After the passing of the said Acts the defendants commenced erecting the works thereby authorized, and in September, 1851, and at

consequence of which the quantity of water required to flow or be discharged from and out of the said Compensation Reservoir as aforesaid, shall not so flow or be discharged therefrom."

Section 55. "That nothing in this Act contained shall be construed to affect, diminish, prejudice or alter in any manner whatsoever any right which, before the passing of this Act, the owners, lessees or occupiers of any lands, mills or works, or of any of the rivers, streams or brooks authorized to be taken or used for the purposes of this Act, had or have possessed, &c., to the use of the waters of the said rivers, &c., except so far as is herein expressly provided."

(a) The 11 & 12 Vict. c. ci. "An Act to amend and enlarge the powers and provisions of the Manchester Corporation Waterworks Act, 1847."

By sect. 3, the Corporation were empowered to enlarge the Woodhead Reservoir and make two other reservoirs on the Etherow at Torside and Rhodes Wood.

Section 12, reciting that by the Act of 1847, the mayor, &c., were required to discharge out of the Compensation Reservoir on each working day sixty cubic feet per second, &c., and that it is "expedient that the quantity of water to be discharged from the said reservoir should be increased," enacts "that in lieu of the quantity of water by the recited Act required to be discharged from the said reservoir, the mayor, &c., shall and they are hereby required to cause a quantity of water equal to seventy-five cubic feet per second, for twelve hours of every working day, to be discharged through or over a gauge at or near a weir across the said river Etherow, &c., such discharge to be made at such a rate, in such manner, at such times, and in such proportions as the occupiers of" (the seven named mills) "or a majority of them shall determine, as in the said recited Act mentioned, and in default of any determination by the occupiers of such mills and works, as in the said Act mentioned, then and in such case the said mayor, &c., shall and they are hereby required to cause to be discharged from the said reservoir, at or near Rhodes Wood aforesaid, not less than seventy-five cubic feet per second continuously during twelve hours of every working day, commencing at half-past five o'clock in the morning."

Section 14 repeals the penalty given by the 50th section of the former Act.

Sect. 15. Be it enacted, "that in case of any failure, neglect or default by or in consequence of which the quantity of water required by this Act to flow or be discharged through or over the said gauge lastly hereinbefore mentioned as aforesaid, shall not so flow or be discharged, the mayor, &c., shall, for and during every day on which such failure, neglect or default shall occur, forfeit and pay by way of penalties to the occupiers of the Hollingworth Print Works, the Compstall Mills, and of each of the said several mills and works affected thereby and mentioned in the said recited Act, who shall actually have received damage or incurred any loss by reason of such failure, neglect or default as aforesaid, and who may sue for and recover the same, the sum of fifty pounds."

By section 17, "It shall not be lawful for the mayor, &c., or any person acting under their authority, or under the powers and provisions of this or of the said recited Act, to use or appropriate, for the supply of the inhabitants or others within the limits of this or the said recited Act, any water now flowing or which may flow to or upon the site of the said reservoir at or near Woodhead, or any water now flowing or which may flow into the river Etherow, between the intended site of the said last mentioned reservoir and the Vale House Weirs, until the said mayor, &c., shall have secured to the said several occupiers of the said mills and works, and commence to discharge through or over the said gauge hereinbefore particularly referred to, the said stipulated quantity of seventy-five cubic feet per second for twelve hours of every working day, in manner hereinbefore provided."

all times thereafter, they diverted and appropriated, for the supply of the inhabitants within [676] the limits of their Acts, a considerable part of the waters of, and which but for their works would have flowed into, the Etherow.

The Compensation Reservoir, though apparently completed by the defendants, has from engineering difficulties not been completed as required by the Act of 1847, or with the additions and alterations authorized by the Act of 1848, or otherwise, so as to be filled with water, or so as to be capable of being filled with water, nor has the same been filled with water, nor has water been discharged therefrom in the quantity and manner provided by the said Act of 1847, or in any larger quantity.

In like manner, the Torside and Rhodes Wood Reservoirs, though apparently completed by the defendants have not nor has either of them, from the like engineering difficulties, been so completed, as to be filled with water, or to be capable of being filled with water, nor has water been discharged from the same or either of them in the quantity provided by the said Act of 1848.

No determination by the occupiers of the mills and works specifically mentioned in the 12th section of the Act of 1848, or a majority, as to the discharge of the water, has been come to.

The defendants have during twelve hours or upwards of every working day discharged over a gauge, at or near the place mentioned in section 12, certain quantities of water; but they have not, except in cases of floods, caused to be discharged from the said reservoirs, or any of them; nor have they ever, except in cases of floods, caused to be discharged into the said river Etherow over the said gauge, from any other reservoir or place, a quantity of water equal to seventy-five cubic feet of water per second continuously during twelve hours of every working day.

Since the month of September, 1857, no water intercepted [677] by the defendants has been discharged by them by night, or, except in floods, flowed by night into the channel of the river Etherow. Of the mills mentioned in the 49th section, some are situate above, some below the plaintiffs' mill.

The plaintiffs seek to recover on the several counts of the declaration in respect of damage sustained, down to the commencement of the action, by reason of the loss of water by night, and not receiving as much water by day as they have been and are entitled to, &c. The Court are to have power to draw inferences of fact.

The Court are to decide whether the plaintiffs are entitled to recover on the 3rd and 4th counts, or one of them, and, if they are, whether the plaintiffs are entitled to recover damages on the 1st and 2nd counts, and also on the 3rd and 4th counts, or are bound to elect on what counts they will assess their damages, &c.

Manisty (with whom was Aspland) argued for the plaintiffs. By the 35th section of the Manchester Corporation Waterworks Act, 1847, subject to the restrictions and provisions in that Act contained, the Corporation were empowered to make, construct and maintain reservoirs, &c., for the purpose of collecting and storing up the waters of certain streams, and amongst others, by section 36, the waters of the river Etherow. Section 45 enacts, that they shall not divert, for the supply of the inhabitants within the limits of the Act, any of the waters which flow into the river Etherow, unless and until the Compensation Reservoir be completed and filled with water, and the water discharged therefrom in the quantity and manner thereafter provided. By section 46, they are to discharge, for the supply of the mills on the river Etherow, a quantity of water equal to sixty cubic feet per second, for twelve hours of every working day, commencing, continuing and terminating at such hours as shall be determined by the occu-[678]-piers of the several mills and works therein mentioned. Section 49 provides that the occupiers of the mills shall, from time to time, meet and determine the times and rate of discharge. Section 50 provides that, in case of any failure, neglect, or default by or in consequence of which the quantity of water required to flow or be discharged from and out of the Compensation Reservoir shall not so flow or be discharged therefrom, the corporation shall, for every day on which such failure, neglect or default shall occur, forfeit to the occupiers of each of the several mills 50l. By section 55, nothing in the Act contained is to prejudice any rights which, before that passing of the Act, the owners of any lands, mills or works had to the use of any of the streams authorized to be taken. By the "Manchester Corporation Waterworks Amendment Act, 1848" (11 & 12 Vict. c. ci.), s. 12, in lieu of the quantity of water by the former Act required to be discharged from the Compensation Reservoir, the corporation are required to cause a quantity of water

equal to seventy-five cubic feet per second, for twelve hours of every working day, to be discharged. The 14th section repeals the 50th section of the former Act; and section 15 imposes a penalty of 50l. on failure to supply the stipulated quantity of water. The 17th section enacts, that it shall not be lawful for the corporation to use or appropriate the waters there mentioned, until they have commenced to discharge over the gauge the stipulated quantity of seventy-five cubic feet per second. The question is, whether the plaintiffs have acquired a right to the quantity of water mentioned in the 12th section. The millowners had a right to the water of the Etherow, until they got the new supply. [Mellish. The defendants have paid 1s. into Court on the first two counts. They admit that they have acted illegally, and that the plaintiffs are entitled to damages on that footing: but the Act goes on to provide that, in lieu of the original stream, the cor[679]-poration are to send into the Etherow seventy-five cubic feet per second, for twelve hours of every working day. During the remaining twelve hours, they may stop the supply. The question is, whether the right of the millowners to a supply from the reservoir upon that footing had accrued. The plaintiffs' contention is, that they are entitled to damages for the loss of the natural flow of the water as well as of the substituted stream of seventy-five cubic feet per second over the weir. The defendants' contention is that, the right to divert the natural stream never having come into existence, the obligation to send the seventy-five cubic feet per second over the weir never arose. In any case, the plaintiffs cannot be entitled both to the natural stream and that which is to be substituted for it, but must elect between the two.] The plaintiffs have a right to claim damages for the loss of the natural flow of the stream, up to the period when the defendants commenced discharging water out of the Compensation Reservoir, and damages for not discharging seventy-five cubic feet per second, from the time when they appropriated the stream and completed the reservoir, apparently, as a Compensation Reservoir. [Pollock, C. B. The defendants have not completed their works.] It is enough that they have, apparently, completed them. Upon the true construction of the Acts, the obligation to discharge seventy-five cubic feet per second does not arise until they are in a condition to discharge such a quantity of water: on the contrary, it is expressly provided that they are not to appropriate any water flowing into the river Etherow until they have secured this discharge: 10 & 11 Vict. c. cccii., s. 45; 11 & 12 Vict. c. ci., s. 17. [Pollock, C. B. The plaintiffs might have proceeded by mandamus or injunction: but, in an action for damages, the damage which the plaintiffs are entitled to recover is that occasioned by the [680] wrongful act done, and that, in this case, seems to be the loss of the natural waters of the Etherow.] If there was a time at which the defendants were bound to discharge a specific quantity of water, and they have not done so, the plaintiffs are entitled to damages for the loss of that water. The defendants have made a reservoir, and they cannot set up that they have done so insufficiently. [Bramwell, B. Suppose they had never made any reservoir, would they have been estopped from saying that?] In such a case the plaintiffs would, probably, have a right to turn on the water which the defendants had diverted; but it has been said, in this Court, that where works have been executed, although improperly, under statutory powers, another party cannot abate them. [Pollock, C. B. I should assent to your contention, that the defendants cannot set up the insufficiency of the reservoir, if the Act had provided that the corporation should certify, as, for instance, to the Sessions, that they had made the reservoir, and they had certified to that effect. They have completed the reservoir, and dealt with it as if it were complete for one purpose, and, therefore, they cannot now be heard to say that it is not complete.]

Mellish (with whom was Monk), appeared to argue for the defendants, but was stopped. Martin, B. The case finds that the Compensation Reservoir, though apparently completed by the defendants, has, from engineering difficulties, not been completed as required by the Acts of 1848, or otherwise, so as to be capable of being filled with water &c. The facts are either against the plaintiffs, or the statement is unintelligible.]

POLLOCK, C. B. We are all of opinion that the plaintiffs are not entitled to recover damages under the third [681] and fourth counts of the declaration. After the passing of the Acts the defendants found that they could not complete the reservoir. The millowners did not think fit to interfere by mandamus or injunction, but suffered the defendants to intercept the water without interruption for a period

exceeding six years. Under these circumstances we think that the plaintiffs are only entitled to damages for the loss they have sustained by getting less water than they would have had if the natural stream of the Etherow had not been interfered with; and that the defendants are not bound to pay for the non-supply of the water from the reservoir as if they had completed the works, and wrongfully withheld the water.

MARTIN, B. It is not necessary for me to say more than that the fifth plea is proved; viz., that the defendants had not made and completed the reservoir and works, so as to make it the duty of the defendants to cause seventy-five cubic feet per second to be discharged; and that it is a good plea.

BRAMWELL, B. The question is whether the plaintiffs are entitled to recover on the fourth count. I think that they are not. The fourth count alleges that the defendants, under colour of the Acts, used, diverted, interfered with, detained and appropriated, for the supply of the inhabitants within the limits of the Acts, certain of the waters of the Etherow, and, under colour and in obedience to the provisions of the 45th and 46th sections, &c., made certain reservoirs for the supply of the mills and works on the Etherow, and it became the duty of the defendant to cause a quantity of water equal to seventy-five cubic feet per second, for twelve hours of every working day, to be discharged, and the breach is, that the defendants did [682] not cause the prescribed quantity of water per second to be discharged. The fifth plea is that the defendants have not made and completed the reservoir and works by the said acts of parliament required, so as to make it the duty of the defendants to cause a quantity of water equal to seventy-five cubic feet per second to be discharged. The question is whether the allegation so traversed is made out in fact. The case shews that it is not. The plaintiffs contend that, as the defendants had no right to divert the water unless they had completed the reservoir, they are precluded from saying that they have diverted it wrongfully. If it was known to everybody that the defendants had tried to make the reservoir, and failed, they would not be estopped from saying so. I can easily understand that, if the plaintiffs had gone to the defendants, and asserted a right to the natural flow of the stream at common law, and the defendants had said, "your common law right is gone, you must claim under the statute," then they might have been estopped. There is another difficulty in the plaintiffs' way. Assuming for a moment that they had a right to say that the defendants are estopped; in the declaration they have chosen to treat the defendants as wrong doers. The defendants must be entitled to say, "True, we are so." Assuming then that the plaintiffs had the option before, by this mode of pleading they gave the defendants the option. The plaintiffs, therefore, cannot get damages on the third and fourth counts, but only for the injury to their common law right.

Judgment for the defendants on the special case, the plaintiffs not being entitled to recover on the third and fourth counts of the declaration.

[683] CHAMP v. STOKES. May 2, 1861.—The defendant, the surveyor of highways of the parish of L., retained the plaintiff to defend an indictment against the parish for the non-repair of a highway. Pending the proceedings, the defendant ceased to be surveyor, and a new surveyor was appointed. In a correspondence between the defendant and plaintiff as to the costs of the indictment, the defendant requested the plaintiff to send his bill of costs to the new surveyor. The plaintiff sent by post his bill of costs to the defendant in the following letter:—"Herewith you have my bill of costs in the L. matter. I have sent a copy to the surveyor of the parish of L." The bill was headed "The surveyor of the highways of the township of L., and the inhabitants of the said parish, debtors to C." (the plaintiff). Held, that as the 6 & 7 Vict. c. 73, s. 36, does not require any heading to an attorney's bill, the requisites of that statute were complied with, since the bill and the letter sufficiently notified to the defendant that he was the party to be charged.

[S. C. 30 L. J. Ex. 242; 7 Jur. (N. S.) 607; 4 L. T. 334. Referred to, *Re Hildesheim*, [1914] 3 K. B. 845.]

Declaration, for work and materials, money paid and money due on accounts stated.

Pleas. First: Never indebted. Secondly: That the action was brought for the

recovery of fees, charges and disbursements, for business done by the plaintiff as an attorney for the defendant, and that no signed bill was delivered as required by the 6 & 7 Vict. c. 73. Issues thereon.

At the trial, before Willes, J., at the last Wiltshire Spring Assizes, the following facts appeared. The plaintiff was an attorney at Newport, in Monmouthshire, and he had a branch office at Cardiff, in Glamorganshire. The defendant was a farmer residing in the parish of Lanphey, in Glamorganshire, and surveyor of the highways of that parish. In the year 1857, an indictment for the non-repair of a highway was preferred and found against the inhabitants of Lanphey, and at a vestry meeting called by the defendant on the 24th December, 1857, it was unanimously resolved to defend the indictment. The defendant consulted the plaintiff on the subject, and numerous letters passed between them, the result being that the defendant retained the plaintiff to conduct the defence on behalf of the parish. The indictment was tried at the assizes, and a verdict of guilty returned. Pending the proceedings the defendant ceased to be surveyor, and a new surveyor was appointed in his place. Another long correspondence ensued between [684] the defendant and plaintiff as to the costs of the indictment, the vestry being unwilling to levy a rate to defray them, and the defendant requested the plaintiff to send his bill to the new surveyor. On the 15th of September, 1858, the plaintiff sent by post his bill of costs to the surveyor, inclosed in the following letter:—

“To the surveyor of the highways of the parish of Lanphey.

“St. Bride’s Major, near Brigend.

“Sir,—Herewith I beg to send you my bill of costs, amounting to 101l. 3s. 10d. You will be good enough, if you have not sufficient funds* in hand, to call a vestry meeting, and make a special rate to meet my bill. I suppose you have repaired the highway: if not, let it be done at once, and send me a certificate to enable me to report to the Court of Queen’s Bench.—Yours truly,

“AUG. B. CHAMP.”

The bill of costs was headed as follows:—

“The surveyor of the highways of the township of Lanphey, and the inhabitants of the said parish, debtors to Aug. B. Champ, solicitor, Newport, Monmouthshire.

“The Queen on the prosecution of R. Franklin, Esqr., against the inhabitants of the township of Lanphey, for a defective highway.

“Bill of costs of Augustus Bertram Champ, attorney for the defendants, Glamorganshire General Quarter Sessions.” (Then followed the items, amounting to 101l. 3s. 10d.)

The plaintiff also sent by post a copy of his bill to the defendant, inclosed in the following letter:—

“Mr. C. Stokes.

“15th Sept., 1858.

“Dear Sir,—Herewith you have my bill of costs in the Lanphey matter, amounting to 101l. 3s. 10d. I have not included the witnesses; but Mr. E. Griffith’s claim is about 12l. I [685] have sent a copy to the surveyor of the highways of the parish of Lanphey.—Yours truly,

“AUG. B. CHAMP.”

The defendant subsequently wrote to the plaintiff, and acknowledged the receipt of the bill and letter.

It was objected on behalf of the defendant, first, that he was not personally liable to the plaintiff; and, secondly, that there was no sufficient delivery of a signed bill, as required by the 6 & 7 Vict. c. 73, s. 37.

The learned Judge left it to the jury to say whether the defendant had retained the plaintiff, and they found a verdict for the plaintiff for 53l. 13s. 4d. (the amount at which the bill had been taxed) and leave was reserved to the defendant to move to enter a nonsuit.

Karslake, in the present term (April 23), obtained a rule nisi accordingly, against which

Coleridge and Kingdon now shewed cause. First, there was a sufficient delivery of a signed bill, within the meaning of the 6 & 7 Vict. c. 73, s. 37. It is objected that the bill is improperly headed, inasmuch as “the surveyor of highways” means the then surveyor, but the heading is sufficient to point out the defendant as the party

charged. In *Daubney v. Phipps* (16 Q. B. 504, 514) the action was against one of the managing committee of the "Northampton, Lincoln and Hull Railway Company," provisionally registered, for work done by the plaintiff as an attorney, and a bill headed "Northampton, Lincoln and Hull Railway, to Robert Heaford Daubney, Dr." was held to be sufficient. Here there was a sufficient delivery of the bill; it was inclosed in a letter addressed to the defendant, and the receipt of which he acknowledged: *Eggington v. Cumberland* (1 Exch. 271). The head-[686]-ing would have been sufficient even if the bill had not been addressed to any one, for the bill and the letter, taken together, notified to the defendant that the plaintiff meant to charge him: *Roberts v. Lucas* (11 Exch. 41). [Wilde, B. The plaintiff, in his letter to the defendant, says that he has sent him his bill, and a copy to the surveyor.] The copy was sent to the new surveyor, at the defendant's express request. *Mant v. Smith* (4 H. & N. 324) is also an authority that this bill is sufficient. Moreover the heading is mere surplusage, for the statute does not require any. Secondly, the defendant is personally liable.

The Court then called on

Karslake, to support the rule. It is true that the statute does not require any particular form of heading to the bill, but the bill or the letter must notify to the person to whom they are sent that he is the party charged. Here the heading of the bill notifies, not that the defendant, but the surveyor of highways, or the inhabitants of the parish, are the persons charged. There is no authority that, under the circumstances of this case, the requirements of the statute have been complied with. He also argued that the defendant was not personally liable.

POLLOCK, C. B. The rule ought to be discharged. Looking at all that passed between the parties, the defendant could have had no doubt that the plaintiff looked to him as the person liable to pay the bill. No heading is required by the statute, and, even if there had been none, the defendant must have known that he was the person charged; therefore the heading could not have misled him. As to the other point, it was a question for the jury, and they have determined it.

[687] MARTIN, B. I am of the same opinion. The legislature has thought fit to make an enactment, with respect to an attorney's bill, providing that certain things shall be done by him before he can recover his costs, and we ought to carry out that enactment. But if, in a case like this, the attorney is not entitled to maintain the action, he would be in a condition far beyond what the statute intended. The bill was headed "The surveyor of the highways of the township of Lanphey, and the inhabitants of the said parish," and entitled in the matter of the business done; it was sent to the defendant in a letter signed by the plaintiff, and referring to the bill. Now, the statute enacts that no attorney or solicitor shall commence or maintain any action or suit for the recovery of charges, fees or disbursements until the expiration of a month after he shall have delivered, or sent by post, to the party to be charged therewith, a bill of such charges, which shall either be subscribed with his hand, "or be enclosed in or accompanied by a letter subscribed in like manner, referring to such bill." There is not one word about heading the bill. It is to be delivered or sent to the party to be charged. Here it has been sent to the party called upon to pay. It is true that the plaintiff, at the request of the defendant, sent a copy of the bill to the new surveyor, but great injustice would be done if that was to preclude him from recovering the amount from the defendant. Suppose an attorney sent his bill to his client, and the latter insisted that he was not liable to pay it, and requested the attorney to send the bill to A. B., and the attorney afterwards said "I have sent a copy of the bill to A. B., but you are the person to whom I look for payment;" what is there to prevent him recovering the amount? We ought to take care that all parties have the benefit of this statute. Here the plaintiff has done all that the statute requires; he has sent [688] his bill in a signed letter, intimating that the defendant was the person whom he considered liable to pay it. With respect to the other point, it was a question for the jury, and they have determined it.

BRAMWELL, B. I agree with my brother Martin that it is desirable that we should not encourage special demurrers to attorneys' bills of costs. The statute requires that the bill shall be delivered, or sent to the party to be charged. Here, on the face of the bill and letter, the defendant is the party charged. In *Grimley v. Austen* (16 Q. B. 504, 512) Patteson, J., said: "I think that the attorney ought to shew whom he means to charge with his bill." I also think he ought. But here there is no doubt

that the letter and bill sufficiently intimate to the defendant that he is the party charged.

WILDE, B. I have not heard the whole of the argument; but, so far as I have heard it, I agree with the rest of the Court.

Rule discharged.

KILLIGREW v. PETERS. April 23, 1861.—On motion for a rule nisi for a new trial, in a case tried before the sheriff, under a writ of trial, the sheriff's notes must be produced, unless good cause be shewn to the contrary; and it is not a sufficient excuse for their non-production that the motion is made by the counsel who was engaged at the trial, and is prepared to state what occurred.

Ballantine, Serjt., moved for a new trial in this case, which was tried, upon a writ of trial, before the Secondary of London, when a verdict was found for the plaintiff for 13l.

[689] The Court having asked for a copy of the Secondary's notes of the trial,

Ballantine, Serjt., submitted that in this case it was not necessary to produce them on moving for the rule nisi, since he had been counsel for the defendant at the trial, and was prepared to state what had occurred on that occasion. He referred to Chitty's Archbold's Practice, vol. 1, p. 406, 10th ed., where it is said: "If the motion be made by counsel engaged at the trial, the Court will not require the production of the sheriff's notes or an examined copy of them, upon the motion for a rule nisi;" citing *Flower v. Adams* (8 Dowl. P. C. 292), *Reynolds v. Stone* (1 Dowl. P. C. N. S. 578), and *Barnett v. Glossop* (3 Dowl. P. C. 625).

Per Curiam.(d) We think that in this case the Secondary's notes ought to be produced. As a general rule, the notes must be produced unless good reason be shewn to the contrary, as, for instance, if there be some difficulty in obtaining them; but we think it is not a sufficient excuse for not producing them that the motion is made by the counsel who was engaged at the trial, and is prepared to state what occurred.

The motion was then adjourned for the production of the notes.

[690] OXENHAM v. SMYTHE. May 2, 1861.—A count of a declaration stated that the plaintiff was tenant to C. of a public house, and also owed her money; that C. had seized, as a distress for arrears of rent, certain goods of the plaintiff; and thereupon the defendant, representing and pretending that he was authorized by C. to act as her attorney in that behalf, and as such attorney to enter into the agreement thereafter mentioned in her behalf, it was agreed between the plaintiff and defendant, as such attorney on behalf of C., that for the consideration in the agreement mentioned, C. would withdraw the distress and take no proceedings for the recovery of the arrears of rent for six months. The declaration then stated that, although the plaintiff performed his part of the agreement, the defendant, representing and pretending that he was authorized as attorney for C. so to do, did, in the name of C., take proceedings for the residue of the arrears of rent within six months, and in violation of the agreement did, as such attorney, in the name of C., distrain for the residue of the arrears of rent the plaintiff's goods and chattels. By means whereof the plaintiff was not only prevented from carrying on his business as a publican, but lost divers gains and profits. That the plaintiff trusting in the said representations of the defendant, and believing that the defendant was so authorized as aforesaid by C. to act, and that he did act as attorney on her behalf, as well as to enter into the said agreement, as to putting in the said distress in violation thereof, sued C. in an action of trespass, and at the trial the plaintiff was nonsuited by reason of the defendant not having been authorized by C., and by reason of the defendant, who was called as a witness on the trial by the plaintiff to prove the authority of C. to the defendant to put in the distress and to enter into the agreement on her behalf, denying any authority from C. to him, as her attorney, either to put in the distress or enter into the agreement on her behalf: Whereby and by reason

(d) Pollock, C. B., Martin, B., Bramwell, B., and Wilde, B.

of the premises, the plaintiff expended and became liable to pay large sums of money for costs. On demurrer: Held, that the count was bad for not distinctly averring that the defendant was not authorized by C. to act on her behalf.

[S. C. 31 L. J. Ex. 110 : at Nisi Prius, 2 F. & F. 220.]

Third count. The declaration stated that, before the making of the agreement hereinafter mentioned, one Esther Collins was the proprietor of a certain brewery called "The Richmond Brewery," and the plaintiff was tenant to the said Esther Collins of a certain public house, called "The Cricketers," situate at Richmond Green, at a yearly rent of 50l., payable quarterly; and the plaintiff was also indebted to the said Esther Collins in a certain sum of money, exceeding the sum of 30l., for certain arrears of the said rent; and also in a further sum of money, also exceeding the sum of 30l., for a certain book debt for beer and other goods sold and delivered by Esther Collins as proprietor of the said brewery to the plaintiff. And the said Esther Collins had seized as a distress for the said arrears of rent certain goods and chattels of the plaintiff, then being in and upon the said premises, and had placed a man in and upon the said premises to keep possession of the said goods and chattels so seized as aforesaid. And the plaintiff [691] had informed the said Esther Collins that he, the plaintiff, was desirous of obtaining six months, time to enable him to dispose by sale or otherwise of his interest in the said premises, in order to free himself from his said embarrassments and debts; and thereupon the defendant, being an attorney, and representing and pretending that he was authorized by the said Esther Collins to act as her attorney in that behalf, and as such attorney to enter into the said agreement hereinafter mentioned on her behalf, it was on, &c., agreed by and between the plaintiff and the defendant, as such attorney on behalf of the said Esther Collins, that in consideration that the plaintiff would, on the 4th day of January, 1859, pay the brokers' charges in the said distress, and also the sum of 2l. 2s., for the costs of the defendant as the attorney of the said Esther Collins incurred in the said distress, and also the sum of 30l., on account of the said book debt, and would also on the said 4th day of January give to the defendant as attorney for the said Esther Collins, a certain bill of exchange drawn by one W. Hammond and accepted by the plaintiff, dated the said 4th day of January, 1859, at three months after date, for the sum of 30l., on account of the said rent so in arrear as aforesaid, she, the said Esther Collins, would forthwith withdraw the said man from possession of the said goods and chattels under the said distress, and not take any proceedings for the residue of the said book debt, nor for the residue of the said arrears of rent for the space of six months from the said 4th day of January, provided the said bill of exchange should be duly honoured. And the plaintiff says that though he did on the said 4th day of January duly pay the said monies and give to the defendant as attorney for the said Esther Collins the said bill of exchange according to the said agreement, and did all things necessary on his part to be performed and fulfilled; and although the said [692] bill of exchange was duly honoured; yet the defendant representing and pretending he was authorized as attorney for the said Esther Collins so to do, did in the name of the said Esther Collins take proceedings for the said residue of the said arrears of rent within the space of six months from the said 4th day of January, and in violation of the said agreement and without the consent of the plaintiff, and within the space of six months, did as such attorney as aforesaid, in the name of the said Esther Collins, seize as a distress for the said residue of the said arrears of rent, the goods and chattels of the plaintiff then being in and upon the said premises, and also within the said space of six months, placed a certain man in and upon the said premises of the plaintiff, to hold possession of the goods so seized as last aforesaid, and kept and continued the said man so in possession as aforesaid in and upon the said premises for the space of thirty days. By means whereof the plaintiff was not only greatly harassed and incommoded in the occupation of the said premises, and hindered and prevented from carrying on his said business of a publican in as ample and beneficial a manner as he otherwise might and would have done, but has lost and been deprived of divers gains and profits which he otherwise would have derived and acquired in his said business of a publican; and has been prevented from completing an advantageous agreement for the sale of his interest in the said premises with one Jane Foster, and which said agreement with the said Jane Foster was known to the said Esther Collins before the said last mentioned distress was so put in as aforesaid. And

the plaintiff says that, thereupon he the plaintiff, trusting in the said representations of the defendant, and believing that the defendant was so authorized as aforesaid by the said Esther Collins to act, and that he did act, as attorney on her behalf, as well as to enter [693] into the said agreement of the 4th day of January as to putting in the said distress in violation thereof as aforesaid, sued the said Esther Collins in this Honourable Court, in an action for breaking and entering into the said premises of the plaintiff, and converting and disposing of his said goods and chattels, and also for breach of the said agreement in this count mentioned, which action the said Esther Collins defended by the defendant as her attorney, and denied her liability therein, and which said action came on to be tried at the Surrey Assizes, at Kingston, on &c., when the plaintiff was nonsuited by reason of the defendant not having been authorized by the said Esther Collins as aforesaid, and by reason of the defendant, who was called as a witness on the said trial by the plaintiff to prove the authority of the said Esther Collins to him the defendant to put in the distress hereinbefore last mentioned, and to enter into the said agreement on her behalf, denying any authority from the said Esther Collins to him as her attorney, either to put in the said last mentioned distress, or to enter into the said agreement on her behalf, and judgment was afterwards signed against the plaintiff in the said action. Whereby, and by reason of the premises, the plaintiff has not only suffered the damage hereinbefore mentioned, but has also expended and has become liable to pay divers large sums of money amounting to 250l., in unsuccessfully suing the said Esther Collins, and has also paid the further sum of 92l. 2s. 4d. to the said Esther Collins for costs in defending the said action.

The fourth count was substantially the same as the first, except that, instead of alleging that Esther Collins was landlady, it alleged that the defendant let the plaintiff into possession of the premises, representing that Esther Collins was landlady.

Demurrer to each count, and joinder therein.

[694] Garth argued in support of the demurrer in last Hilary Term (January 16). These counts do not disclose any cause of action. The cause of action must be founded in tort or on contract. These counts are not in tort, because no fraud is alleged. Then, are they in contract? *Collen v. Wright* (8 E. & B. 647) decided that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. But if these counts are founded on that principle, they should have contained an express averment that the defendant was not authorized to act as the attorney of Esther Collins. No sufficient breach is alleged. The case resembles that of an action by lessor against lessee for not repairing, and in which, instead of alleging that the lessee did not repair, the lessor merely stated that the superior landlord brought an action against him in consequence of the lessee not repairing. There is no direct allegation as to the want of authority which the defendant could traverse. [Pollock, C. B. A Court of law decides *secundum allegata et probata*; therefore the third count may mean only this,—that the plaintiff was nonsuited by reason of his not having proved that the defendant had authority to enter into the agreement.] It only means that the plaintiff was nonsuited by reason of it not appearing by the evidence that the defendant had authority.

C. Wood, in support of the counts. *Randell v. Trimen* (18 C. B. 786) is an authority in support of these counts. There the declaration stated that the defendant, who was employed as architect by A. and others to superintend the building of a church, falsely and fraudulently represented and pretended [695] that he was authorized by A. to order, and did order, stone of the plaintiffs, for the building of the said church, for and on account of, and to be charged to A.; and that the plaintiffs, relying on that representation, and believing that the defendant had authority from A. to order the stone on his account, delivered the same, and the same was used in the building of the church; whereas, in truth and in fact, the defendant was not, as he well knew, authorized to order the said stone. The declaration then averred that, A. refusing to pay for the stone, the plaintiffs, trusting in the defendant's representations, sued A. for the price, and failed in their action, and had to pay A. costs, and also the costs incurred by their own attorneys. It was held that the declaration disclosed a good cause of action; and, it appearing that the defendant had no such authority as he represented, that the plaintiffs were entitled to recover from him, not only the value of the stone, but also the costs they incurred and paid in the former

action. [Martin, B. That was not an action upon a contract, but for a false and fraudulent representation, and it was expressly averred that the defendant was not authorized to order the stone, and that he knew that the representation was false.] Here it is averred that the plaintiff was nonsuited by reason of the defendant not having been authorized by Esther Collins, as her attorney, to put in the distress, or enter into the agreement. That amounts to the distinct denial that the defendant had any authority. [Pollock, C. B. Courts of justice do not proceed upon what is absolutely true or false, but upon what is made to appear by the evidence. A plaintiff does not recover a debt because the defendant owes him the money, but because the plaintiff proves that the defendant owes it. The meaning of this allegation is that the plaintiff was nonsuited by reason of its not appearing upon the evidence that the [696] defendant was not authorized; it is not alleged as a positive fact that he was not authorized.] Upon general demurrer, the saying "by reason of the defendant not having authority" is equivalent to an averment that he had no authority. *Collen v. Wright* (8 E. & B. 647) shews that the plaintiff need not allege fraud. If the statement as to the plaintiff having been nonsuited be struck out, sufficient will remain to constitute a good cause of action, for it will appear that the defendant represented that he had authority, and then at the trial swore that he had no authority. [Martin, B. By thus transposing the words the allegation would be right: "the defendant was not authorized by Esther Collins, by reason whereof the plaintiff was nonsuited."]

Garth was not called upon to reply.

Cur. adv. vult.

POLLOCK, C. B., now said,—In this case there was a demurrer to the third and fourth counts. By those counts the plaintiff sought to recover damage resulting from a representation made by the defendant that he was authorized by one Esther Collins, of whom the plaintiff was tenant, to act as her attorney, in entering into an agreement, and putting in a distress upon the plaintiff's goods, when in point of fact he had no such authority. We are of opinion that those counts are bad in point of law, inasmuch as they do not distinctly and sufficiently state that the defendant was not authorized by Esther Collins to act on her behalf.

Judgment for the defendant.

[697] JONES v. PRATT. May 7, 1861.—In an action for infringement of a patent the Court refused to allow the plaintiff to administer interrogatories to the defendant before declaration, it appearing that the cause of action arose more than six years before the action was commenced.

[S. C. 30 L. J. Ex. 365; 7 Jur. (N. S.) 978; 9 W. R. 696; 4 L. T. 411.]

This was an action for the infringement of a patent. Before declaration, the plaintiff took out a summons at Chambers for leave to deliver to the defendant interrogatories in writing. The application was supported by the affidavit of an agent of the plaintiff, who deposed that he "had been engaged for some time past in making inquiries with the view of ascertaining who were the persons who had made machines for the purpose of [preparing, stubbing, roving, spinning, and doubling cotton, silk, wool, worsted, flax and other fibrous substances, such machines being infringements of the plaintiff's patent; that he had visited Manchester, Rochdale, &c., and other places for the purpose of ascertaining who were the persons who had infringed the plaintiff's patent; that he had seen several of the said machines at the said towns and places being infringements aforesaid, and had ascertained and believed that many of such machines, being infringements of the said patent of the plaintiff, had been made and sold by the defendant previous to June, 1845: that he believed that defendant had made a great many of such machines; and that it was absolutely necessary that the plaintiff should be at liberty to deliver interrogatories to the defendant previous to the delivery of a declaration in this action, as, if the defendant answered the interrogatories fully and faithfully, he verily believed the answers would disclose many more breaches of the patent than he or the plaintiff had yet discovered." There was also an affidavit of the plaintiff's attorney, in the terms prescribed by the 52nd

section of the Common Law Pro[698]-cedure Act, 1854, and who also deposed that he verily believed the interrogatories were necessary for framing the declaration. The affidavit of the defendant's attorney, in answer, stated that the patent was dated the 17th of June, 1841.

The summons was heard before Bramwell, B., who made an order for the delivery of the interrogatories.

Mellish, in the present term, obtained a rule nisi to rescind the order of Bramwell, B.; against which

Grove (with whom was Hance) now shewed cause. The 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), provides that, "by order of the Court or a Judge, the plaintiff may, with the declaration, and the defendant may, with the plea; or either of them by leave of the Court or a Judge may, at any other time, deliver to the opposite party, &c., interrogatories in writing." The rule laid down in *Crookes v. Morrison* (5 E. & B. 984) is, that a plaintiff, who seeks to deliver interrogatories before declaration, must do more than produce an affidavit in the terms prescribed by the 52nd section of the Common Law Procedure Act, 1854. Lord Campbell, C. J., there said: "He must always shew the nature of his case; but, if the application be before declaring, he must do more, in order to satisfy the Court that the interrogatories are pertinent, than is required if he has declared." That has been done in this case. The 41st section of "The Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), enacts that the plaintiff shall deliver, with his declaration, particulars of the breaches complained of in the action, and no evidence shall be given of any alleged infringement not contained in the particulars. Here the affidavit shews that the plaintiff [699] cannot deliver proper particulars without interrogatories are administered to the defendant. In *James v. Burns* (17 C. B. 596), the Court allowed a plaintiff to deliver interrogatories to the defendant after plea pleaded without a special affidavit. [Martin, B. What is the principle on which a Court of equity would act in a case like this?] It is submitted that they would grant the application. In *The Patent Type Founding Company v. Lloyd* (5 H. & N. 192), which was an action for the infringement of a patent, a Court of equity granted an order for inspection, after the same application had been refused by this Court.

Mellish (Aston with him), in support of the rule. This is not a case in which the Court, in the exercise of its discretion, will allow interrogatories to be administered. The patent expired more than five years ago, and the plaintiff has not shewn any infringement of it within six years. He ought either to give some answer to the Statute of Limitations, or confine his interrogatories to an infringement within six years. In equity the plaintiff must have filed his bill, and shewn the ground on which he wanted a discovery, before he could ask to administer interrogatories. The practice at law and in equity cannot be assimilated; because in equity a defendant has three modes of dealing with a bill of discovery, either by demurrer, plea or answer. If the defence be so framed to raise an issue in law only, as by demurrer, the plaintiff will not be entitled to any discovery: *Wigram on Discovery*, sect. 48, p. 25, 2nd ed. So, where the defence is by plea, the plaintiff will not be entitled to any discovery which may not be necessary for the trial of the plea itself: *id.* sect. 48, p. 26. And a defendant may plead in bar to the discovery that which is [700] merely matter of legal defence to the action: *id.* sect. 66, 68. By analogy to the rules in equity, the plaintiff ought to shew, by affidavit, that he has an answer to the Statute of Limitations. Why should the defendant be compelled to disclose every machine he made, and every person to whom he sold it, when *prima facie* there is a complete answer to the action? [Channell, B. The 61st section enables either party, by leave of the Court or a Judge, to interrogate the other "upon any matter as to which discovery may be sought." Therefore, to ascertain whether a party is entitled to an order for interrogatories, it must be seen whether the case is of such a nature that he would be entitled to a discovery under the 50th section.] Here, as there is no cause of action within six years, a Court of equity would not grant a discovery. (a)

Cur. adv. vult.

POLOCK, C. B., now said—In the case of *Jones v. Pratt* (without laying down any general rule) we think that at present the plaintiff ought not to be allowed to administer interrogatories to the defendant, though possibly he may be entitled to do

(a) See *Smith v. Fox*, 6 Hare, 386.

so after issue joined. In that case he will be at liberty to amend his particulars of breaches, in accordance with the answers given.

Rule absolute.

[701] EDWARDS AND ANOTHER, Assignees of Maurice, a Bankrupt v. GABRIEL, PHILLIPS AND ROBY. May 2, 1861.—Notice to an execution creditor that his debtor has filed a petition for arrangement under the 76th section of the Bankrupt Law Consolidation Act, 1849, is notice of an act of bankruptcy within the meaning of the 133rd section, provided an adjudication of bankruptcy is filed within two months after the petition for arrangement is dismissed.

[S. C. 30 L. J. Ex. 245; 7 Jur. (N. S.) 634; 9 W. R. 669; 4 L. T. 303: affirmed 1861, 7 H. & N. 520.]

Trover. The first count of the declaration alleged a conversion of the goods of one Maurice, a bankrupt, before his bankruptcy. The second count alleged a conversion of the goods of the plaintiffs, as assignees of Maurice, since the bankruptcy.

Pleas: not guilty and not possessed.

At the trial, before Pollock, C. B., at the London Sittings after last Hilary Term, the following facts appeared:—The plaintiffs were the official and creditors' assignees of Maurice, the bankrupt. On the 29th of May, 1860, Maurice, who then carried on business as a merchant in London, sent the goods in question to the warehouse of one Southgate, a packer, at London Wall, to be packed and forwarded to Odessa. On the 26th of June, 1860, the defendant, Roby, recovered a judgment against Maurice, in the Court of Common Pleas, for 93l. 18s.; and on the 3rd of July issued a writ of fi. fa., indorsed to levy 93l. 18s. and 1l. 6s. costs of execution, which writ was on the same day delivered to the defendants Gabriel and Phillips, who were sheriffs of London, to be executed. On the 6th of July, Roby called at Southgate's premises with an officer of the sheriffs and pointed out to him the goods in question as the goods of Maurice, and the officer then seized them and left a man in possession. On the 9th of July, Maurice petitioned the Court of Bankruptcy, under the 211th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), for a private arrangement with his creditors. This petition was duly filed, and a private sitting and an official assignee [702] appointed, but the Court did not direct that any part of the estate and effects of the petitioner should be possessed or received by the official assignee, or be taken possession of by the messenger of the Court. On the same day the sheriffs and their officer were served with the following notice:—

“In the Common Pleas.

“Between A. Roby, Plaintiff, and S. Maurice, Defendant.

“Take notice that the above named defendant has committed an act of bankruptcy, by filing a petition in the Court of Bankruptcy, London, for a private arrangement with his creditors; and I further give you notice not to sell or otherwise dispose of the goods and chattels seized by you under and by virtue of the writ of fi. fa. issued between the parties. Dated this 9th of July, 1860.—Yours, &c.

“S. SPYER,

“Solicitor in the matter of the said petition.”

On the 13th of July, the goods seized under the writ of fi. fa. were purchased by Roby for 103l. 4s. 4d., being the appraised value thereof; and the sheriff then executed a bill of sale and delivered the goods to him. On the 7th of August, the petition for arrangement was dismissed, and on the same day Maurice was adjudged a bankrupt, on a petition for adjudication of bankruptcy filed against him by another creditor.

It was submitted, on behalf of the defendants, that the seizure and sale of the goods were valid by the 133rd section of the Bankrupt Consolidation Act, 1849, inasmuch as the notice of the 9th of July was not a notice of a prior act of bankruptcy within the meaning of that section. The learned [703] Judge directed a verdict for the plaintiffs, reserving leave to the defendants to move to enter the verdict for them.

Shee, Serjt., in the present term, obtained a rule nisi accordingly; against which

H. James (Honyman with him) shewed cause. At the time of the sale of the goods under the execution, the defendants had notice of a prior act of bankruptcy committed by Maurice, and therefore the transaction is not protected by the 133rd section of the Bankrupt Law Consolidation Act, 1849. The 76th section enacts, "That the filing of a petition by any such trader for an arrangement between such trader and his creditors, under the provisions of this Act with respect to arrangements between debtor and creditor under the superintendence and control of the Court, shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed: Provided also, that no adjudication shall be made on any such act of bankruptcy, unless and until after such petition for arrangement shall have been dismissed." Here, everything has occurred which is required by that enactment to render the filing of the petition conclusive evidence of an act of bankruptcy—a petition for adjudication of bankruptcy was filed within two months, and the petition for arrangement was dismissed before any adjudication on the act of bankruptcy. It is contended, however, that the notice served on the defendants was not "notice of any prior act of bankruptcy" within the meaning of the 133rd section, because, at the time it was given, it was uncertain whether any petition for adjudication of bankruptcy would ever be filed, or the petition for arrangement be dismissed. But the decisions on a corresponding enactment, in the 5 & 6 Vict. c. 122, shew that when those events occurred, they had relation back to the time of filing the petition for arrangement, and rendered it conclusive evidence of an act of bankruptcy at that time. The 22nd section of the 5 & 6 Vict. c. 122 enacted, that if any trader shall file a declaration of insolvency in the mode there prescribed, he "shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a fiat in bankruptcy shall issue against such trader within two months from the filing such declaration." In *Follett v. Hoppe* (5 C. B. 226) a trader, against whom a judgment had been obtained, filed a declaration under that Act and gave his creditor notice of it, and on being taken in execution paid the judgment debt; a fiat in bankruptcy having issued against him within two months from the filing the declaration, it was held that his assignees were entitled to recover the money so paid. *Green v. Laurie* (1 Exch. 335) is another authority to the same effect. In *Monk v. Sharp* (2 H. & N. 540), where it was held that filing a petition for arrangement was not an act of bankruptcy, the petition had never been dismissed, and no petition for adjudication of bankruptcy had been filed within two months.

Shee, Serjt., and Barnard, in support of the rule. It is not contended that a petition for arrangement under the 211th section is not an act of bankruptcy from the time it is filed, provided the events occur which are required by the 76th section; but the question here is, whether before the sale the defendants had notice of a prior act of bankruptcy, or whether they are not protected by the 133rd section. As there was no adjudication of bankruptcy before the execution was completed by sale of the goods, there was up to that time no act of bankruptcy, and consequently [705] no notice of one within the meaning of the 133rd section. The question does not depend on the 76th section alone, but also on the 89th, 101st and 133rd. The 89th points out the proceedings to be taken to obtain adjudication of bankruptcy. They originate by petition upon which there must be an adjudication of bankruptcy: sect. 101. Here, there could be no adjudication until the petition for arrangement was dismissed, which was not until after the sale of the goods. [Pollock, C. B. The 76th section says, that the filing a petition shall be evidence of an act of bankruptcy at that time. The defendants had notice that a petition was filed which might or might not be an act of bankruptcy, and after that, if they choose to deal with the goods, it was at their peril.] The statute does not say that notice of filing a petition shall be notice of an act of bankruptcy; and unless the creditor has notice of some act, upon which proceedings of adjudication can at once take place, he has no notice of an act of bankruptcy within the 133rd section. In *Follett v. Hoppe* (5 C. B. 226), and *Green v. Laurie* (1 Exch. 335), the petitions were filed under the Insolvent Act. *Conway v. Nall* (1 C. B. 643) shews that, in order to defeat an execution, the creditor must have notice of a prior act of bankruptcy complete in itself at the time the notice is given. The notice there given was to the following effect:—"J. S. has committed an act of bankruptcy. He signed a declaration of insolvency yesterday. J. S. will

be declared bankrupt immediately. I have sent for a fiat;" and that was held not such a notice as to deprive the execution creditor of the protection of the 2 & 3 Vict. c. 29, the 6th section of the 6 Geo. 4, c. 16, requiring the declaration of insolvency to be filed and advertized in the *London Gazette*. [Pollock, C. B. That was no notice of an act of bankruptcy committed, but only [706] that it would be committed. The notice amounts to this—"I give you notice there is going to be an act of bankruptcy, and I have sent for a fiat." Lying in prison for debt for six months was made an act of bankruptcy by the 1 Jac. 1, c. 15. That period was reduced to two months by the 21 Jac. 1, c. 19. The 6 Geo. 4, c. 16, made a further reduction to twenty-one days; but when the requisite time was completed, it had relation back to the day of the first arrest. In Henley's Bankrupt Law, p. 263, it is said:—"Where a payment is made to a trader who is in prison, if the party have notice of that fact, and if the requisite time to constitute an act of bankruptcy be afterwards completed, such payment will not be protected." The authority cited for that position is *King v. Leith* (2 T. R. 141, 144), which decided if a trader become bankrupt by lying in prison two months after his arrest, his assignees may maintain an action for money had and received against a person who, having notice that a commission would be issued against him, sells his goods and pays him the produce before the two months have expired. Ashurst, J., there said:—"Though, strictly speaking, at the time of the notice the act of bankruptcy was not complete, yet after that notice the defendant was not warranted in paying the money over to the bankrupt, and it cannot be called a *bonâ fide* payment." Here the execution was *bonâ fide* levied. *Hocking v. Acraman* (12 M. & W. 170) decided that notice of a docket having been struck is not "notice of a prior act of bankruptcy" within the meaning of the 2 & 3 Vict. c. 29. [Pollock, C. B. That was only a notice that some one had sworn that he believed the trader had committed an act of bankruptcy.] Here the proceedings were inchoate only at the time of the sale.

POLLOCK, C. B. The rule must be discharged. The [707] question turns on the construction of the 76th section of the Bankrupt Consolidation Act, 1849, which makes the filing a petition for arrangement conclusive evidence of an act of bankruptcy at the time of filing it, provided a petition for adjudication of bankruptcy shall be filed within two months after the petition for arrangement is dismissed. That having occurred, the bankruptcy has relation back to the time of filing the petition, so that the defendants who had notice of the filing had notice of an act of bankruptcy. Mr. Barnard is right in saying that no case has occurred in Westminster Hall upon this particular statute, but there are old authorities on corresponding provisions in the 21 Jac. 1, c. 19, and 6 Geo. 4, c. 16. The 21 Jac. 1, c. 19, s. 6, rendered the lying in prison for debt for two months an act of bankruptcy, and the case of *King v. Leith* (2 T. R. 141, 144), to which I have already referred, decided that when the two months expired the bankruptcy related back to the day of arrest, and that a person who, with notice that the bankrupt was in prison, sold his goods and paid him the money during the period of the two months was liable to his assignees. There Buller, J., said:—"Whether this be considered on the construction of the bankrupt laws, or on the cases adjudged, I have not the smallest doubt but that the bankruptcy relates to the day on which the bankrupt was arrested; and the Court are bound to consider it so, and reason upon it as such." Here the statute says that the filing a petition for arrangement shall be conclusive evidence of an act of bankruptcy committed by the trader at the time of filing such petition; and, in putting a construction upon that statute, I consider that we are bound by the old authorities, and that the plaintiffs are entitled to recover.

MARTIN, B. I did not hear the whole of the argument, and therefore decline giving any opinion.

[708] BRAMWELL, B. I am also of opinion that the rule ought to be discharged. No doubt there is a difference between the enactment referred to in the statute of James and that in the present Act, because the former does not say at what time the act of bankruptcy shall be complete, but the latter says that the filing the petition shall be an act of bankruptcy from the time of filing it. Now, suppose it had gone on to say that there should be no adjudication of bankruptcy until the expiration of two months after the filing the petition, surely an execution creditor, who had notice of the filing of the petition, would be bound to observe that nothing could be done with the goods until the expiration of the two months. *Green v. Laurie* (1 Exch. 335), which

was decided on a corresponding section in the Insolvent Act, 5 & 6 Vict. c. 122, is very much in point. The 76th section of the present Act is inartificially drawn. It says the filing a petition shall be accounted and adjudged conclusive evidence of an act of bankruptcy, provided a petition for adjudication of bankruptcy shall be filed within two months after the petition for arrangement is dismissed; and provided also that no adjudication shall be made until after the petition for arrangement shall have been dismissed. In this case those conditions have been complied with, and consequently we have what the statute says shall be conclusive evidence of an act of bankruptcy. I therefore think that the notice served on the defendants was a valid notice of that act of bankruptcy.

WILDE, B. I am of the same opinion. The 76th section of the Bankrupt Act says that the filing a petition for arrangement shall, under certain circumstances, be an act of bankruptcy from the time of filing it. Here those circumstances have happened; therefore there was an act of bankruptcy from the time of filing the petition, and the only [709] question is whether the defendants had notice of that act of bankruptcy. It is said that, though they had notice of an act of bankruptcy, they had not notice within the meaning of the 133rd section, because at the time the notice was given they did not know whether the filing the petition would turn out to be an act of bankruptcy. But to put such a construction on the 76th section would do violence to its language, for it expressly says that if a petition for arrangement is filed and certain events occur, the filing the petition shall be an act of bankruptcy from the time of filing the petition. On the plain words of the statute, I think that this rule ought to be discharged.

Rule discharged.

SYMONDS v. PAIN AND OTHERS. May 2, 1861.—The master of a steam-tug, of which the defendants were owners, was employed by the plaintiff to tow his smack out of a harbour. In so doing the smack was stranded through the alleged negligence of the master. The plaintiff had on previous occasions hired the defendants' steam-tug, and on paying the charge had received a receipt, upon the back of which was printed a notice that the defendants would not be answerable for damage occasioned by any supposed negligence of their servants. Held, that it was a question for the jury whether the contract was made on the terms printed on the back of the receipts.

[S. C. 30 L. J. Ex. 256. Referred to, *Reg. v. Dennis*, [1894] 2 Q. B. 464.]

The declaration stated, that in consideration that the plaintiff, at the request of the defendants, would retain and employ the defendants to tow a certain fishing-smack of the plaintiff from Yarmouth harbour out to sea, for reward to the defendants in that behalf, the defendants promised the plaintiff to tow the said smack in a careful, skilful and proper manner: that the plaintiff, confiding in the said promise, employed the defendants to tow the said smack upon the terms aforesaid, for such reward as aforesaid; and although the defendants accepted and entered upon the said retainer and employment, and under the same did tow the said smack, and the plaintiff had done all things, and all times had elapsed, necessary to entitle the plaintiff to have the defendants so to tow the said smack in a careful, skilful and proper manner, yet the defendants omitted so to do, and by their carelessness, negligence and unskilfulness in [710] that behalf the said smack became and was improperly detached from the said tug by which the defendants were so towing the same, and was run in and driven upon a sand bank, and became stranded and damaged, &c.

Pleas. First: non-assumpsit. Secondly: that the plaintiff did not retain and employ the defendants, nor did the defendants accept and enter upon the said retainer and employment as alleged. Thirdly: a traverse of the breach. Issues thereon.

At the trial, before Pollock, C. B., at the last Norfolk Spring Assizes, the following facts appeared:—The plaintiff was owner of a fishing-smack called the "Agenoria," and the defendants were owners of a steam-tug called the "Florence Nightingale." On the 21st of November last, the plaintiff requested the master of the steam-tug to tow his smack out of Great Yarmouth harbour to sea. The master took the smack in tow together with a schooner and a lugger, the smack being next to the tug, and proceeded with them out of the harbour. Before they were clear of the harbour, the

master improperly, as the plaintiff alleged, cast off the tow-rope which was attached to his smack, and in consequence it was stranded. The plaintiff, on cross-examination, admitted that on previous occasions he had employed the defendants' tugs to tow his smack out to sea, and that he had received from the defendants printed receipts for their charges in the following form :—

“Mr.

“Dr. to owners of ‘Volunteer’ and ‘Florence Nightingale’ Steamers,
Chesapeake and Andrew Woodhouse.

“To towing

“Received

“Office at S. J. Hill's, Shipchandler, South Quay.

“N.B.—The owners will feel particularly obliged by payment on delivery of this bill.

[711] “The owners of the above steam-tugs are not responsible for any damage done by the vessels towed either to themselves or others.”

On the back of these receipts were printed the rates charged for towing and the following notice :—

“To Shipowners, Fishing-owners, Shipmasters and Others.

“The owners of the ‘Volunteer’ and ‘Florence Nightingale’ steam-tugs respectfully give further notice, that on and after the 1st day of April, 1859, they will tow vessels, boats or other craft, by the above named steam-tugs, on the following conditions only, as heretofore. That they are not to be answerable or accountable for any loss or damage whatever, which may happen to or be occasioned by any vessel, boat or craft, or any of the cargoes on board the same, whilst such vessel, boat or craft are in tow of either of the above steam-tugs, in the river or at sea, and whether arising from or occasioned by any supposed negligence or default of them or their servants, or defects or imperfections in the said steam-tugs, or either of them, or the machinery, or any other part of the same, or any delays, stoppage or slackness of the speed of the same, however occasioned or for what purpose, wheresoever taking place; and that the owner or persons interested in the vessels, boats or crafts, or the cargoes on board the same, so towing, undertake to bear, satisfy and indemnify the said tug-owners against the same. All vessels waiting to be towed to be booked, and towing money paid at the tug-office.

“SAMUEL JOHN HILL, Shipchandler, South Quay,
“Great Yarmouth, April 18, 1859.”

The plaintiff said that he had no recollection of having read the notice, or even of having looked at the back of the receipts, and that the notice had never been brought to his knowledge in any other way. The defendants' charge for towing the plaintiff's smack was 7s. 6d.

[712] At the conclusion of the plaintiff's case, the Lord Chief Baron expressed an opinion that the evidence did not prove the contract alleged in the declaration: that the contract was upon the terms of the notice, and that the plaintiff, having the means of knowledge, in point of law had knowledge of the notice: that he knew he was dealing with a servant of the defendants, and who therefore had only a limited authority and could not contract except on the terms of the notice; and that it was evident the defendants did not undertake, for the charge of 7s. 6d., to be insurers against accidents to the vessels they towed. The plaintiff was then nonsuited.

Bulwer, in the present term (April 16), obtained a rule nisi for a new trial on the ground of misdirection, namely, that evidence in support of the issues was given in the plaintiff's favour, which ought to have been left to the jury: that the jury ought to have been asked what the contract between the parties was, and whether the plaintiff was bound by the terms of the notice on the back of the receipts: that the jury ought to have been told that, even assuming the plaintiff to have contracted on the terms of the notice, nevertheless a breach of the contract was proved.

O'Malley and Keane shewed cause. The question is, whether the learned Judge was right in withdrawing from the jury the question whether the contract was made on the terms mentioned on the back of the receipt. This is not the case of a common carrier. There was no common law obligation on the defendants to tow the plaintiff's vessel, but the liability depends on contract. Then, what were the terms of the contract proved, and was there any evidence that the defendants authorized such a contract? The contract declared on is a contract simpliciter to use due care and skill in towing the plaintiff's vessel. Such a contract [713] would be implied by law from the previous dealing between the parties; but the contract which the defendants entered into was upon the terms printed on the back of the receipts. It cannot be supposed that they meant to be insurers against accident, when they only charged 7s. 6d. for the towing. The plaintiff had several of these receipts; and he cannot cast a responsibility on defendants by not reading them. He had the means of knowledge, which, in law, is knowledge. If a letter is sent containing a notice, though the person to whom it is sent may not choose to read it, it is nevertheless a notice. [Martin, B. It was a question for the jury whether the contract was on the terms to be collected from these documents.] The Judge would be bound to tell the jury, as a matter of law, that the contract was on those terms. The master of the steam-tug was an agent with limited authority, and could only contract on the terms of the notice. [Pollock, C. B. The notice might have been made more public, or the defendants might have directed the masters of their vessels to call the attention of persons employing them to the terms of the notice.] The plaintiff having several of these receipts containing the notice, the case is the same as if notice had been given him by word of mouth. The question whether there was any evidence of the contract alleged in the declaration was a question for the Judge, and he has rightly decided that there was none.

Bulwer and J. Cherry appeared to support the rule, but were not called upon to argue.

MARTIN, B. I am of opinion that the rule should be absolute. The declaration is in the common form against the owners of a steam-tug for negligence in towing the plaintiff's vessel out to sea. On the cross-examination of [714] the plaintiff some receipts were put into his hands, upon the back of which was printed a notice of the terms upon which the defendants did business, and it was contended that the contract was made upon those terms, and that the defendants were entitled to a verdict, or the plaintiff ought to be nonsuited, on the ground of variance. I am of opinion that it was a question for the jury what was the contract which the plaintiff and defendants entered into, and that it was not a question of law for the Judge to decide. Whether the plaintiff had knowledge of the notice by reason of having the receipts was essentially a question of fact, and ought not to have been withdrawn from the consideration of the jury.

BRAMWELL, B. I am also of opinion that there ought to be a new trial; but I am still inclined to think that if the jury had done their duty they must have found in accordance with my lord's direction. Mr. O'Malley admits that the contract alleged in the declaration is one which would be implied by law from the relation between the parties, and that the master of the tug would have authority to enter into the usual contract for towing vessels; but of course it is competent to the defendants to shew that no such contract was entered into. For that purpose they put into the hands of the plaintiff certain papers, partly printed and partly written, and which, it was said, contained the terms of the contract; and the plaintiff having admitted that he had many of those documents in his possession, it was contended that he must be taken to have a knowledge of their contents. If, indeed, upon the employment of the steam-tug, a paper containing the terms upon which the defendants towed vessels had been put into the hands of the plaintiff—no matter whether the whole or a part only was printed, or whether on the front or back of the [715] paper—the plaintiff would have been bound by those terms. Here, however, the document given to the plaintiff was not the contract, but a receipt, and it may be that he never looked at the terms, for no man is under any obligation to read a printed notice on the back of a receipt. I therefore think that the circumstance of having those receipts is not equivalent to knowledge. Suppose a tradesman sends a customer a circular, which the latter throws into the fire without reading it, but afterwards goes to the tradesman's shop and purchases some goods, could the tradesman say,

"You have had my circular, and know my terms of dealing, and the purchase was made on those terms"? He certainly could not, as there was no obligation to read the circular. If the defendants only did their work, as they contend, on the terms printed on the back of those receipts, it was a matter of fact for the jury whether the plaintiff could have received them without those terms being brought to his knowledge.

WILDE, B. I concur, with reluctance, in making the rule absolute. I say with reluctance, because substantial justice was done at the trial in nonsuiting the plaintiff; for it is impossible to believe that he did not know that the defendants meant to protect themselves by the notice when they did the work for such a trifling charge. I agree with my brother Bramwell that most probably the jury would have found that the contract was made on the terms contained in the notice; but, as a matter of strict law, I think there was evidence of a contract without condition, and also evidence of a qualification of that contract, and the question what was the real contract ought to have been submitted to the jury.

POLLOCK, C. B. I doubt whether the evidence fully [716] justified the view I took at the trial; but had it gone further, and shewn that these notices were stuck up on the wharves or otherwise made public, I should have thought the matter clear. If the notice had been on the face of a document by which the defendants undertook to perform the service, there could have been no doubt; but it was on the back of receipts which the plaintiff was under no obligation to read. The declaration alleges the ordinary contract which the law would imply from the employment, and the question is whether such a contract was proved. If the case had turned solely on that, I should not have been disposed to grant a new trial any more than I should in an undefended case, because the jury were not asked whether they found for the plaintiff or the defendant. But, in reality, the contest at the trial was, not that these notices were not given by the defendants, but that, notwithstanding the notices, and notwithstanding proof that the plaintiff was cognizant of them, the defendants were liable. However, upon the question of evidence, to which my attention was not so particularly called at the trial as it has now been, I think the rule ought to be absolute, though, if notice is brought home to the plaintiff, I do not see how it can be successfully contended that the defendants are not exonerated.

Rule absolute.(a)

[717] IN THE MATTER OF FERNANDES, a Prisoner, &c. April, 23 1861.—A Court of assize is a superior Court; and consequently, in a warrant of commitment by a Judge of assize for contempt, the adjudication of contempt may be general, and the particular circumstances need not be set out.

[S. C. 30 L. J. Ex. 321; 7 Jur. (N. S.) 529; 9 W. R. 559; 4 L. T. 296: in Common Pleas, 10 C. B. (N. S.) 3; 142 E. R. 349 (with note).]

In November, 1859, Joze Luis Fernandes was examined as a witness before the Commissioners appointed under a commission of her Majesty to inquire into certain corrupt practices at the election for the borough of Wakefield in April, 1859.

On the 25th day of January, 1860, the Commissioners granted him their certificate in these words:—"Certificate to witness. Wakefield Election Inquiry Commission: Whereas a commission, dated the 20th of August, A.D. 1859, was issued under the 15 & 16 Vict. c. 57, directed to us G. Pigott, W. H. Willes and W. Slade, appointing us Commissioners to make inquiry under the said Act, into the existence of corrupt practices at elections for members to serve in parliament for the borough of Wakefield: And whereas, in pursuance of the said commission, we have proceeded with the said inquiry under the said Act, and in the progress of such inquiry and of the proceed-

(a) The cause was again tried before Erle, C. J., at the Norwich Summer Assizes, 1861, when the defendants proved that, before the cause of action arose, they had caused bills to be posted about the quays and public houses at Yarmouth frequented by fishermen, containing a notice similar to that printed on the back of the receipts. The learned Judge left it to the jury to say whether the contract between the plaintiff and defendants was made on those terms, and, the jury having found in the affirmative, the plaintiff elected to be nonsuited.

ings connected therewith J. L. Fernandes has been examined by us as a witness, and has given evidence before us touching such corrupt practices as aforesaid: Now we, the said G. Pigott, W. H. Willes and W. Slade hereby certify under our hands that the said J. L. Fernandes has, upon his examination, made a true disclosure touching all things to which he has been examined within the meaning and intent of the 9th and 10th sections of the said Act. Given under our hands the 28th day of January, A.D. 1860.—G. Pigott, W. H. Willes, W. Slade.”

A criminal information for bribery at the said election, which was subsequently filed against one John Barff Charles-[718]-worth, came on for trial, before Hill, J., at the Yorkshire Spring Assizes in 1861. On that occasion J. L. Fernandes was present in obedience to a subpoena to attend and give evidence on behalf of her Majesty on the information, and was examined as a witness. In the course of his examination the following question was put to him by the Solicitor General, who conducted the prosecution:—

“Did you receive any money from the defendant John Barff Charlesworth in the month of April 1859?”

The witness declined to answer the question, stating that he had been advised by counsel that he was not bound to do so.

The Solicitor General asked the witness if he had been examined before the Commissioners, and whether he had received a certificate. The certificate and the commission under the sign manual of her Majesty were then put in.

The learned Judge, after consulting Keating, J., stated that having considered the question whether the witness would be exposed to any peril by reason of answering the question proposed to him, they were both of opinion that he would be free from all penal actions, forfeitures, punishments, disabilities, incapacity, criminal proceedings of every kind and sort by reason of the certificate which had been granted to him, upon any matter connected with corrupt proceedings at the Wakefield election, and that he was bound to answer the question.

The witness stated that he had been advised that the certificate was no sufficient indemnity against an impeachment by the House of Commons.

The learned Judge stated that in his opinion it was. The witness however persisted in his refusal to answer, notwithstanding repeated remonstrances and warnings by the Court. The learned Judge then said that no other course was left him than to state that, the evidence of the witness being material to the prosecution which was before the [719] Court, he well knowing that fact, had sought to evade giving the benefit of his testimony to the administration of justice, in a way which shewed that he was firmly persuaded that he would be in no peril if he did answer the question. His lordship therefore adjudged the witness guilty of contempt, and sentenced him for that contempt to be imprisoned for the period of six calendar months unless sooner discharged by competent authority, and to pay a fine of 500*l.*, and be further imprisoned until that fine was paid.

The Associate then ordered the gaoler to take the witness into custody.

The following is a copy of the warrant of commitment:—

“Yorkshire to wit.—At the Assizes, held at the Castle of York, in and for the said county, on Thursday, the 7th day of March, in the 24th year of the reign, &c., and in the year of our Lord 1861, before the Honorable Sir Hugh Hill, Knight, and the Honorable Sir Henry Singer Keating, Knight, two of her Majesty’s Justices assigned to take the said assizes according to the statute,” &c.

“*The Queen v. John Barff Charlesworth.*—On the trial of the information against the defendant, for bribery alleged to have been committed by him on the election of a Burgess to serve in parliament for the borough of Wakefield, J. L. Fernandes, a witness produced, sworn, and examined on behalf of the Crown, having refused to answer a certain question touching the matter in issue in the said information, put to him by her Majesty’s Solicitor General, of counsel for the Crown in that behalf, and this Court having adjudged that the said J. L. Fernandes was bound by law to answer the said question, and having required him so to do, he wilfully, and in contempt of the Court, refused to answer the said question, and he having wilfully persisted and still so persisting in such his refusal, the said Court doth therefore adjudge that the said J. L. Fernandes has been and is guilty of a contempt of Court; and the [720] said Court doth order and adjudge that the said J. L. Fernandes be for such his contempt

committed, and he is hereby committed, to the custody of the sheriff of the said county of York, and to his keeper of her Majesty's gaol of the Castle of York in and for the said county, to be there detained and kept in safe custody for the term of six calendar months from the day and year first above mentioned. And the said Court doth further order and adjudge that the said J. L. Fernandes, also for such his contempt, shall and do pay to our said lady the Queen the sum of 500l., and that he be further detained in the custody aforesaid until the said sum of 500l. shall have been paid.

"By the Court.

"BELL, Associate."

On affidavits stating the above facts, setting out the opinion of counsel referred to, and alleging that the witness really and conscientiously believed that answering the question would have a tendency to accuse himself; that he had no intention of doing more than to stand on what he believed were his legal rights, and that he was not called upon to shew cause why sentence should not be passed upon him.

Bovill moved for a writ of habeas corpus to bring up the body of J. L. Fernandes in order that he might be discharged from custody. (a)¹ First: the prisoner is liable to be impeached by the House of Commons, notwithstanding the certificate, whether the offence of bribery is a high crime and misdemeanor at common law or only by statute. [Pollock, C. B., referred to 4 Black. Comm. p. 259, and *Rex v. Flower* (8 T. R. 314). Bramwell, B. We ought to hear the warrant of commitment read and see if it is objectionable.] The warrant is defective. [Wilde, B., referred to *Gosset v. Howard* (10 Q. B. 359, 411).] The warrant is simply headed, "At the [721] Assizes held at the Castle of York, in and for the said county, &c., before Sir H. Hill and Sir H. S. Keating, two of her Majesty's justices assigned to take the said assizes according to the statute." The Judges have several commissions, viz., oyer and terminer, general gaol delivery, of assize and nisi prius by the statute of West. 2, 13 Edw. 1, c. 30, and of the peace. Not only the Judges but the serjeants and Queen's counsel are joined in these commissions. Any Commissioner may fine and imprison if the Judge at nisi prius has such power. A Court so constituted cannot issue warrants in a general form; it is a Court of limited jurisdiction deriving its authority from the commission, and its commitments should therefore shew on the face of them that the Court had jurisdiction. In *Harrison v. Wright* (13 M. & W. 816), that rule was applied to the case of a Judge making an order under the Interpleader Act, 1 & 2 Wm. 4, c. 58. Even the steward of a Court leet may fine and imprison. In commitments by the superior Courts at Westminster or by the High Court of Parliament, it is not necessary to state the cause of the commitment; but in commitments by inferior Courts it is always necessary to state the cause of the commitment, in order that the Courts at Westminster may be able to judge of the sufficiency of the cause. That the authority of a Judge of assize depends on the commission under which he is acting appears from *Bullock v. Parsons* (2 Salk. 454. He also referred to 4 Inst. 162, 168): per Holt, C. J. In Bacon's Abridg. Courts (D.), it is said:—"The most general division of our Courts is into such as are of record or not; those of record are again divided into such as are supreme, superior and inferior. . . . Superior Courts of record are again those that are more principal or less principal; the more principal ones are the Lords House in Parliament, the Chancery, King's Bench, [722] Common Pleas and Exchequer; and by Hale, such are the justices itinerant ad communia placita et ad placita forestæ. The less principal ones are such as are held by commission of gaol delivery, oyer and terminer, assize, nisi prius, &c., by custom or charter, as the Courts of the counties palatine of Lancaster, Chester, Durham, or by virtue of acts of parliament and the King's commission, as the Court of sewers, justices of the peace, &c." Commissioners of sewers have power to hold Courts and assess fines. In *Bushell's case* (a)² it was held that a general form of commitment by a Court of oyer and terminer was insufficient: that, "the commitment and return pursuing it being in itself too general and uncertain, the Court ought not implicitly to think that the commitment was *re verâ* for cause particular

(a)¹ April 19. Before Pollock, C. B., Martin, B., Bramwell, B., and Wilde, B.

(a)² Vaughan, 135, 138, 140. He also referred to *Bushell's case*, 1 Mod. 119, and *Bushell v. Starling*, 3 Keb. 322.

and sufficient enough, because it was the act of the Court of sessions" in London. In the present case the commitment is not signed by a judge or serjeant. In *Bushell's case* it was suggested that the commitment might have been made by an alderman. So, here, it might have been a commitment by a counsel whose name was in the commission. The commitment should have set out the facts so as to shew that the Court arrived at a proper conclusion. In *Vaughan's Reports*, p. 154, four instances are given where, upon habeas corpus, the Court of Common Pleas discharged prisoners committed by other Courts upon the insufficiency of the return only. In *The Earl of Shaftesbury's case* (1 Mod. 144, 157) the Earl having been committed by the House of Lords for a high contempt against the House, though the warrant did not express the nature of the contempt, nor the place where it was committed, nor the time when it was committed, nor whether it was on a conviction [723] or accusation only, the Court of King's Bench refused to discharge him by habeas corpus. But Sir T. Jones, J., said, "Such a return made by an ordinary Court of justice would have been ill and uncertain." If the Court had no power to make a general warrant, the rule as stated by Lord Denman in *Howard v. Gosset* (10 Q. B. 359; see p. 407, and per Coleridge, J., p. 381), applies, viz., that "at common law every warrant must speak for itself, and must shew two things, a good cause for depriving the party named of his liberty, and some lawful period for his confinement." It is true, that in the case of a warrant of commitment by the Speaker of the House of Commons for contempt, it is not necessary to shew the nature of the contempt; but that is because "credit is given (which in the case of an inferior jurisdiction would not be) to the House of Commons that they would not commit without a sufficient cause": per Williams, J. (10 Q. B. 401, 402), *Brass Crosby's case* (2 W. Black. 754, 757). [Wilde, B. I am not aware that in any of the cases which arose out of *Stockdale v. Hansard* (9 A. & E. 1) it was said that in this respect Parliament is of higher jurisdiction than the superior Courts at Westminster.] In *Regina v. Paty and Others* (2 Ld. Raym. 1105) Gould, J., held that "the return being of a commitment by the House of Commons, which is superior to this Court (Queen's Bench), it is not reversible for form." The power to compel the witness to answer the question being a special statutory power, the nature of the power should have been stated, according to the principle acted upon in *Harrison v. Wright* (13 M. & W. 816, 819), *Christie v. Unwin* (11 A. & E. 373), and *Brancker v. Molyneux* (4 Man. & G. 226). The prisoner having been committed for a refusal to answer a particular question, the question should have [724] been set out in order to enable the Court to judge whether it was a lawful question, according to the rule adverted to by Parke, J., in *Ex parte Leake* (9 B. & C. 234, 240), and established in *Thomlinson's case* (12 Rep. 104). It cannot be collected from the expression "the Court having adjudged," and the signature "By the Court; Bell, Associate," by what Court the prisoner was adjudged guilty of contempt. [Pollock, C. B. The heading is the same as that of an order of reference. Martin, B. It is the same as that of the calendar signed by the Judge which warrants the execution of a prisoner found guilty of murder. Pollock, C. B. The legal authority to the sheriff to execute a prisoner is the sentence pronounced in open Court, which he is supposed personally to hear. Charles Ratcliffe, the brother of Lord Derwentwater, was executed on Tower Hill by an ordinary rule of Court.(c)] It does not appear whether the trial took place on the civil or criminal side of the Court. [Bramwell, B. In *Mansell v. The Queen* (8 E. & B. 54) the record set out the commission of the Judge. Wilde, B. It appears to have been before justices assigned to take the assizes. In *Rex v. Jolliffe* (4 T. R. 285, 292) it was held that an affidavit made at nisi prius, to put off the trial of an information, must be considered as taken under the authority of the Court of Queen's Bench.] It does not appear that this was an issue sent down from either of the superior Courts at Westminster. [Bramwell, B. We must take it for granted that the proceedings took place before Commissioners assigned to take [725] the assizes. It is not material that they had other Commissions.] Criminal trials take place under the commission of oyer and terminer and general gaol delivery; and it cannot be assumed that this trial did not take place under the commission of oyer and terminer. Even

(c) See "Proceedings at the Court of King's Bench, Westminster, Nov. 21, against Charles Ratcliffe, Esq., on a conviction and attainder of high treason in May 1716 before special Commissioners of oyer and terminer, 20 Geo. 2, A.D. 1746," 18 State Trials, 429. See also *Rex v. Rogers and Others*, 3 Burr. 1809.

supposing that a warrant of commitment in general terms would have sufficed, yet if a cause is stated in part, the whole ought to be set out so as to shew its sufficiency. Here the commitment does not shew that the question put to the witness was material. Next, assuming that the Court had not the same authority as the Courts at Westminster, the merits may be inquired into on affidavits: in *Re Bailey* (3 E. & B. 607). The witness was not bound to answer the question, because the production of the certificate would not protect him from impeachment by the House of Commons. It is for the witness, not for the Judge, to determine whether the answer may criminate him: *Fisher v. Ronalds* (12 C. B. 762), *Adams v. Lloyd* (3 H. & N. 351), *Regina v. Garbett* (2 C. & K. 495). The Court cannot compel a witness to answer, if the answer will criminate him, though he has been pardoned, or suffered punishment for the offence: *Reading's case*.^(e) [Wilde, B. Suppose a witness were asked, "Is your name Jones?" and said "I refuse to answer, because it may criminate me."] Lastly, the witness should have been called upon to say why he should not be deemed guilty of contempt.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. I have to deliver the judgment of the Court in this case, moved by Mr. Bovill on Friday last. The [726] motion was for a writ of habeas corpus to bring up the body of J. L. Fernandes in order to his being discharged on the ground that the commitment was illegal. The argument occupied a considerable time, and was founded on cases not very often cited, and some of ancient date. We had little doubt at the close that the writ ought not to issue, but we thought it desirable to take a short time to look into the state of the law upon the subject; and we are of opinion that no writ ought to be granted. The only question in reality before us is, whether the Court of Assize at York (which ordered this commitment,) is a superior or an inferior Court. If superior, it is not required to set out the cause of commitment with the particular circumstances; it is sufficient to state the cause generally; otherwise, if it be an inferior Court. To support the view of Mr. Bovill, that the Court of Assize is an inferior Court, two authorities, and only two, were cited. The first was Bacon's Abridgment, tit. "Courts," letter (D.), on referring to which it appears to be an authority directly the other way. Courts of record are there divided into Supreme, Superior, or Inferior. Superior Courts of record are more principal or less principal. The more principal are Parliament, Chancery, King's Bench, Common Pleas and Exchequer, with the justices itinerant. The less principal Courts are such as are held by commission of gaol delivery, oyer and terminer, assize, nisi prius, &c., and all these seem to stand upon the same footing. A Court of assize or of nisi prius is therefore a superior Court, though a less principal one, and, as such, has authority to commit for contempt, without setting forth the particulars of the contempt in respect of which the commitment is awarded.

The other authority was *Bushell's case*,—the comments upon which by Lord Ellenborough, in *Burdett v. Abbott* (14 East, 69, 70), [727] shew that for this purpose *Bushell's case* is no authority. It was cited to shew that an order of the Court of Commissioners at the Old Bailey ought to set out the cause of commitment, and therefore that that Court is to be considered an inferior Court. In page 70 Lord Ellenborough called Mr. Holroyd's attention to the fact that in *Bushell's case* it is laid down generally that the cause of commitment ought to appear (whether the Court be superior or inferior), and that the necessity of setting out the cause with particularity is not confined to the case of an inferior Court, but ought to be observed whether the Court be inferior or superior, and Mr. Holroyd admitted (as he could not avoid doing) that it was laid down generally. So far *Bushell's case* was wrong, though the decision was quite right.

The argument therefore fails to shew that the Court of Commissioners at the Old Bailey was an inferior Court. But there is an authority (not cited by Mr. Bovill) which goes directly to shew that that Court is a superior Court in the opinion of Lord Chief Justice Abbott, and also expressly of Mr. Baron Wood; it is *Rex v. Clement* (4 B. & Ald. 218; 11 Price, 70). In that case the Court at the Old Bailey had made an order forbidding any publication of a portion of certain trials till the whole were

(e) 7 Howell's State Trials, 259, 296. See however Taylor on Evidence, s. 1312, p. 1135, 2nd edition, and cases there cited.

concluded ; this order had been disobeyed by the defendant, and the Court fined him 500l. for his contempt in disobeying the order, not stating what was the order he had disobeyed. The presiding Judge at that session was Lord Chief Justice Abbott, and we have no doubt the order imposing the fine for the contempt of the defendant in disobeying the order was very carefully prepared. It is set out in full in the report in 11 Price, and it is an authority to shew that that Court at that time, Lord Chief Justice Abbott being the presiding Commissioner, claimed to act and [728] did act as a superior Court, not setting out the particulars of the contempt it proposed to punish. Indeed Baron Wood's judgment (p. 87) expressly speaks of it as a superior Court of record. Assuming, therefore, that the Court of assize is as superior Court, the law applicable to its commitments is not open to doubt. It was solemnly decided in the House of Lords in *Burdett v. Abbott* (5 Dow. 165, 200), as it had been in the Court below (14 East, 1) and in the case of *The Sheriff of Middlesex* (11 A. & E. 273), that in a warrant of commitment by a superior Court the adjudication of contempt may be general and the particular circumstances need not be set forth.

This is all that is necessary for the decision of this case. But we do not regret that Mr. Bovill brought under our notice the circumstances that took place at the trial, as it affords us an opportunity of saying that we entirely concur in the view taken by the learned Judge who presided, Mr. Justice Hill, as to the whole proceeding.

Writ refused.(d)

WESTHEAD AND OTHERS v. SPROSON AND PIPER. May 1, 1861.—P. being indebted to the plaintiffs, the defendants gave them the following guarantee :—"In consideration of your agreeing, at our request, from time to time to supply on credit to P. such goods as he may require and you may think fit to supply, we do hereby guarantee to you the payment of such sum as he now owes and may at any time, from time to time, owe to you." Held, that the guarantee did not contain any binding agreement on the part of the plaintiffs to supply goods to P., and that as they never did supply any goods to P. after the date of the guarantee, the defendants did not become liable to pay the existing debt of P.

[S. C. 30 L. J. Ex. 265 ; 7 Jur. (N. S.) 502 ; 9 W. R. 695 ; 4 L. T. 408. Applied, *Morrell v. Cowan*, 1877, 6 Ch. D. 171.]

Declaration. That on the 23rd of April, 1860, the defendant made and signed and delivered to the plaintiffs a guarantee in the words and figures following, that is to say :—"To Messrs. J. P. and E. Westhead & Co., &c. [729] Gentlemen,—In consideration of your agreeing, at our request, from time to time, to supply, on credit, to W. Piper such goods as he may require and you may think fit to supply, we, William Sproson and Joseph Piper, do hereby guarantee to you the due and regular payment of such sum and sums of money as he now owes, and may at any time and from time to time owe to you, on any account whatsoever, so that we shall not be answerable for more than four hundred pounds in respect of his dealings with you ; and we give you full liberty to extend the period of credit to the said William Piper and to hold over or renew any bills, notes or other securities you may at any time hold, and to grant him and the persons liable upon such bills, &c., any indulgence, &c. This guarantee to continue good notwithstanding any change in the parties constituting your firm. Dated, &c.—Wm. Sproson, Joseph Piper." That the persons to whom the said guarantee was addressed were and are the plaintiffs, and that the names William Sproson and Joseph Piper attached to the said guarantee were and are the names of the defendants. That although the plaintiffs thereupon accepted the said guarantee accordingly, and were always ready and willing, as the defendants well knew, to supply from time to time the said W. Piper on credit such goods as he might require, according to the terms of the said guarantee, and although at the time of the giving the said guarantee the said W. Piper owed to the plaintiffs, and there was then due and payable from him to the plaintiffs a large sum of money, to wit 400l., which said sum the said W. Piper ought to have paid to the plaintiffs before suit, and although the defendants before suit had notice of the premises and were requested by the plaintiffs to pay them the said sum of money, to wit 400l., yet the

(d) See *Ex parte Fernandez*, 10 C. B. N. S. 3.

defendants made default in paying such sum, and a part thereof, to wit 300l., is still unpaid, &c.

Demurrer and joinder therein.

[730] Phipson, in support of the demurrer. The claim against the sureties is for payment of monies due when the guarantee was given; but there is no consideration to support a promise to pay the past debt. It is not shewn that any new credit was given. The supposed consideration is the agreement. [Pollock, C. B. This is not such an agreement on the part of the plaintiffs as the law can enforce. It amounts only to an agreement to treat.] The words "such as you may think fit to supply," make the supply entirely optional on the part of the plaintiffs; therefore, if there is any agreement at all, it is only an agreement to supply just what the plaintiffs may please. In *White v. Woodward* (5 C. B. 810), the guarantee was similar in its terms to that in the present case, but there the plaintiff supplied goods. In the course of his judgment Cresswell, J., said—"I think that a sufficient consideration is disclosed on the face of the guarantee, and that it imports that the continued supply should be *bonâ fide* and to a reasonable extent." But that observation was not necessary to the decision, which is explained by Martin, B., in *Broom v. Batchelor* (1 H. & N. 255, 263), who said that the writing in *White v. Woodward* (5 C. B. 810) was construed as meaning "That, conditionally, on a real and *bonâ fide* future credit to be given by the plaintiff, the defendant contracts to guarantee." (He referred also to *Taylor v. Brewer* (1 M. & Sel. 290), and *Bryant v. Flight* (5 M. & W. 114): Per Parke, B.)

Mellish (with whom was John Henderson), for the plaintiffs. The consideration is not the supply of goods, but the entering into an agreement to supply them. The making such agreement is a perfectly valid consideration. *White v. Woodward* (5 C. B. 810) is in point. In the course of the [731] argument in that case it was suggested that there was no agreement to supply goods. Wilde, C. J., answered:—"Yes, there is. The amount is discretionary, but not the supply;" and it is evident that his judgment proceeds mainly upon that ground. In the present case, the fair meaning of the instrument is, that the plaintiffs bind themselves to go on dealing with W. Piper as they had done before; and the words "may think fit to supply" are inserted merely to give them the power of refusing if they have a reasonable ground, as, for instance, if W. Piper became insolvent. In *Oldershaw v. King* (2 H. & N. 399; S. C. in Error, ib. 517) the agreement was "in consideration of your forbearing to press for immediate payment;" and it was held that the promise was not too vague to constitute a consideration. (He also referred to *The Liverpool Borough Bank v. Eccles* (4 H. & N. 139).)

POLLOCK, C. B. We are all of opinion that, upon the true construction of this document, the plaintiffs entered into no binding agreement to supply goods to W. Piper. We must therefore construe the guarantee as being conditional, so that, in the event of the plaintiffs thinking fit to supply and supplying goods to W. Piper, there would be a performance of the condition, and the defendants would be bound, but not otherwise. This makes the agreement sensible and intelligible. The substance of Mr. Mellish's argument was that, inasmuch as the parties meant to agree to supply, we must put such a construction on the document as to make it a mutual agreement. But I have no doubt that what the plaintiffs meant in saying "we agree to supply," was to give a sort of colour to the promise to pay the existing debt, but without being under any obligation to supply any more goods.

[732] MARTIN, B. I also think that this document did not bind the plaintiffs to supply any goods. If the words are transposed thus:—"In consideration of your agreeing to supply W. Piper such goods as you may think fit and he may require," it becomes manifest that the supply is to depend entirely on the will of the plaintiffs, and that is no consideration for an agreement.

BRAMWELL, B. If it appeared that the plaintiffs agreed to do anything of value, there would be a good consideration for the guarantee. But the words "such goods as he may require," may be left out, because of course the plaintiffs could not supply any other. Then, striking out those words, what remedy would the defendants have on the supposed agreement for the non-supply of goods for a month or a year: what damages could they get? The only difficulty which I have arises out of the case of *Oldershaw v. King* (2 H. & N. 399; S. C. in Error, ib. 517). If it is possible to find out what is a reasonable time, I do not see why we should not be able to discover what is a reasonable supply of goods.

WILDE, B. I think that the true meaning of this instrument is, that if the plaintiffs supplied goods to W. Piper the guarantee should attach, but not otherwise. Judgment for the defendants.

[733] THE ATTORNEY GENERAL *v.* SIR FREDERICK WILLIAM POTTINGER, Baronet. April 24, 1861.—P., who was the son of Irish parents and an officer in the military service of the East India Company, on the Bombay Establishment, returned to England in 1840, having attained the regimental rank of colonel. By the regulations of the service officers who have attained that rank were permitted to reside where they pleased, subject to the Company's orders for their return to duty in India. P. continued in the service of the Company until his death. In 1841 he was appointed by her Majesty as Plenipotentiary in China, and accepted this appointment with consent of the East India Company. On his return in 1844, having been made a Privy Councillor, he purchased the ground lease of a house in Eaton Place, which he furnished and fitted up for his residence and resided there. Soon afterwards he was appointed Governor of the Cape of Good Hope, where he continued until 1848, when he was appointed Governor of Madras. He resided at Madras until 1854, when he returned to his house in Eaton Place, but afterwards went to other places in England, and ultimately to Malta, where he died. In his will and codicils he described himself as "of Eaton Place." During the last period of his life he frequently declared his intention of returning to India. Held, that the fact that P. continued in the service of the Company and was liable to be ordered to return to India did not prevent him from acquiring an English domicile on his return from China: that his subsequent residence as Governor at the Cape of Good Hope and at Madras did not involve the loss of his English domicile; and that, as he had acquired an English domicile on his return from China in 1844, subsequent expressions of intention to return to India, and even the going to Malta with the view of ultimately returning there, did not affect the domicile he had acquired in England.

[S. C. 30 L. J. Ex. 284; 7 Jur. (N. S.) 470; 9 W. R. 578; 4 L. T. 368. Referred to, *Winans v. Attorney-General*, [1904] A. C. 299.]

Information against the defendant, the executor of Sir Henry Pottinger, Baronet, deceased, for payment of legacy duty in respect of the testator's personal estate.

2. The testator died at Valetta, in the Island of Malta, in March, 1856.

3. He was the son of Irish parents, and born in Ireland, and remained in the United Kingdom till 1804, when he went to India as a cadet in the East India Company's Military Service, in which he continued down to the time of his death.

4. During the latter part of his residence in India he was employed as political Resident at different Native courts, and for his services in that capacity was made a baronet in 1836.

5. He continued to reside in India down to the year 1840, when he left Bombay (the presidency to which he was attached) and came to England (having attained the regimental rank of colonel in the Company's service), and [734] though he afterwards went out to India as Governor of Madras, he never returned to Bombay.

6. Officers who have attained the regimental rank of colonel in the Company's service are permitted to reside in this country on furlough, under the regulations contained in the despatch of the Court of Directors of the Company, dated the 25th of April, 1853, of which the following is an extract:—"That the officers last mentioned" viz., colonels of regiments of infantry and cavalry, and of the battalions of artillery, "be allowed to reside in Europe with their shares of off-reckonings and pay, subject always to the Court's orders, for their return to duty in India." And Sir James Melville, the late Secretary of the Company, in a letter dated the 16th of July, 1857, written by him by the authority of the court to J. Timm, Esquire, the Solicitor of Inland Revenue, enclosing a copy of the said extract, states as follows:—"I am desired to add, that officers so situated are eligible to be permitted to return to their duty in India, and that should they or any other officer, when on furlough in this country, refuse to obey an order issued by the Court of Directors for their return to duty in India, they would be liable to be brought to trial by court martial."

7. In 1841 the testator was sent by her Majesty to China as Plenipotentiary and Envoy Extraordinary from this country to the Chinese court. The defendant says that the testator accepted this appointment with the consent of the East India Company; and as evidence thereof, on inquiry being recently made on the subject at the East India Office by the defendant's solicitors, they received in reply the following letter:—"India Office, 16th Oct. 1860. Gentlemen,—I am directed by the Secretary of State for India in Council to acquaint you, in reply to your inquiry, that although nothing can be traced on the official records in proof that the late Sir H. Pottinger accepted the appointment of her [735] Majesty's Plenipotentiary to China in August 1861, with the consent of the late Court of Directors of the East India Company, there can be no doubt that the Chairman of the Court of Directors, in accordance with the practice in such cases was consulted with regard to such appointment and assented thereto. The gentleman who filled the office at that date is not living. Sir H. Pottinger attained the rank of Major General on the 23rd of November, 1841, and as officers of that rank in the India armies can reside where they please, it is not necessary that he should apply for leave of absence from India.—I am, Gentlemen, &c., W. E. B., Colonel."

8. The testator remained in China in the capacity of her Majesty's Plenipotentiary there down to the year 1844, when he returned to England. In November 1844 he was sworn a member of her Majesty's Privy Council, and a pension of 1500*l.* a year was soon afterwards granted to him by the Crown for his services in China.

9. Upon his return from China he purchased the ground lease of a dwelling-house in Eaton Place, which he furnished and fitted up for his residence and resided there until he again left England. Upon his leaving England the said dwelling-house, with the furniture therein, was let as a furnished house during his absence.

10. Not long after his return from China he was appointed Governor of the Cape of Good Hope, which appointment he immediately accepted and forthwith proceeded there. It does not appear that the consent of the East India Company was asked for his acceptance of the appointment, or that he in accepting it contravened the rules of the service. He remained at the Cape as Governor down to the year 1848, when, having been appointed by the East India Company to be Governor of the Presidency of Madras, he left the Cape of Good Hope and proceeded to Madras. He [736] held the office of Governor of Madras and continued to reside there down to the year 1854, when his term of service having expired he left India, and returned in the same year to England in shattered health, his departure from India having been delayed for some time in consequence of the death on his way to India of the Governor appointed to succeed him.

11. The testator remained in England from June 1854 to September 1855. He went first to his house in Eaton Place, but afterwards, with the view of improving his health, to other places in England, and ultimately to Malta.

12. On the 17th of July, 1855, during the time he was in England, he made his will, describing himself therein as "The Right Honorable Sir Henry Pottinger, Baronet, Lieutenant General, G.C.B., and Privy Councillor, of No. 67 Eaton Place, in the county of Middlesex."

13. The testator while at Valetta, in the island of Malta, whither he proceeded sometime in the autumn of 1855, made two codicils to his will. The first of such codicils, dated the 26th of December, 1855, purports to be executed by the testator, who is described therein as "The Right Honorable Sir Henry Pottinger, Baronet, Grand Cross of the Bath, one of her Majesty's Privy Councillors, now residing at this island of Malta," in the presence of a Notary Public and other witnesses, according to the law of Malta. The other of such codicils is dated the 26th of January, 1856, and the testator is therein described as of "No. 67 Eaton Place, London, Baronet, G.C.B., and one of her Majesty's Privy Council, and now residing in the city of La Valetta, in the island of Malta." Such last mentioned codicil was executed by him and attested by five witnesses, according to the law of Malta, and he thereby appointed certain persons executors of his will jointly with his eldest son the defendant. He died at La Valetta in the month of [737] March following, holding at the time of his death the rank and commission of a Lieutenant General in the Company's service.

14. The defendant alone proved the testator's will, &c., but has not paid legacy duty thereon, having been advised that the testator by his residence and service in India, and holding a commission to the day of his decease in the East India Company's

service, acquired a foreign or Indian domicile which he never afterwards lost, and that consequently no duty is payable.

15. The defendant says it was the testator's wish and intention, during his last stay in England, to return to India. And, as evidence thereof, on the 17th of June, 1854, the testator wrote a letter to his son-in-law, R. Stephens, in which, after dwelling on some unpleasant matters, he said, "I shall arrange my affairs to go back to India, where I can keep aloof from all such annoyances and miseries." And on the 27th of April, 1855, in a letter to his daughter, he said, "I still cling to the hope (a faint one I admit), that I shall benefit by the change that we may expect in the summer; if not, I have finally resolved to give up my house, and go abroad for good." And he frequently declared his intention of returning to reside in India; and even during his stay in Malta, a short time previously to his death, expressed the probability of proceeding thither in the ensuing spring.

16. Although the testator, in manner aforesaid, expressed his wish or intention to return to India, he never in fact gave up his house in Eaton Place.

Prayer (inter alia). That it may be declared that the testator was domiciled in England at the time of his death, and that legacy duty is payable to Her Majesty in respect of his personal estate, &c.

The defendant, by his answer, admitted the truth of the [738] statements in the information, but alleged that the testator was domiciled in India at the time of his death, relying on the statements in the information, and certain declarations contained in a schedule annexed, viz.:

Declaration of R. Stephens, son-in-law of the testator. I have frequently heard Sir H. Pottinger assert, that he would leave England and return to India, not only on account of domestic unhappiness and miseries which oppressed him, but also from his preference for a country where he had lived more than half a century. His letters to me on leaving India shewed his reluctance to return to England; and during the fourteen months he passed in this country, from June, 1854, to September, 1855, he was constantly wishing to return to India. And I firmly believe that one of the chief reasons which induced him to select Malta as a winter residence for the benefit of his health, was, that in the event of his recovery, he should be able with greater facility to proceed to India. The testator's daughter confirmed this, and stated, "I have frequently heard my father declare his intention of returning to reside in India: and even during his stay at Malta he expressed the probability of proceeding thither in the ensuing spring." The testator's sister-in-law and wife made a declaration, that during his last stay in England he had declared his intention of returning to India. And his solicitor made a declaration that to the best of his recollection, he never heard from Sir H. Pottinger a single observation leaving him to suppose that Sir H. Pottinger had relinquished the idea of returning to India.

The Attorney General and the Solicitor General (with whom were Sir F. Kelly, Mellor, and A. Hanson), argued for the Crown. Sir Henry Pottinger was born in Ireland, therefore that country was his domicile of origin. He subsequently [739] acquired an Indian domicile, but he returned from India after having obtained the regimental rank of colonel. It appears from the information and answer, that officers who have attained that rank are allowed to reside where they please, unless specially commanded to return to their military duties in India. The domicile of a person generally depends upon his voluntary choice and his own act in setting up his tabernacle in a particular place, but there is an exception with respect to officers in the military and naval service of the country, where there is an obligation to reside in a particular part of the empire. In such cases domicile does not result from the voluntary choice of the party. In the case of officers in the East Indian service, the ground on which it has been held that they are domiciled in India, is that they are under an obligation of being with their regiment in India: *Munroe v. Douglas* (5 Madd. 404), *Bruce v. Bruce* (2 Bos. & P. 229, n.). After they have attained the regimental rank of colonel, when the obligation of continuing with their regiment ceases, the reason for the rule ceases, and they are restored to perfect competency to elect a permanent place of abode; that is, in other words, they are at liberty to set up their domicile anywhere they please. The question then is, whether, when the testator came home and established himself in England, he did so *animo manendi*, that is, with the intent of remaining an indefinite time. In *Craigie v. Lewin* (3 Curt. Eccl. Rep. 435), the deceased, a native Scotchman, who had by employment in the military service of

the East India Company acquired a domicile in India, having attained the rank of lieutenant colonel, returned to Scotland on furlough, and in determining the question of his domicile, Sir Herbert Jenner Fust said that the question was, "did the deceased, when in 1837 or in 1839 he went to Scotland, go there *animo manendi*, [740] or did he merely go there to remain so long as the rules of the service would permit, and no longer?" And upon the facts he decided that the deceased was here for a temporary purpose only. Upon this principle it is submitted that Sir Henry Pottinger did acquire a domicile in England in 1844. He came back from China, accepted the office of a Privy Councillor, purchased a house in Eaton Place, and furnished it. That was a conclusive step. His connection with the East India Company had ceased, except that he was a Major General. As a member of the Privy Council he became liable at all times to be called upon to serve her Majesty in this country. He was afterwards appointed Governor of a colony. This however is a temporary office, ordinarily held for a period of six years. No man loses or acquires a domicile by the acceptance of such a temporary appointment. The acceptance of such an office implies the existence of an "*animus redeundi*." It is a general principle in the law of domicile, that the acceptance of a diplomatic or other office in the service of the Crown, to perform the duties of which a party leaves his country, does not at all affect the domicile he has at the time. [Pollock, C. B. In the case of a diplomatic employment the residence of the ambassador is deemed part of the dominions of his master.] There is no evidence to shew that Sir Henry Pottinger ever lost his English domicile. He returned to his home in Eaton Place, where, but for the state of his health, he would have continued to reside; and he died at Malta, whither he had gone for relief. The testator appears to have expressed some intention of returning to India; but expressions of intention to return to a particular place are of no avail for the purpose of changing the domicile, unless the party acts upon and fulfils his intention. If, instead of merely expressing his intention in words, the testator had broken up his establishment, discharged his servants, sold his house [741] in Eaton Place, and died on board ship on his return to India, it would not have been enough to revive his Indian domicile. *Lyall v. Paton* (25 L. J. Chan. 746).

Bovill and Trevor, for the defendant. Sir H. Pottinger lost his domicile of origin by entering into the Indian service and acquired an Indian domicile. The ground on which the testator's Indian domicile rests appears from *Craigie v. Lewin* (3 Curt. Eccl. Rep. 435), the marginal note of which is as follows:—"A native Scotchman having, by employment in the military service of the East India Company, acquired a domicile in India; held, that by his return to Scotland, *animo manendi*, his original domicile did not revive, the party still holding his commission and being liable to be called upon to return to India, and intending to return if called upon to do so." [Pollock, C. B. The case is rightly decided, but the marginal note is wrong. The ground of the decision was that the deceased had not returned to Scotland with the intention of residing there permanently.] It is for the Crown to shew affirmatively that the intention of the testator was not to return to his duty in India. Though absent on leave he was liable to be ordered to serve in India. [Pollock, C. B. As a privy councillor he was bound to be in attendance on her Majesty.] In *Cockrell v. Cockrell* (25 L. J. Chan. 730), the testator, an officer in the English Navy on half-pay, had obtained leave of absence and was residing in India; it was held, that whether the testator was domiciled in India or not depended upon the question whether he had the *animus manendi*. But there the only effect of absence without leave would have been that the testator would have forfeited his half-pay. Here, Sir H. Pottinger might have been tried by a court martial for disobedience if he had refused to [742] return to India when ordered. That liability was adverted to by the Court in *Hodgson v. De Beauchesne* (12 Moo. P. C. 285), where Dr. Lushington said—"Any officer after twenty years' service may retire on the full pay of his rank. But Colonel Hodgson did not retire." Neither did Sir H. Pottinger in the present case. It should be observed that Colonel Hodgson was a full colonel. There is a presumption that an officer will not relinquish or abandon the intention of returning to his duty. The fact that Sir Henry Pottinger asked, and obtained the consent of the East India Company before going to China, affords strong evidence of his intention to continue subject to their orders, and consequently not to abandon his Indian domicile. In *The Attorney General v. Dunn* (6 M. & W. 511), what the testator did in purchasing and furnishing a residence in the Papal States was stronger evidence of intent to acquire

a new domicile than what took place here with respect to the house in Eaton Place. That case shows that the mere fact of the purchase of a residence amounts to very little, unless there is an intention to abandon the previous domicile. That also appears from *Munro v. Munro* (7 Cl. & F. 842, 880). In 1848 the testator was appointed Governor of Madras, having, as it is submitted, down to that time an Indian domicile. Suppose he had died in India in or prior to 1853, could it be said that he had an English domicile. The Governor is not merely a civil officer; he has authority as a military commander in the absence of the Commander-in-Chief. As such Governor Sir H. Pottinger was in the service of the East India Company. [Pollock, C. B. Suppose before he went to Madras he had acquired an English domicile, is it contended that he lost it by accepting the appointment of Governor?] It is submitted that while on the one hand there is an entire absence of evidence of any [743] intention to abandon the Indian domicile, on the other there is evidence of the testator's intention to return to India. Reliance has been placed on the testator's description of himself in his will, but this description was unnecessary and cannot affect the question. In *Whicker v. Hume* (13 Beav. 366, 400), the testator described himself as "of the city of Edinburgh, but now residing at Paris." Lord Langdale said, that "no description which the testator could have given of himself would by itself have had any effect in determining his domicile." *In re Steer* (3 H. & N. 594) shews that no new domicile can be acquired by the animus without the factum, and, by parity of reasoning, the mere change of residence, without the animus, is not sufficient to establish a new domicile.

The Attorney General was not called upon to reply.

POLLOCK, C. B. The question is, whether Sir Henry Pottinger at the time of his decease was domiciled in England or in India. I am of opinion that he was domiciled in England. The only question that can be raised is, whether he acquired an English domicile on his return from China in 1844, when he took a house and furnished it, accepted honours from the Crown and placed himself in a situation to acquire an English domicile, if he was capable of doing so. It is clear that if an English domicile was acquired by him when he returned from China he did not afterwards lose it; for his appointment as Governor of the Cape of Good Hope would not involve the loss of an English domicile. And I am of the same opinion with respect to his acceptance of the office of Governor of Madras, for it was an appointment which might have been conferred upon any civil servant of the Crown, and had no connection with his military duty. There is no evidence that the testator, in going to Malta, had any intention to abandon [744] his English and resume his Indian domicile. The question then comes to this, whether he acquired an English domicile by what took place on his return from China in 1844. Supposing he had ceased to be a general officer in the Indian service there could have been no doubt about his domicile. The only doubt arises from this, that he continued in the service of the East India Company and might have been called upon at any time to serve in India. In *Hodgson v. De Beauchesne* (12 Moo. P. C. 285), which was cited to establish that, because an Indian officer continued liable to be called upon to serve in India he could not acquire an English domicile, the Court decided that such circumstances constituted a strong reason against such an officer acquiring a French domicile. But the distinction between a foreign and an English domicile is pointed out in the judgment, and Lord Cranworth, in the course of Dr. Phillimore's reply, said:—"If the deceased had gone to Scotland on furlough, and resided there as long as he did in France, it would be difficult to say that he had not acquired a Scotch domicile." Applying that to this case, I think that, notwithstanding Sir Henry Pottinger continued in the Indian army, his purchase of a dwelling house in Eaton Place, his continuing to hold it whilst absent from England, his return to it as his place of residence and his home, and his reference to it in his will as his residence abundantly establish his English domicile. Having once acquired it he did nothing to lose it, and the Crown is therefore entitled to legacy duty on that footing.

MARTIN, B. I am of the same opinion. For the purpose of enabling us to say that Sir Henry Pottinger renewed his British domicile, we must be satisfied that when he returned to England in 1840, he came home with the intention of spending the rest of his life in England. I have no doubt, that if called upon at any period he would [745] have gone to India. But I think that state of mind did not affect his intention, after having spent thirty-six years of his life in India, to return home

and spend the rest of his days with his wife and family in this country. There would have been strong evidence for a jury that he came back to remain here though liable to be ordered to return to India. He had acquired a high reputation and attained great eminence, and might fairly have expected to be employed in the public service. He was made a Major General in 1841. It may be that this rank gave him a right to remain in England. However I will assume that it did not; that he might have been called upon to return to his duty in India, and that he would have gone back if called upon. He remained in England until 1844, and while here bought the lease of a dwelling-house. I agree that the mere purchase of a house may be an ambiguous act, and in many cases a very immaterial circumstance in considering the question of domicile. But I think it was not so here. After this he was appointed Governor of Madras; that, as I collect from a statement in paragraph 10, was an appointment for a fixed time. He remained there during his term of service and then returned to England. Mr. Bovill contended that there was nothing to shew that he did not resume his Indian domicile. He went there as much an Englishman as Lord Elgin did, who at one time held the same appointment. In his last will he describes himself as "Privy Counsellor, of No. 67 Eaton Place, Belgrave Square, in the county of Middlesex." Perhaps this taken alone is not a matter of great weight, and under some circumstances is of hardly any importance. But coupled with the other circumstances of the present case, it is almost as strong a declaration as he could make, that he was "Sir Henry Pottinger, Baronet, &c., of No. 67 Eaton Place, in the [746] county of Middlesex," temporarily residing in the Island of Malta. There is, therefore, a strong declaration in a very solemn matter of his own view of his domicile. It would be cogent evidence to lay before a jury that he came back to England to resume a British domicile; and I cannot doubt that such was his intention, though he may have meant, if called upon to serve, to return to India. It was urged that there are circumstances in the case to shew the contrary. I can understand that some unpleasant circumstances had occurred which induced Sir H. Pottinger to form an intention of leaving the place where he was subjected to annoyance of a painful character; but such intention is nothing like a change of domicile. On another point I felt some difficulty until the Solicitor General referred to the case of *Lyall v. Paton* (25 L. J. Chan. 746), because I am in doubt whether the testator intended to go back to India when he went to Malta.

BRAMWELL, B. I think that this is a plain case. The question is where was the testator domiciled at the time of his death, and to determine that we must first ascertain the facts, and then the intent of the testator. The testator returned from China in 1844, when he purchased a house in Eaton Place, Belgrave Square, as his permanent residence, and furnished it. If the testator had not been in the service of the East India Company, if he had been a merchant, and there had been no evidence of subsequent intention to change his domicile, there would have been no doubt about the case—we should have had the *factum* with the intention. But I agree with Mr. Bovill that we must look to all the facts down to the last moment of his life. I will assume that the testator might have been ordered to return to India, [747] and we ought not to infer that he would do anything contrary to his duty. In *Hodgson v. De Beauchesne* (12 Moo. P. C. 285) the Court held that if a general officer in the East India Company's service established a domicile in France, it would be inconsistent with the duty which required him to be where he could be called upon. But, as the Lord Chief Baron has shewn, that doctrine does not apply if the domicile to be acquired is in England. Would it have been in any respect contrary to the duty of Sir Henry Pottinger to establish a domicile in England? I think certainly not; because, by the rules of the service, he was at liberty to come back to England and reside there. Therefore the reason in the case referred to has no application here. It is evident therefore to my mind that had Sir H. Pottinger died before he went to Madras, we should have had the *factum* and the intention clear without any difficulty. With respect to the intention, I think that it is a mistake to suppose that a person must absolutely intend one of two things; it may be that he has no absolute intention of doing either. In the present case it may be that the testator did not contemplate going back to India. If suddenly appealed to he might have said, "I never thought of it." But it is very likely he may have intended to do so if an occasion arose. But many a man may have in his mind an

intention to do what would be very much for his benefit, as, for instance, to accept high office abroad, if the occasion should arise, but would that prevent him acquiring a domicile here? I can easily understand that Sir Henry Pottinger contemplated the possibility of his being again employed in India; but that is immaterial. He intended to reside here, where he had taken up his residence permanently, or (as I should perhaps say with the Attorney General, as being a more [748] correct expression than that which I used in *Steer's case* (3 H. & N. 594)), for an indefinite time. That he had abandoned his Indian domicile is manifest from the fact that he had accepted the office of Governor of the Cape of Good Hope. If the evidence had stopped there, it would appear that when he originally returned to England and came to reside in Eaton Place he intended to remain an indefinite time; so that there would have been the factum and the intention, without any evidence to the contrary. There is no evidence of any intention to return to India until 1855, when some family differences appear to have arisen. Then does what he says in 1855 indicate what was his intention in 1854? I think not. I infer from his letters that new circumstances had arisen, and the expressions contained in them do not indicate any original intention not to reside an indefinite time in this country. He says, "I shall arrange my affairs and go back to India." I do not believe that he went to Valetta with the intention of returning to India, though he may have thought that if he did return he would be nearer to India at Valetta. I think then that there was both the factum and the intention to establish an English domicile. Mr. Bovill ingeniously suggested that, taking separately each fact which goes to shew this, there is little or nothing in it. That may be true; but the facts taken altogether are strong evidence. Mr. Bovill asked, "If Sir Henry Pottinger had died at Madras would he have had an English domicile?" To that I answer, yes. He had acquired an English domicile in 1844, and the acceptance of the Governorship of Madras did not effect it. I think that he had no final intention to abandon his English domicile, and that there is no evidence of the factum and the intention of changing it for an Indian domicile.

Decree accordingly.

[749] TUPLING v. WARD.(a) Feb. 25, 1861.—In an action for libel, the Court will not permit the plaintiff to exhibit interrogatories to the defendant, the answers to which, if in the affirmative, would tend to shew that he composed or published the libel, and would therefore criminate him.

[S. C. 30 L. J. Ex. 222; 7 Jur. (N. S.) 314; 9 W. R. 482; 4 L. T. 20. Commented on, *Bartlett v. Lewis*, 1862, 12 C. B. (N. S.) 262. Applied, *Edmunds v. Greenwood*, 1868, L. R. 4 C. P. 74. Referred to, *Villeboisnet v. Tobin*, 1869, L. R. 4 C. P. 189; *Hill v. Campbell*, 1875, L. R. 10 C. P. 238.]

T. Jones, in last Hilary Term, had obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to exhibit interrogatories to the defendant, pursuant to the Common Law Procedure Act, 1854.

The declaration stated that the plaintiff was an accountant, and that the defendant, intending to insult the plaintiff and bring him into contempt, and to cause people to believe that he was an hypocritical, fraudulent, tricky and contemptible person composed and published of and concerning the plaintiff, as such accountant, in the form of an article called "Cheating the Gallows," contained in a book called "The Diary of an Ex-Detective," the false, &c., matter following:—"Cheating the gallows" (setting out the libel, which ended with the words), "At any rate Tupling had succeeded in cheating the gallows," &c.

The defendant was the publisher of the book in question, and the interrogatories proposed to be administered were as to whether the defendant had composed the article complained of; whether he knew who composed it; whether "Charles Martel," the name on the title page, was real or fictitious; whether the defendant had been, or expected to be, indemnified; with other questions of that kind.

Joseph Phillips shewed cause.(b) The questions proposed in this case are such

(a) Decided in last Hilary Vacation.

(b) In Hilary Term, Jan. 29. Before Martin, B., and Wilde, B.

that, if answered in the affirmative, the answers would expose the defendant to a criminal prosecution. It is now established that interrogatories can only be administered in those cases in which, on bill filed, a Court of equity would enforce discovery. *Whately v. Crowter* (5 E. & B. 712), *Edwards v. Wakefield* (6 E. & B. 464), *Moor v. Roberts* (2 C. B. N. S. 671). If the interrogatories are objectionable on the ground that they do not fall within this rule, they must be altogether disallowed. No discovery could be obtained in equity in aid of an action of libel. A bill filed for that purpose would be demurrable: Mitford's Pleadings in Chancery, 194, 5th ed. No argument can be founded on the practice at nisi prius of putting a question to a witness and allowing him either to answer it or not as he thinks fit, because the 51st section of the Common Law Procedure Act, 1854, refers to discovery in equity. If it be contended that the statute contemplates that the defendant may refuse to answer in a case like the present, and if reliance be placed on the expression that "any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought," shall be deemed to have committed a contempt, the answer is, that this provision was probably meant to apply to cases in which interrogatories, proper in themselves, have been exhibited, but where, from some cause within his own knowledge, the party interrogated may be entitled to refuse to answer. [Martin, B. Many of these questions are wholly irrelevant in an action against the defendant, the publisher of the book.]

T. Jones, in support of the rule. The admissibility of interrogatories such as those now sought to be administered to the defendant was decided in *Osborn v. The London Dock Company* (10 Exch. 698), and that case has never been overruled. It was an action of detinue and trover for wine and casks. Interrogatories were allowed, the object of which was to shew that the defendants had a defence to the action on [751] the ground that fraudulent practices had been resorted to with respect to the substitution, by third persons, of other wine in the place of that deposited with the defendants, and that the plaintiff was a party to the fraud. Notwithstanding an affidavit by the plaintiff's attorney that if the plaintiff was a party to such proceedings he would be liable to be indicted for the same, Alderson, B., said:—"The proceeding is analogous to that of the examination of a witness at a trial at nisi prius. It seems to me that the same rule should be followed." Parke, B. said:—"The plaintiff must be put on his oath, and when he finds any question pinch him, he must object to it." And, again, Alderson, B., said:—"If the law be that laid down in *Fisher v. Ronalds* (12 C. B. 762), his (plaintiff's) bare statement that the question has such effect will be a sufficient objection to the question. The system introduced by this statute is an improvement upon the method of proceedings by bill of discovery." The language of the latter part of the 51st section expressly indicates that such is the proper mode of objecting to questions which tend to criminate. The 50th section is not limited to cases where the party is entitled to the production of documents for the purpose of discovery. Its language is "for the purpose of discovery or otherwise." In *Boyle v. Wiseman* (10 Exch. 647) it was held that a party to a suit cannot object to be sworn and examined on the ground that the only relevant question which could be put to him would tend to criminate him, but must be sworn, and on his oath claim his privilege. [Keane, amicus curiæ, referred to a case of *Simpson v. Carter*,^(c) where, in an [752] action for slander, the Court of Queen's Bench allowed interrogatories to be administered to a plaintiff, leaving it to him, if he thought fit, to refuse to answer, Lord Campbell, C. J., saying that the plaintiff might be glad of an opportunity of denying upon oath the offences imputed to him. Wilde, B. There is a distinction between the language of the 50th and 51st sections. In the 50th it is, "to the production of which he is entitled for the purpose of discovery or otherwise;" in the 51st, "as to which discovery may be sought." He also referred to *Mahon v. Ellis and Others* (10 Irish Com. Law Rep. 120).] The answers will be material with respect to the question of damages, and the plaintiff is entitled to have the benefit of the defendant's refusal to answer.

(c) Q. B. Mich. Term, Nov. 16, 1857. There is no report of this case; but the *Law Times*, vol. 30, p. 133, contains the following notice of it:—

"*Simpson v. Carter*. Edwin James, for the plaintiff, consented to answer interrogatories proposed. Sir F. Thesiger and Keane, contra." That was probably so, or the case would have been reported.

Cur. adv. vult.

MARTIN, B., now said,—We have considered this matter, and are all of opinion that the rule ought to be discharged.

The action is for a libel, published in a book called "The Diary of an Ex-Detective," in which it was alleged that the defendant had imputed to the plaintiff some grave offence. It was proposed to administer to the defendant a number of interrogatories as to whether he composed the article complained of, whether he knew who composed it, whether the name on the title page was real or fictitious, whether he had been, or expected to be, indemnified; with other questions of that kind.

We are all of opinion that, in the exercise of the authority and discretion given to us by the 51st section of the Common Law Procedure Act, 1854, such interrogatories ought not to be allowed. It was scarcely contended that the defendant was bound to answer them; but it was urged that the interrogatories ought to be administered, leaving the defendant to refuse to answer if he thought fit.

Without laying down any general rule on the subject, we [753] think that, in cases of this kind, it would be unfair to submit questions which a party is clearly not bound to answer; the object being either to compel him to answer when not bound, or to refuse, and so create a prejudice against him. We therefore think that these interrogatories ought not to be allowed.

It may be that some of them are free from objection, but the Lord Chief Baron, in delivering judgment in a case in this Court, (a) said that the parties must come with proper interrogatories, and not require the Court to select from a large number those which ought to be allowed; the practical effect of such proceeding being that the party generally gets much more than he is entitled to.

Rule discharged.

THE QUEEN, on the Prosecution of Mappin and Another, *Respondents*, YOULE, *Appellant*. April 29, 1861.—By memorandum in writing Y. agreed to serve M. as a cutler for three years, and M. agreed to employ him and pay him for his work according to a schedule of prices. Having quitted his service during the term, he was convicted under the 4 Geo. 4, c. 34, and imprisoned for twenty-one days, for unlawfully absenting himself from his service. After his discharge from prison he did not return to the service of M., but went and worked elsewhere. On a second information laid against him for unlawfully absenting himself from the service, it was proved to the satisfaction of the justices that on the first occasion he absented himself on account of a difference with his master as to the scale of prices; that when, after his discharge from prison, he refused to return, he was advised by his attorney that he was not bound to do so; and the justices stated that they thought it very probable that he bona fide believed what his attorney told him. The justices convicted him under the 6 Geo. 3, c. 25, for unlawfully absenting himself, and sentenced him to one month's imprisonment. On a case stated by the justices under the 20 & 21 Viet. c. 43: Held, that the conviction could not be sustained.—Per Pollock, C. B., and Bramwell, B., dubitante Martin, B., because the defendant in refusing to return appeared to have been acting bona fide in the exercise of a supposed right.—Per Pollock, C. B., and Martin, B., dubitante Bramwell, B., because the provisions of the 6 Geo. 3, c. 25, s. 4, relating to this matter, are repealed or superseded by the 4 Geo. 4, c. 34.—Per Pollock, C. B., and Martin, B., dissente Bramwell, B., because the defendant having been once convicted for a departure with intent to leave his service altogether, could not be convicted a second time under the 6 Geo. 3, c. 25, s. 4.

[S. C. 30 L. J. M. C. 234; 9 W. R. 637; 4 L. T. 299. Referred to, *Unwin v. Clarke*, 1866, L. R. 1 Q. B. 424.]

This was an information by E. Mappin and J. C. Mappin, of Sheffield, cutlers, against Robert Youle; for that [754] he did, on the 19th of December last, by memorandum in writing, contract to serve E. Mappin and J. C. Mappin, as a journeyman in the business of a spring-knife cutler, for three years from the 19th of December last, at and for wages, at certain prices referred to in the said memorandum; and

(a) *Robson v. Crawley*, 2 H. & N. 766.

having entered into the service according to his contract, had been, in the execution of the said contract, and otherwise respecting the same, guilty of a misdemeanor; for that he did, on the 29th day of August last, before the term of his said contract was completed, unlawfully absent himself from his said service, without leave or lawful excuse, and without his said masters' consent, and neglected to fulfil the conditions of the said contract, contrary to the statutes in that case made &c.; and after hearing the parties &c., the justices &c., did thereupon convict the said R. Youle of having, on the 29th of August, at &c., without notice, and before the term of his said contract was completed, unlawfully, without the consent of his said masters or either of them, and without any just or lawful excuse, absented himself from his said service, and of having from thence unlawfully continued absent from such service, and of not having fulfilled his said contract, contrary to the form of the statute (6 Geo. 3, c. 25), entitled "An Act for better regulating apprentices and persons working under contract;" and did adjudge him to be imprisoned in the house of correction for the space of one month.

The defendant, being dissatisfied with this determination, as being erroneous in point of law, the justices stated a case (in substance) as follows:—

The defendant was brought before us on the 13th of September, 1860, when the following documents were put in and proved.

An agreement, dated the 19th of December, 1859, [755] between R. Youle and E. and J. C. Mappin: "R. Youle doth hereby hire himself to and agree to work for E. and J. C. Mappin, as a cutler, for the term of three years from the date hereof, &c., during all which time the said R. Youle shall and will diligently and wholly employ and apply himself in the service of E. and J. C. Mappin, and shall not work for nor assist any other person or persons, &c. In consideration whereof E. and J. C. Mappin do hereby hire and agree fully to employ R. Youle in the capacity and for the term aforesaid, and to pay him for the work which he shall do under this agreement," according to a statement of prices, &c. (Then came a proviso for the determination of the agreement at the end of the second year, in which case R. Youle was to pay all money he might then owe.) "Signed for self and E. Mappin,—J. C. Mappin, Robt. Youle."

Then followed an agreement stating the prices of the work,—three shillings and ninepence for fourteen knives, &c., signed by R. Youle.

It was proved that the defendant entered the service under the agreement and was absent from his service on the 29th of August, 1860, the day named in the information, and had not returned to his service after that day. That the defendant was found by one Golding, the manager of the plaintiffs' works, on the 11th of September, 1860, working at a manufactory which was not a part of Messrs. Mappin's manufactory; when, on being asked how it was he had not come to his work now that he was out of prison, he said that he had offered to pay Messrs. Mappin the money he owed them, and he thought that Messrs. Mappin ought to accept it and release him; he was "earning more money there, and did not want to return."

It was proved that, on the complaint of Messrs. Mappin, he had been committed by a justice of the borough to the [756] house of correction at Wakefield, on the 3rd of August, 1860, for twenty-one days, for having absented himself from their service under the agreement; and that he had not returned to his service since he was discharged from prison.

In answer to a question put by us to the defendant, he said he would not return to Messrs. Mappin's service in consequence of his solicitor having advised him not to return.

The first warrant of committal was in substance as follows:—

To the constable of the borough of Sheffield, &c., and the keeper of the House of Correction, &c. Whereas information and complaint were, on the 1st of August, A.D. 1860, made upon oath before J. S., Esquire, &c.; for that R. Youle, of &c., did, at the borough aforesaid, on the 19th of December last, by memorandum in writing, contract to serve E. Mappin and J. C. Mappin, of &c., as a journeyman, in the business of a spring-knife cutler, for the term of three years from the 19th of December, subject to a proviso &c., at and for wages &c.; and having entered into his said service, according to his said contract, had been, in the execution of the said contract and otherwise respecting the same, guilty of a misdemeanor, for that he did, on the 7th day of July last, and still did, unlawfully absent himself from his said service without leave or lawful excuse and without his said masters' consent, and neglected to fulfil

the conditions of the said contract, contrary to the statute in that case made and provided: And whereas R. Youle this day appeared before me, H. W., Esq., one of her Majesty's justices &c., in pursuance of a summons issued by J. S., Esq., for that purpose; and, having examined the proofs &c., and the nature of the said information and complaint, and the respective witnesses &c., I adjudge the [757] same to be true, and did therefore convict him, R. Youle, of the said offence, in pursuance of the statute &c.; and I did adjudge that the said R. Youle should be imprisoned &c., and be kept to hard labour for the space of twenty-one days, and that during that time the wages of the said R. Youle should abate. These are, therefore, to command you, &c. H. WILKINSON (L.S.).

The defendant's attorney contended, before the magistrates, that the defendant having been before convicted, and imprisoned for absenting himself from the service of Messrs. Mappin under the agreement, and not having returned to the service after the expiration of the imprisonment, the justices had no further jurisdiction, and that the defendant could not be again convicted and imprisoned for absenting himself from the service, inasmuch as it was one offence, which had been satisfied.

The justices were of opinion that the defendant was proved to be guilty of the offence charged, contrary to the statute, 6 Geo. 3, c. 25, and that the defendant was liable to be imprisoned for not returning after his imprisonment, but, on the contrary, advisedly absenting himself from the service of his masters, and working for others, and adjudged him to be imprisoned for one month.

If the Court is of opinion that the determination is erroneous in point of law, then the determination shall be reversed, &c.

The case came on for argument in Hilary Term (Jan. 16), when the Court sent it back to the justices to be restated on the following points:—

First, whether any evidence was given before the justices to shew whether the absence of Youle, in respect of which the first conviction took place, was a temporary absence or an absence with intention not to return at all, and not to fulfil the contract; and if there was, to state it, and the conclusions they drew from such evidence.

[758] Secondly, whether if, on the last occasion on which he refused to return to the service, he *bonâ fide* believed that he was not bound to return to the service in consequence of the previous conviction.

In the amended case the justices, after setting out more fully some of the evidence above referred to, stated:—From the above evidence and statement we conclude that the appellant, in the first instance, absented himself from his service by reason of some difference with his masters as to the scale of prices, &c. We also conclude that if the masters had acceded to his wishes in these respects, he was then willing to have returned to his work; otherwise not, &c. We also conclude that the appellant had not decided, in his own mind, before he was discharged from prison, whether, after such discharge, he would or would not return to his masters' service, or whether he would abide the result of further proceedings against him, after taking the advice of his solicitor. Secondly: We further state that on the last occasion when the appellant refused before us to return to his service, we have no doubt he was strongly advised before us, by his attorney, that he was not bound to return in consequence of the previous conviction, and that he was fully determined to have the point settled at law if he was able to raise the funds, &c., and we think it very probable he did *bonâ fide* believe that to be true which his adviser assured him was so.

Mellish, for the appellant. First, the case as now stated by the justices shews that the appellant *bonâ fide* believed that upon the principles stated in the judgment of the Lord Chief Baron in *Re Baker* (2 H. & N. 219, 248), he was not bound to return to his service. He cannot be convicted criminally for doing an act under a *bonâ fide* claim of right, even if he were mistaken. That appears from *Rider v. Wood* (2 El. & El. 338) [759] where the appellant had given a notice to terminate the engagement, which notice he intended to be good, and the Court held that, whether good or not, if he *bonâ fide* believed it to be so he could not be convicted for quitting the service in pursuance of it. [Wilde, B. There the appellant believed that he had complied with his contract, not that he could break it with impunity.] Secondly, the appellant was not compellable to return to his service. In *Re Baker* (2 H. & N. 219), the Lord Chief Baron expressed his opinion that the power to enforce the contract was put an end to by a conviction for quitting the service. [Martin, B. Suppose a workman

who has contracted to serve for five years, quits his service at the end of three months, does not the master, by taking proceedings against him before magistrates and procuring him to be imprisoned for unlawfully absenting himself from the service, elect his remedy? Can the justices, after that, punish the servant by repeated imprisonment, for the same offence, during the remaining four years? It would be a species of slavery if the workman were in such a position. The present conviction is under the 6 Geo. 3, c. 25, intituled "An Act for better regulating apprentices and persons working under contract." The first section of that Act recites that "persons employed in manufactories, frequently take apprentices who are very young, and for several years of their apprenticeships are rather a burthen than otherwise to their masters;" and that "it frequently happens that such apprentices, when they might be expected to be useful to their masters, absent themselves from their service:" it then enacts that, "if any apprentice shall absent himself from his master's service before the term of his apprenticeship shall be expired, every such apprentice shall, at any time or times thereafter, whenever he shall be found, be compelled to serve his master for so long a time as he shall have so absented himself from such [760] service, unless he shall make satisfaction, &c., and so, from time to time, as often as any such apprentice shall, without leave of his master, absent himself from his service before the term of his contract shall be fulfilled;" and if he shall refuse to serve or make satisfaction, it shall be lawful for a justice to commit him for any time not exceeding three months. The language of the 4th section (which relates to artificers not fulfilling their contracts), is different, as was pointed out by the Lord Chief Baron in *Re Baker* (2 H. & N. 219, 247). That case, however, turned upon the 4 Geo. 4, c. 34. Thirdly, this conviction is under the 6 Geo. 3, c. 25, s. 4, but the provisions of that section are superseded or repealed by the 4 Geo. 4, c. 34, which, after reciting the former Acts, states that "it is expedient to extend the powers of the said Acts." [Wilde, B. The 6 Geo. 3, c. 25, s. 4, does not mention servants in husbandry, and it applied to all contracts whether in writing or not.] The 6 Geo. 3, c. 25, subjects the party to a term of imprisonment in no less case than one month. The 4 Geo. 4, c. 34, s. 3, enables the justices to imprison for any time not exceeding three months, and to abate the wages, or, to punish the offender by abating the whole or any part of his wages. The provisions of the two Acts are, in many respects, plainly inconsistent.

Quain, in support of the conviction. In *Ex parte Baker* (7 E. & B. 697) the main point argued before the Court of Queen's Bench was whether, under the 4 Geo. 4, c. 34, the justices had power to convict a workman a second time for refusing altogether to return to his work after he had suffered imprisonment for absenting himself. Lord Campbell said, "I think a fresh offence was committed when the prisoner, after being liberated from imprisonment, did not return to the service, because the contract continued and he absented himself; that is a distinct offence from [761] the offence of which he was before convicted; and he is liable to be convicted for that, although he had not returned to the service in the meanwhile." Coleridge, J., said, "I think the doctrine contended for most unreasonable." And Erle, J., expressed himself to a similar effect. [Pollock, C. B. The difference of the language of the statutes, when dealing with apprentices and servants, appears not to have been pointed out in the argument in the Court of Queen's Bench. Wilde, B. The 6 Geo. 3, c. 25, was not referred to.] The legislature has always treated it as a matter of the utmost importance that servants should perform their contracts, because, from their inability to pay damages, there is practically no remedy against them by action for breach of contract. The object of the punishment is to compel performance of the contract; but if the contract is to be treated as determined by the imprisonment, the intention of the legislature will be defeated. The 20 Geo. 2, c. 19, s. 2, enabled the justices, on complaint made by any master against any servant, &c., concerning any misdemeanor, &c., to punish the offender by commitment, or otherwise by abating some part of his wages, or by discharging him. The 4 Geo. 4, c. 34, recites this Act, and does not repeal it; and in that statute also the power of discharging the servant is given as an alternative punishment. There is an Act relating to colliers, the 40 Geo. 3, c. 77, s. 3, by which on conviction the legislature expressly puts an end to the contract. Therefore, where the legislature intended that the contract should be determined by the conviction, it has expressly so provided. [Pollock, C. B. I do not say that the contract was at an end by the conviction, but that there could not be a second commitment. The case of *Ex parte Baker* (7 E. & B. 697), in the Court of Queen's Bench,

is no authority that the [762] magistrates can convict a second time under the 6 Geo. 3, c. 25. Martin, B. The clause relating to apprentices appears to contemplate the case of an apprentice absenting himself, returning to his master's service and afterwards again absenting himself.] There are several authorities which shew that the conviction of the servant for absenting himself does not put an end to the contract. In *Rex v. Barton-upon-Irwell* (2 M. & Sel. 329), where a servant under a yearly hiring served two months, and was then committed and imprisoned under the 20 Geo. 2, c. 19, for misbehaviour to his master, and after nine days imprisonment was, upon the application of the master discharged and returned to serve him as before, it was held that the commitment and imprisonment were not a dissolution of the contract, or such an interruption of the service as to prevent a settlement. Lord Ellenborough, C. J., there said, "It would be clearly against the policy of the law if the servant, by his own act of delinquency, should have the power of dissolving the contract. The justices have that power, but they have not exercised it." In *Rex v. Hallow* (2 B. & C. 739) it was held that a servant hired for a year who had been committed under the 20 Geo. 2, c. 19, must be considered as abiding in his master's service within the meaning of the 8 & 9 Wm. 3, c. 30. Bayley, J., there said, "the contract not being dissolved, if the servant were released from prison before the end of the year the master would be under the necessity of receiving him." And Holroyd, J., said: "the servant being imprisoned and punished as a servant, might have insisted on going back to his master, or the master might have compelled him to return, as soon as he was discharged out of custody." [Pollock, C. B. The wages of the servant would be payable during the period of imprisonment were it not for the abatement. As to the suggestion that the defendant had [763] no guilty intention at the time when he absented himself; he did so wilfully in order to get higher wages; and when he came before the justices on the last occasion, the attorney took it upon himself to advise him that he might rely on the opinion of a single Judge whose opinion differed from that of the majority of the Court, and from that expressed by the Court of Queen's Bench. The case is one to which the maxim "ignorantia juris neminem excusat" applies. The case of *Rider v. Wood* (2 El. & El. 338), where the appellant intended to perform his contract, is distinguishable, for in that case the mens rea was absent. Lastly, as to the point whether the 6 Geo. 3, c. 25, s. 4, is repealed by the 4 Geo. 4, c. 34, s. 3, Baron Watson, in his judgment in *Re Baker* (2 H. & N. 219), points out that an affirmative statute does not repeal an earlier Act on the same subject, unless they are plainly inconsistent with each other. Now it is submitted that there is a large class of cases to which the 6 Geo. 3, c. 25, applies, but the 4 Geo. 4, c. 34, s. 3, does not; as, for instance, in the case of piece work, where there can be no abatement of wages. Again, an appeal is given by the 6 Geo. 3, c. 25, but it is taken away if that statute is repealed. He also referred to *Willett, App., Boote, Resp.* (6 H. & N. 26).

Mellish replied.

POLLOCK, C. B. I am of opinion that this adjudication and conviction cannot be sustained, because it appears to me that the defendant acted with perfect bonâ fides, and that his determination not to return to his employment arose out of an honest opinion that the contract was at an end. The case of *Rider v. Wood* (2 El. & El. 338) shews that, under such circumstances, the defendant [764] ought not to have been convicted. My brother Wilde, who has left the Court, intimated that on this point he did not agree with me. Then, without discussing whether justices can interfere a second time on the refusal of a workman to return to his service when the first absence is merely of a temporary nature such as an attempt to take a holiday, I think that when the servant's conduct shews that he meant to quit the service altogether, the justices should treat it as an entire abandonment of the service, and punish him accordingly. Here the defendant's original departure from the service of his master was a departure with intent to leave it altogether and for ever. I think that the legislature intended that this should be dealt with as an entire and single offence. But, in addition to that, I find that this conviction took place under the 6 Geo. 3, c. 25, by which the justice is empowered to commit for a period not less than one month. In that respect, the statute 6 Geo. 3, c. 25, is repealed. For these reasons I am of opinion that the conviction cannot be supported.

MARTIN, B. I also think that the conviction under the statute 6 Geo. 3, c. 25, is bad. If a statute deals with a particular class of offences, and a subsequent Act is passed which deals with precisely the same offences, and a different punishment is

imposed by the later Act, I think that, in effect, the legislature has declared that the new Act shall be substituted for the earlier Act. That is the real and sensible meaning to be collected from the two Acts, if they are read and construed with reference to each other as any other written documents would be. I think, therefore, that justices must act on the 4 Geo. 4, c. 34, and cannot fall back on the 6 Geo. 3, c. 25. My brother Wilde intimated to me that he agreed with my lord and myself on this point.

[765] As to the question whether the defendant could be convicted a second time, I adhere to the opinion I expressed in *Re Baker* (2 H. & N. 219, 245. *Nota bene*, at p. 245, line two from the bottom, for "no" read "a"). I think that if a workman leaves his service intending never to return to it, the master may sue him at law; but, if so, he must treat the departure from the service as one entire breach, of which recovery in an action must be deemed a satisfaction whether the workman be rich or poor. Or, if he prefer it, the master may proceed under the statute, and then the offence is abandoning the service. That is an entire and single offence, which neither the master nor the servant can split into several offences; and when once adjudicated upon there is an end of it. As to the point that the defendant relied on the advice of his attorney, I prefer not to express any opinion upon it. It is difficult to say that a person who breaks the law shall be excused because he bona fide believes that he has a right to do so.

BRAMWELL, B. I incline to think, that upon the point whether the 6 Geo. 3, c. 25, so far as it relates to this matter is abrogated, the appellant is right, though I am not prepared to give a final opinion that the earlier enactment is repealed. Still I do not think it must be assumed that the 4 Geo. 4, c. 34, would not apply to the case of a man working by piece work. I desire to express no definite opinion on the point. As to the question whether a workman who absents himself can be convicted a second time under this statute, I think that he may. It is true that, generally speaking, breaches of contract are left to be dealt with as civil injuries by the ordinary tribunals; but the legislature has thought it necessary to make some exceptions, as in the case now under consideration, in the case of fraudulent bailees, and under the County Courts Acts, [766] where parties are subjected to imprisonment by way of punishment. Indeed I do not see why, if a person wilfully breaks a contract with the dishonest purpose of bettering himself (though, no doubt, generally speaking, such an act would not be called a crime), he should not be punished for it. The proceeding by action against a workman would be nugatory. The legislature has given to the workman countervailing privileges, by enabling him to avail himself of a cheap remedy before magistrates for his wages. Therefore I do not think it unreasonable that the master should have a similar remedy to compel the performance of his agreement. The cases shew that the contract is not terminated by the imprisonment. Indeed, that is manifest from the third section of the 4 Geo. 4, c. 34, which empowers the magistrates to punish or discharge the workman. That statute, therefore, contemplates that they may punish and not discharge. The master may say to the workman, "You have chosen to go, and shall not come back to by service." But the first offence may have been drunkenness for a day, and if the workman is punished for such an offence, why should the master lose his remedy during the continuance of the contract? No doubt, it would be a hard case if a workman should be again brought up after having suffered punishment for quitting the service; but the answer is, that no discreet magistrate would impose more than a nominal punishment for such an offence. Then as, under the 3rd section of the 4 Geo. 4, c. 34, there is power to punish a workman a second time for a second misdemeanor, I think there was the same power under the 6 Geo. 3, c. 25, s. 4. But, entertaining that opinion as to the policy of the Act, I should be sorry if the law was not as laid down in the case of *Rider v. Wood* (2 El. & El. 338), because if it were not it would be harsh and unrea- [767] sonable. It appears to me that the object of the statute was to punish persons for wilful breaches of contract. It would be a great hardship if, in cases where a workman quits his service, thinking he has a right to do so, the master should not be left to his common law remedy upon the contract. The Court of Queen's Bench held that the summary jurisdiction applies only in cases where the act is knowingly and wilfully done—where the workman knows he is doing wrong. That decision is entirely satisfactory to my mind, and the substance of it is that the statute is not intended to apply to cases where the workman is acting in the exercise of a supposed

right, but to punish and repress avowed and wilful breaches of contract. There are cases where a man does a prohibited act as to which no question of intention arises, as, for instance, in the case mentioned in the argument of bigamy committed by an Englishman after a divorce obtained in Scotland. Here, however, the justices find that the defendant was advised that he was not bound to return to his service, and they think it probable he really believed what he was so advised, and under these circumstances they ought not to have convicted him. It is not material on what ground he believed he had a right to continue absent from his service—it may have been a very foolish one; but if the justices do not find that he absented himself knowing he was doing wrong, one of the ingredients essential to a conviction is wanting. I incline to think that the conviction is bad on the ground that the 6 Geo. 3, c. 25, s. 4, is no longer in force. But I dissent from the view of my learned brothers on the other point.

Determination of the Justices reversed.

[768] JOHN WAKE, Executor of Wilkinson v. THOMAS HARROP AND J. C. HARROP. May 1, 1861.—To a declaration on a charter-party, alleging as a breach the refusal by the defendants to load a cargo, the defendants pleaded, as an equitable defence, that they entered into the charter-party solely as agents for A. D. and Co., and that, when the defendants signed the charter-party, it was agreed and understood between the plaintiff and the defendants that the defendants were only to sign the charter as such agents, so as to bind A. D. and Co., and were not to make themselves liable as principals for the performance of the charter: that they signed as follows:—"For A. D. and Co., of Messina. H. and Co. agents:" the defendants and the plaintiff *bonâ fide* believing at the time the charter was made, that the defendants having so signed would not be liable to be sued on the charter, notwithstanding the charter in the body thereof professed to be made between the plaintiff as owner of the one part and the defendants as freighters on the other; that the defendants had the power to bind A. D. and Co., and that the plaintiff was inequitably taking advantage of the mistake in drawing the charter. Held, that the plea shewed a good equitable answer to the action. And per Bramwell, B. *Semble*, that it was a good answer at law.

[S. C. 30 L. J. Ex. 273; 9 W. R. 788: affirmed 1862, 1 H. & C. 202.]

Declaration by the plaintiff, as executor of T. Wilkinson, stating that T. Wilkinson and the defendants agreed by charter-party that T. Wilkinson's ship, the "William Hutt," should proceed to one usual port in Sicily, as ordered at her outward port of discharge, say Venice, or as near thereto as she could get; and that the defendants should then load her with a complete cargo of sulphur in bulk, &c., which she should carry to Newcastle-upon-Tyne, and there deliver the same on payment of freight, seventeen shillings per ton of twenty hundred weight delivered; that the defendants should be allowed thirty running days for loading the said ship abroad and discharging at Newcastle, and ten days for demurrage, if required, at five pounds per day; that the defendants duly ordered the ship at her outward port of discharge to proceed to Catania; that T. Wilkinson did all things necessary to entitle him to have the agreed cargo loaded on board the ship at Catania and the time for so doing elapsed, yet the defendant made default in loading the agreed cargo, &c.

Plea, on equitable grounds. That the defendants entered into the charter-party solely as agents for A. Davidson and Co. of Messina; and that, before the defendants signed the [769] said charter, it was agreed and understood between and by T. Wilkinson and the defendants, that the defendants were only to sign the said charter as such agents as aforesaid, so as to bind the said A. Davidson and Co., and were not to make themselves liable as principals for the performance of the said charter; that they signed the charter-party in the following manner:—"For A. Davidson and Co., Messina, T. W. and J. C. Harrop and Co., agents;" they, the defendants, and T. Wilkinson *bonâ fide* believing at the time the said charter was signed, that the defendants having so signed the said charter would not be personally liable to be sued on the said charter as the charterers, notwithstanding the said charter in the body thereof professed to be made between T. Wilkinson as owner of the ship on the one part, and the defendants as merchants and freighters on the other part; that

the defendants had power to bind the said A. Davidson and Co. by signing the charter as their agents; that A. Davidson and Co. are bound by the said charter, and are liable to be sued for the breaches of the said charter in the declaration mentioned; and that the plaintiff is inequitably taking advantage of their mistake in drawing the said charter, so as to make the defendants personally liable as charterers contrary to the intention both of T. Wilkinson and the defendants, to maintain this action against the defendants.

Demurrer and joinder.

Manisty (with whom was Lewers), in support of the demurrer. By the terms of the charter-party declared on the defendants contracted personally. The effect of a contract similar in its terms to that now before the Court was considered by the Court of Queen's Bench in *Lennard v. Robinson* (5 E. & B. 125), where it was held that the defendants were [770] contracting parties, and that there was nothing in the signature to prevent them from being so. The plea alleges that the defendants did not contract except as agents, but if they wished to carry that intention into effect they should have expressed it in the body of the instrument, as in *Deslandes v. Gregory* (2 El. & El. 602). [Wilde, B., referred to *Mahony v. Kekule* (14 C. B. 390). Martin, B. There is an ambiguity in the form of the signature, and the demurrer admits that the contract was intended to have a particular meaning.] Though evidence is admissible to shew that a person is the real principal for the purpose of charging him, it is not so for the purpose of discharging one who appears as principal on the face of the contract: 2 Smith's Lead. Cas. p. 303, 4th ed., *Higgins v. Senior* (8 M. & W. 834), *Dale v. Humfrey* (E. B. & E. 1004). [Bramwell, B., referred to *Pym v. Campbell* (6 E. & B. 370). Pollock, C. B. Assuming that such evidence could not be given if the fact were disputed, here it is not denied. Suppose in the course of a trial a written instrument is put in by which it appears that the defendant is bound as principal, but the plaintiff admits that the defendant signed only as agent and not so as to render himself liable, would not effect be given to the admission? Here the plea states and the demurrer admits, that before signing the contract it was agreed that the defendants should sign only as agents.] If that statement be true, the defendants' remedy is to get the contract reformed. [Wilde, B. Why should not the defendants avail themselves of it as an equitable defence without having recourse to so inconvenient a remedy?] The plaintiff is entitled to a remedy against the principal, but on this agreement he cannot sue the principal because, knowing that Davidson and Co. were principals [771] and the defendants agents, the testator took an instrument which made the defendants responsible. [Martin, B. That does not entitle the plaintiff to hold the defendants liable, as on a contract into which they never entered.] According to the principle of the cases of *Perez v. Oleaga* (11 Exch. 506) and *Teede v. Johnson* (11 Exch. 840) an equitable defence is not allowable in a Court of common law, unless the party pleading it is entitled to unconditional relief. [Martin, B. Here we can afford complete relief.] The defendants are not entitled to relief without giving the plaintiff a remedy against Davidson and Co. There is no equity in relieving one party unless the other is put in the position in which it was agreed that he should stand. A decree that the defendants should go without day would not do complete and final justice between the parties. On that ground an equitable plea was held bad in *Wodehouse v. Farebrother* (5 E. & B. 277). The plea merely sets up a mistake in law, and it is laid down as a maxim of equity that though parties making a mistake of fact shall not be held bound by acts committed by them under such mistake, yet when they make a mistake in law they cannot afterwards be heard to say that the contract shall on that account be set aside: per Lord Abinger, *Marshall v. Collett* (1 Y. & C. C. C. 238).

Mellish, in support of the plea. The charter-party is drawn in a form which binds the defendants at law, but the plea affords a good equitable answer to the claim of the plaintiff. [Bramwell, B. The case of *Lennard v. Robinson* (5 E. & B. 125) is distinguishable from the present. The plea did not state, as here, what was the real agreement between the parties. It is consistent with the matters alleged in the plea in that case, that the plaintiff may have said to the [772] defendants, "I want your engagement." There is no allegation of mistake; and the Court thought that the reasonable construction was that the defendants were agents, but that they were to be liable.] That case only shews that on the face of this charter-party the defendants would be liable at law. The testator brought a charter-party to the defendants and requested them to execute it, telling them that they should not be held responsible,

and upon that footing the contract was made. It has been contended that a Court of equity will not give relief against a mistake in law. In Story's Equity Jurisprudence, s. 115, p. 133, 6th ed., that matter is discussed, and it is pointed out that a Court of equity will not "grant relief where a security becomes ineffectual, not by fraud or accident, or because it is not what the parties intended it to be, but because conforming to that intention the parties in executing it innocently mistook the law. . . . Equity has no authority to make agreements for the parties or to substitute one for another. If there had been any mistake in the instrument itself, so that it did not contain what the parties had agreed upon, that would have formed a very different case; for where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman either as to fact or law, does not fulfil that intention or violates it, equity will correct the mistake so as to produce a conformity of the instrument." When there is a mistake in an agreement, it is unnecessary to go to a Court of equity to reform it if the agreement has been wholly executed, and nothing remains to be done by either party: *Steele v. Haddock* (10 Exch. 643, 645), *Vorley v. Barrett* (1 C. B. N. S. 225), *Wood v. Dwarries* (11 Exch. 493), *Perez v. Oleaga* (11 Exch. 506, 511). [Wilde, B. In the last mentioned case, [773] if the agreement had been reformed the defendant would have continued liable.] In *Wodehouse v. Farebrother* (5 E. & B. 277), the Court held that the plea was not a good equitable defence, but they did not intimate that the decision might not have been otherwise if the defendant had brought the money actually due into Court. It must not be assumed that Davidson and Co. are not liable upon this charter-party. The principal may be liable as well as the agent on the same agreement. [Wilde, B. Mr. Manisty's contention is, that the principal cannot be sued if, the other party at the time of contract, knowing the principal, elects to contract with the agent.] In the present case if there was an election it was to contract with the principal.

Manisty, in reply, referred to *Minshull v. Oakes* (2 H. & N. 793); Story on Agency, s. 267, p. 345, 4th ed., and *Croome v. Lediard* (2 Myl. & K. 251).

POLLOCK, C. B. We are all of opinion that the plea is good, either at law or in equity. I think that it is good in equity. It professes to state that at the time of the execution of the agreement the defendants said, "We do not mean to make ourselves liable;" and that was assented to by the testator. I do not doubt but that if this were made out satisfactorily, a Court of equity would hold the defendants entitled to a perpetual injunction on the ground that the testator expressly renounced his rights against them. Under these circumstances the plaintiff had no right to sue the defendants, and never ought to have sued them. I do not agree that we are bound to find out some one against whom an action may be maintained. My brother Martin suggests that if the testator allowed the charter-party to be executed in such a form [774] that he could sue no one, it was his own fault. All we say is, that he was not entitled to sue the defendants.

MARTIN, B. I am of the same opinion. Assuming that the defendants are responsible at law, equity would give them relief. The plaintiff seeks to make them responsible on a charter-party executed by them. Before the instrument was executed it was agreed by the testator and the defendants that the defendants should only sign as agents, so as to bind Davidson and Co., but not to make themselves liable. The charter-party was signed in the following form:—"For A. Davidson and Co., S. W. and J. C. Harrop and Co., agents." As I have already observed, this is ambiguous; and though in a Court of law the defendants may be bound, I dare say that a person not being a lawyer would not so understand it. The charter-party is not under seal. In the body it professes to bind the defendants. But they would probably think that their responsibility depended upon the way in which they signed. The plea states that the testator and the defendants executed the charter-party, believing that the defendants would not be liable, that the defendants had power to bind Davidson and Co., and that they were bound; and that the plaintiff is taking an improper and inequitable advantage of the mistake in drawing the charter-party. If that is true, the plaintiff is taking a fraudulent advantage of the mistake. On these grounds I think that the defendants are entitled to absolute and unconditional relief.

BRAMWELL, B. I am also of opinion that the defendants are entitled to judgment. I was disposed to think the plea a good answer at law; but I entertain some doubt

on that point because Mr. Mellish did not urge it. It should be borne in mind that a written contract, [775] not under seal, is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to shew whether or not the written document is the binding record of the contract. Suppose agreements were prepared for the sale of two horses, one for 50l., and the other for 100l., and the buyer of one horse, by mistake, signed the contract for the other. The preliminary question would be, “Is this writing the record of the contract?” Again, suppose a person intending to become witness to a contract signed his name in the wrong place, and appeared to be the principal, the mistake might be shewn. In *Pym v. Campbell* (5 E. & B. 277) the Court of Queen’s Bench held, that it was open to the defendant to shew that an instrument, purporting to be an agreement signed by the defendants, was not intended to operate as an agreement. Here it is admitted that the defendants never agreed with the plaintiff’s testator, but that Davidson, through their agency, did. They say, “This paper was signed as the record of an agreement between Davidson and Co. and the testator, and not of any agreement between ourselves and the testator. There never was any valid agreement between the testator and ourselves.” It might be that the defendants so conducted themselves that the testator was entitled to say that he looked to them. But that is not so here, if I am right in my appreciation of the facts. In the body of the document the defendants appear to be personally bound; then comes the signature, which, but for the previous part, would seem to shew that the defendants signed for Davidson and Co.; and, as between the plaintiff and the defendants, I am [776] not sure that it might not be so read. The case of *Lennard v. Robinson* (5 E. & B. 125) is no authority that this plea does not afford a good defence at common law. There the plea alleged that the agreement was entered into by the defendants, by the authority and as agents for Schwedersky, and not otherwise. The plea said, in effect, that the plaintiff, knowing this, ought to have understood that the defendants were signing only as agents. The Court say that the plaintiffs may have known that the parties signing were agents, and yet intended that they should be bound. But the principle of that decision would not prevent the defendants from shewing that they never entered into any agreement at all—that all they did was to contract on behalf of others, and that if the agreement purports to record an agreement between themselves and Wilkinson it is a mistake, and Wilkinson knew it,—and that, in fact, it never was intended to be the record, or evidence of an agreement between Wilkinson and the defendant. I have already observed, that, at first sight, the agreement appears to bind the defendants; but there is, nevertheless, an ambiguity, as explaining which the plea may be good at common law. But if so, it is clearly good in equity. The plaintiff puts forward an agreement purporting to bind the defendant; the defendant says:—“It was so drawn up by mistake, and you are inequitably availing yourself of the mistake.” Mr. Manisty, for the plaintiff, said, “I am entitled to some agreement. Cancel this, and give me one binding other people.” But I think that the plaintiff cannot make this a condition of abandoning the agreement, which he ought never to have attempted to enforce.

WILDE, B. I am of opinion that there must be judgment for the defendants. I think that at law the contract bound the defendants. I cannot distinguish it from that in *Len-[777]-nard v. Robinson* (5 E. & B. 125). On the face of the agreement the defendants appear as principals. Then comes the question whether the plea on equitable grounds shews any defence. I think it does. Though the contract is so worded that in a Court of law it must be considered as binding the defendants, it was a mistake so to word it. It was understood by both parties that the principals only should be liable. The plea is that they thought that such was the effect of the contract: and I think it shews ground for relief in equity. The passages cited from Story’s Equity Jurisprudence satisfy me that the defendants are right on this point. Mr. Manisty argued that, if so, it does not follow that they can plead this matter as an equitable defence. He says, with good reason, that Courts of law will not allow as an equitable defence any matter which does not put an end to the right of the plaintiff to sue the defendant. Thus, if the plea sets up a contract on which the defendant would be in some way liable, it is insufficient. But such is not the case here. If the

mistake is corrected it would lead to the exoneration of the defendants. Then, he says, it would leave the plaintiff wholly without remedy against any one. For my own part, I am inclined to think that, on the contract as it stands, he has a remedy against Davidson and Co., but it is not necessary to decide that point, because, though the plaintiff may have no remedy against Davidson and Co. without getting the agreement reformed, the plea puts an end to all claims against the defendants whether there is a remedy against Davidson and Co. or not. I doubt whether, in applying the doctrine of equitable defences, we may not be giving them a wider operation than they have in Courts of equity. We constantly find Courts of equity saying they will interfere if ground for relief is shewn on satisfactory evidence. That is a principle on which a Court of equity is competent to act. But Courts of [778] common law must allow or disallow pleas without reference to the extent of proof by which they may be supported. However, I do not think myself justified in acting on a principle different from that hitherto adopted. I merely throw out the suggestion, and possibly some modification of the present practice may be introduced. Perhaps, according to the opinion expressed in *Luce v. Izod* (1 H. & N. 245, 246), it would be more satisfactory that the issue on such a plea should be tried not by a jury but by the Judge.

MARTIN, B. It strikes me that terms such as those mentioned in the case cited might reasonably be imposed as a condition of allowing the plea.

Judgment for the defendants.

ATKINSON v. DENBY. April 20, 1861.—The plaintiff, being in embarrassed circumstances, offered his creditors a composition of 5s. in the pound. The defendant, a creditor, refused to accept it unless the plaintiff paid him 50l., and gave him a bill of exchange for 108l. The other creditors would not accept the composition if the defendant did not. The plaintiff paid the defendant the 50l. and gave him the bill of exchange, and the defendant then executed the composition deed. Held, that the plaintiff might recover back the money in an action for money had and received. Per Pollock, C. B., Bramwell, B., and Wilde, B. Martin, B., dissentiente.

[S. C. 30 L. J. Ex. 360 : affirmed 1862, 7 H. & N. 934.]

Action for money had and received. Plea. Never indebted.

At the trial, before Martin, B., at the Middlesex Sittings, in Michaelmas Term, 1860, it appeared that the action was brought to recover 50l., paid by the plaintiff to the defendant under the following circumstances. In October, 1857, the plaintiff, a manufacturer, being in embarrassed circumstances, offered a composition to his creditors of 5s. in the pound, and a deed of composition was prepared for the purpose of carrying out the offer. The defendant, a creditor for 319l., refused to [779] accept that offer or to sign the deed of composition, saying he never would consent to do so unless he got something more. On the 13th of October the defendant and the plaintiff met at the office of the plaintiff's attorney, when the plaintiff and defendant went into a private room. The defendant pressed the plaintiff to give him 150l. in cash in addition to the 5s. in the pound, but eventually he agreed to take a bill at six months for 108l. and 50l. in cash. The defendant knew that several creditors were then waiting to see what he would do. The plaintiff gave the defendant 50l. and a bill for 108l. The defendant then signed the deed. Five creditors had previously executed it, and twenty signed subsequently to the signature of the defendant. The composition was paid.

The deed was as follows :—"To all to whom these presents shall come : We, who have hereunto set our hands and seals, being respectively creditors of J. Atkinson, of &c., send greeting. Whereas, the said J. Atkinson is indebted to us, his said creditors, in divers sums of money, which he is not able fully to satisfy and discharge ; and the said J. Atkinson hath proposed to us to pay us respectively the sum of 5s. in the pound upon, and in full satisfaction and discharge of, our respective debts : And whereas, we, the creditors of the said J. Atkinson, who have hereunto set our hands and seals, being satisfied of his inability to pay and discharge his said debts in full, have agreed, and do hereby respectively agree, to accept the said sum of 5s. in the pound upon our respective debts, in full payment satisfaction and discharge of all debts, dues and demand owing to us respectively up to the day of the date

hereof: Now, therefore, Know ye that, in consideration of the sum of 5s. in the pound on our respective debts to us severally paid by the said J. Atkinson on the execution hereof by us respectively, [780] the receipt whereof is hereby respectively acknowledged, and for divers other good causes and considerations us thereunto respectively moving, we, the said several creditors who have hereunto set our hands and seals, have and each and every of us hath remised, released and for ever discharged, and by these present do and every of us doth, for our and each of our heirs, &c., fully and absolutely remise, release and for ever discharge the said J. Atkinson, his heirs, &c., from and against all debts, claims, suits, &c., in respect of our said debts, or any cause, matter, or thing relating thereto. In witness," &c.

Upon these facts the defendant's counsel submitted that there was no evidence to go to the jury, and, the learned Judge being of that opinion, the plaintiff was nonsuited, leave being reserved to him to move to enter a verdict for 50l.

Overend, in the same term, obtained a rule for that purpose, on the ground that the money was paid under coercion.

Hawkins and Thrupp shewed cause (January 22 and April 20). This case falls within the rule that money paid voluntarily, and with a full knowledge of the facts, cannot be recovered back. The rule that money obtained by oppression or extortion may be recovered back has no application to this case. It applies to those cases only where there is some duty or right on the part of the person obtaining the money which is abused or unfairly exercised. Such, for instance, as where a collector of tolls has exacted more toll than he was entitled to, or where money is taken to compromise a *qui tam* action. Here, however, the defendant was under no obligation to accept less than the full amount of his debt. It was entirely a matter of free choice with him whether he would [781] do so or not. The composition deed was not a proceeding in bankruptcy, but a mere voluntary agreement between the parties. The defendant, in refusing to enter into this agreement except on his own terms, was, therefore, not oppressing the plaintiff. On that ground *Smith v. Bromley* (2 Doug. 695, n.) is distinguishable. [Martin, B. There it may be said that it was the duty of the creditors to sign the certificate, if a proper case, and that the consent ought not to have been bought. Wilde, B. That was not such a duty as could have been enforced at law or in equity. Pollock, C. B. If the deed is void, the defendant may keep the money. It is better to treat the contract to pay the 50l. as void, and the money as paid without consideration.] Money paid voluntarily in the nature of a gift cannot be recovered back. [Pollock, C. B. It is not a voluntary gift. Martin, B., referred to *Wilson v. Ray* (10 A. & E. 82). Wilde, B. That case seems to amount to no more than that the plaintiff, who had a legal defence of which he might have availed himself, did not do so. The principle of the cases relied on by the plaintiff is, that the party paying is under pressure: in *Wilson v. Ray* (10 A. & E. 82) the pressure was over at the time the money was paid.] In *Smith v. Cuff* (6 M. & Sel. 160) the money was not paid voluntarily. [Martin, B. In *Higgins v. Pitt* (4 Exch. 312, 323) the Court, referring to *Cockshott v. Bennett* (2 T. R. 763), point out that the agreement could not be enforced while *in fieri*.] In *Viner v. Hawkins* (9 Exch. 266) an insolvent debtor who was remanded under the 85th section of the 1 & 2 Vict. c. 110, having been arrested by the creditor at whose suit he was remanded, in order to obtain his discharge signed a consent to a Judge's order for payment of a certain sum down, and the remainder of the debt by instalments. He [782] paid that sum at the time he signed the consent, and was discharged; and it was held that, though the security was invalid, he could not recover back the money paid, since it was paid voluntarily. In the present case the money was not paid under duress, as it might have been contended was the case in *Viner v. Hawkins* (9 Exch. 266). The true criterion of coercion is to be found in a dictum of Lord Kenyon in *Fulham v. Down* (6 Esp. 26, n.), and adopted in *Valpy v. Manley* (1 C. B. 594, 602) by Tindal, C. J., who said: "Without going through the authorities, it is enough to say that this case falls within the exception in the dictum of Lord Kenyon in *Fulham v. Down*, that 'where a voluntary payment is made of an illegal demand, the party knowing the demand to be illegal, without an immediate or urgent necessity (or, unless to redeem or preserve your person or goods), it is not the subject of an action for money had and received'—a form of expression which clearly assumes that if there be an immediate and urgent necessity, or the payment is made for the purpose of redeeming or preserving one's person or goods, the right to bring this sort of action exists. Nor am I able to distinguish this case from *Snowdon v. Davis*

(1 Taunt. 359). I am not aware that there is any difficulty or impropriety in laying it down that where money is voluntarily paid, with full knowledge of all the circumstances, the party intending to give up his right, he cannot afterwards bring an action for money had and received; but that it is otherwise where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconveniences of having his goods sold." [Pollock, C. B. Is there any difference in principle between the case of a debtor giving a 50l. Bank of England note, and a [783] promissory note for 50l. not payable on demand? The tendency of modern legislation is to abolish all distinctions not founded on good sense.] The principle of the decisions that money paid under coercion may be recovered back, is that there was "an unlawful act on the part of the defendant and a necessity on the part of the plaintiff:" per Coleridge, J., in *Glynn v. Thomas* (11 Exch. 870, 879). The taking advantage of a man's situation does not, in every case, amount to coercion. *Smith v. Bromley* (2 Doug. 695, n.) is distinguishable from this case, for there the money was paid for signing a certificate, to which the bankrupt was entitled and which the creditor wrongfully refused to sign unless paid for it. That was, therefore, a case of oppression and the parties were not in *pari delicto*. [Martin, B. If the plaintiff had given the defendant fifty sovereigns, according to the argument on the other side no property would have passed, and trover might have been maintained for them.] The principle of the decision in *Wilson v. Ray* (10 A. & E. 82) was adopted by Tindal, C. J., in *Gibson v. Bruce* (3 Man. & G. 299). The result of the authorities on this subject is thus stated in 2 Wms. Saund., p. 137 k., note:—"Where a note so given has been negotiated by the creditor, and the holder has enforced payment from the insolvent, the latter may recover back the amount from the creditor, though, if he chooses to pay the note to the creditor himself, whether voluntarily or under compulsion of legal process, he cannot recover back the amount so paid." Moreover, the action for money had and received will not lie where the parties cannot be placed in *statu quo*. They also referred to *Bradshaw v. Bradshaw* (9 M. & W. 29), *Parker v. The Great Western Railway Company* (7 Man. & G. 253), and *Mallahew v. Hodgson* (16 Q. B. 689, 712).

[784] Overend and Cleasby, in support of the rule. The present case falls within the principle stated by Lord Ellenborough in *Smith v. Cuff* (6 M. & Sel. 160, 165), that "where money has been obtained extorsively and by oppression, and in fraud of the party's own act as it regards the other creditors," an action lies to recover it back. That is in conformity with the doctrine laid down in *Smith v. Bromley* (2 Doug. 695, 697, n.), where the action was brought to recover 40l., which had been paid to induce a creditor to sign the certificate of a bankrupt. Lord Mansfield said "it was iniquitous and illegal in the defendant to take, and therefore it was so to detain, this 40l. If a man makes use of what is in his own power to extort money from one in distress, it is certainly illegal and oppressive; and whether it was the bankrupt or his sister who paid the money it is the same thing. The taking money for signing certificates is either an oppression on the bankrupt or his family, or a fraud on his other creditors. It is a thing wrong in itself before any provision was made for it by statute." And again—"If the act is in itself immoral or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover." [Pollock, C. B. In *Smith v. Cuff* (6 M. & Sel. 160, 165) Lord Ellenborough said, "this is not a case of *par delictum*; it is oppression on the one side and submission on the other: it never can be predicated as *par delictum* where one holds the rod and the other bows to it."] *Williams v. Hedley* (8 East, 378), and *Horton v. Riley* (11 M. & W. 492), [785] were decided upon a similar principle. In *Higgins v. Pitt* (4 Exch. 312, 325), Parke, B., in delivering the judgment of the Court, suggested a doubt whether a debtor paying money down as the price of procuring a fraud on his other creditors, before the creditors enter into the composition, has a right to recover it back. [Pollock, C. B. No doubt there would be a difficulty if the matter were *res integra*. But what would be the consequences? Either the fraud of the debtor would vitiate the whole deed, or we must say that, though the transaction is wrong on the part of the debtor, it is so far more wrong on the part of the creditor that the trans-

action between them must be deemed void, and the deed good. If the deed is to stand, I do not see how the defendant can be allowed to keep this money. Wilde, B. The case appears to fall directly within the principle established in *Smith v. Bromley* (2 Doug. 695, n.).] On the face of the deed the defendant released the whole of his debt. [Martin, B. The plaintiff in this action is not the person who was defrauded.]

POLLOCK, C. B. I am of opinion that the plaintiff is entitled to recover back this money, and the ground upon which I entertain that opinion is extremely short. It appears to me that if the plaintiff had given the defendant a bill of exchange for the 50l. the latter could not have enforced payment of that bill; and if it had been paid by the plaintiff, he would have been entitled to recover back the money from the defendant. Here, however, instead of giving a bill, the plaintiff has paid the defendant 50l.; and the question is whether the plaintiff is entitled to recover back that money. The course of modern decisions has been to give no effect to a difference between two states of circumstances which is apparent only, not real; and it seems to [786] me that the plaintiff, having paid the money, may be considered in the same position as if he had given a bill and afterwards refused to pay it; or, not having given a bill, had promised to pay the money; in either case he would be free from any obligation to pay, because there would be no legal mode of enforcing the promise. It appears to me that this case is similar, not to that of an insolvent who voluntarily pays a particular creditor, but to that of an insolvent who pays under oppression and coercion. If, in the case which I have put, the creditor could not recover on the bill, what difference does it make if, instead of taking a security, he writes to say, "I will not execute the composition deed unless you pay my debt in full"? He has no right, with the knowledge that he is deceiving the body of creditors, who consent to accept a smaller sum under a notion that he is accepting no more, to be paid the full amount of his debt. It is a gross fraud on the other creditors, and if we were to hold that the money could not be recovered back, the consequence would be that creditors would refuse to enter into arrangements, each suspecting that the other was endeavouring to obtain an unfair advantage. A creditor has no right to say, "I will pretend to take nothing but my composition, but will insist on being paid in full." There is another consideration which weighs with me, viz., that if this money cannot be recovered back, one of the creditors will have received an advantage in fraud of the others, and the whole transaction, from beginning to end is void, and the deed of composition a nullity. It is clear that the defendant intended that the plaintiff's debts should be released, and that the other creditors should believe that the defendant had accepted the composition in discharge of his debt. We are bound to give effect to the law, and the only way in which the insolvent can be relieved is by our holding that this money can be recovered back; for, if the composition deed is void, he might be instantly sued [787] by the whole body of creditors. In my opinion we shall more soundly administer the law and lay down a rule having the effect of promoting the prosperity of trade and relieving those who suffer from misfortune, by deciding that this money may be recovered back, and, moreover, in doing so, we are giving effect to that which the defendant intended, viz., that the plaintiff should be relieved from his debts. On these grounds I think that the rule ought to be absolute.

MARTIN, B. I am of opinion, as I was at the trial, that this money cannot be recovered back. Except that the case is likely to go to a Court of error, I should not have considered it necessary to state at length my view of the law. This was, in my judgment, a voluntary payment by the plaintiff, with full knowledge of the facts, the money being justly due to the defendant. Now, the law is clear that an illegal contract cannot be enforced, and, as a general rule, money paid under an illegal contract cannot be recovered back: *quod fieri non debet factum valet*. This was an illegal contract, and had it remained unexecuted the creditor could have maintained no action against the debtor in respect of it. But the money has been paid under this illegal contract, and therefore it cannot be recovered back unless this case is an exception to the general rule. It is argued that the money can be recovered back for this reason, that, as between the plaintiff and defendant, the defendant is the greater delinquent. But the plaintiff owed it to his creditors to deal honestly by them, and it seems to me that this transaction can only be an exception to the general rule by reason of its operation on the other creditors. But who was the greater delinquent towards those creditors? It was the plaintiff himself; because he has committed a

breach of faith towards those persons to whom he was bound to act honestly. As to oppression, I do not [788] see why a creditor may not get 20s. in the pound for a debt justly due to him. There is, in my opinion, nothing contrary to law or morality in his so doing; and I think we should, so far as we can, strictly carry out the contracts people make for themselves, when they are not contrary to law or morality. When this money was paid it was never intended by the parties that it should be had back. However, my judgment proceeds on the principle that this was an illegal contract, and that money paid under an illegal contract cannot be recovered back. In the case of *Smith v. Cuff* (6 Mau. & Sel. 160), where the debtor was allowed to recover back the money, payment of the promissory note had been enforced against him; he had no defence, and was obliged to pay it. That is quite a different matter from a voluntary payment. For these reasons, I think that the rule ought to be discharged.

BRAMWELL, B. I am of opinion that the rule ought to be absolute. Nothing can be more dishonest on the part of a creditor than to pretend to take a composition of 5s. in the pound, and then agree privately with the debtor for payment of a larger sum and so get more than the other creditors. It may be that I am influenced by that consideration; but if it were not for the opinion entertained by my brother Martin, I should have thought the law plain. I agree that if a man voluntarily pays money which he was not bound to pay, as a general rule he cannot recover it back. So, if a man voluntarily pays a bill of exchange which he was not bound to pay, he cannot say "I ought not to have done so, and I will now recover back the amount." I admit also, that if a man, upon a corrupt bargain, pays money or gives a bill of exchange, he cannot recover it back. But upon this general rule there has been engrafted [789] what has been called judge-made law, but which I think is most salutary law. The qualification is this, that where, though the act is voluntary in one sense, the person for whom it is done has a species of power over the other so that the latter does the act under coercion, there, though the contract is unlawful, it is not a case of *par delictum*, because it is a case of oppressor and oppressed. That is the qualification of the general rule, and in such cases, though the payment of money is in a certain sense voluntary, it may be recovered back. If that is not true, *Smith v. Bromley* (2 Doug. 695, n.) and *Smith v. Cuff* (6 M. & Sel. 160), were wrongly decided, because there the act was in one sense voluntary and the agreement illegal. But those cases having been so decided, I think we are bound by them. Then, as a general rule, a voluntary act cannot be undone, an unlawful agreement cannot be enforced; but the cases to which I have referred have established the qualification I have mentioned. Here, though in one sense the payment was voluntary and the agreement illegal, it was a payment under coercion, and the parties were not in *pari delicto* because there was an oppressor and an oppressed. At one time I doubted whether the payment ought not to be considered voluntary, not in the sense that the plaintiff was not bound to make it, but that at the time he paid the money he did not get the benefit of his bargain. The evidence, however, shews that the whole transaction was *uno flatu*, and whether the advantage to be got by the payment occurred at the time it was made or a week afterwards seems to me to make no difference. If, indeed, the plaintiff had voluntarily paid the money, after the composition was entered into, the case would not have been within the qualification I have mentioned, and *Wilson v. Ray* (10 A. & E. 82) is an authority that the money could not have been recovered back. With great [790] deference to Lord Wensleydale, and the doubt he expressed in *Higgins v. Pitt* (4 Exch. 325), as to the soundness of the dictum of Lord Ellenborough and Bayley, J., in *Smith v. Cuff* (6 M. & Sel. 160), I think that case was rightly decided. In my opinion it cannot alter the principle whether a bill is given which the debtor is obliged to pay to a *bonâ fide* holder, after the execution by the creditor of the composition deed, or whether the money is previously paid by the debtor to the creditor. It makes no difference that in the one case the form of action would be for money paid, in the other for money had and received. At first I doubted whether this was not a voluntary payment, but I should be reluctant to hold that the debtor is bound to say, after the creditor has executed the deed of composition, "I will not give you what you ask:" it would introduce dishonesty. I would rather a debtor should perform his bargain then and recover back the money. *Smith v. Bromley* (2 Doug. 695, n.) is an authority that this is not a voluntary payment in the sense that the plaintiff need not have been paid the money. It was a payment for the purpose of obtaining an advantage which the defendant withheld, and which he

extortionately granted. If this view is wrong no action could have been maintained in *Smith v. Bromley* (2 Doug. 695, n.) and *Smith v. Cuff* (6 M. & Sel. 160).

WILDE, B. I also think that the plaintiff is entitled to recover back the 50l. paid by him to the defendant. It would be a great misfortune if any nice distinction broke through the established principle which, whether it is called commercial law or judge-made law, is the law until overruled, and there are only two ways by which that can properly be done, either by a Court of error or an act of the legislature. So long as it remains the law we are bound to act upon it, for we do not [791] sit here as a Court of appeal. Then, has this question been decided? I think it has. In *Smith v. Cuff* (6 M. & Sel. 160), the bargain was that if the creditor would execute a composition deed with the other creditors to receive 10s. in the pound, the debtor would give him two promissory notes for the remainder of his debt. The deed was executed and the notes given, and one of them got into the hands of a third person who enforced payment from the debtor, and then, notwithstanding the illegality of the original contract, the debtor recovered the amount from the creditor. That is the substance of the case, and it only differs from the present in this, that here, instead of a promissory note being given, and indorsed to a third person, the money was paid at the time of the illegal contract. In my opinion it is the same thing whether the debtor gives his creditor 50l. in money or puts into his hands a piece of paper by which payment of 50l. may be enforced against him. *Smith v. Cuff* (6 M. & Sel. 160) was decided on the authority of *Smith v. Bromley* (2 Doug. 695, n.), where Lord Mansfield said, that "the taking money for signing certificates is either an oppression on the bankrupt or his family, or a fraud on his other creditors." Also, in *Browning v. Morris* (2 Cowp. 790, 792), Lord Mansfield, after observing that, where the contract is executed and the money paid, if the parties are in *pari delicto*, it cannot be recovered back, said:—"For instance, in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action; because both plaintiff and defendant are equally criminal. But where the contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one from their situation and condition being liable to be oppressed or imposed upon by the other; there the parties are not in *pari delicto*, and in furtherance of these statutes [792] the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." Here the plaintiff says to the defendant, "Pay me back the money which you received from me under an illegal contract." The defendant says, "It is true that the contract was illegal, but we were in *pari delicto*, you paid the money with full knowledge of all the circumstances." The plaintiff replies, "We are not in *pari delicto*, for I paid you the money under coercion." That is the principle on which *Smith v. Cuff* (6 M. & Sel. 160), *Smith v. Bromley* (2 Doug. 695), *Browning v. Morris* (2 Cowp. 790), *Williams v. Hedley* (8 East, 378), and that class of cases, proceeds. The application of the maxim, *quod fieri non debet factum valet*, depends on whether the parties are in *pari delicto*, and notwithstanding the dictum of Parke, B., in *Higgins v. Pitt* (4 Exch. 312, 325), it seems to me that this case falls within the principle, and that the parties are not in *pari delicto*, for one was under coercion. Courts of justice should endeavour to throw every impediment in the way of carrying out a contract to pay money in order to induce one creditor to execute a deed which is a fraud on the other creditors; and the most effectual mode of preventing it is to hold that the money may be recovered back. Therefore, on the ground of public policy, on principle, and on authority, if we find that money has been paid under a fraudulent contract, and the parties are not in *pari delicto*, we ought to hold that it may be recovered back.

Rule absolute.

[793] IN THE MATTER OF A PLAINT, IN THE COUNTY COURT OF STAFFORDSHIRE, HOLDEN AT WOLVERHAMPTON, BETWEEN FOSTER AND GREEN. May 8, 1861. —On the trial of a cause before the judge of a County Court and a jury, the jury found a special verdict, on which the County Court judge entered the verdict for the defendant, giving leave to the plaintiff to move to enter a verdict or for a new trial. The application was subsequently made and refused. Held, that,

under the 13 & 14 Vict. c. 61, s. 14, the plaintiff had a right of appeal from the decision of the judge in refusing to enter a verdict or for a new trial.

[S. C. 30 L. J. Ex. 263. Referred to, *Morris v. Lowe*, 1886, 34 W. R. 45.]

Gray had obtained a rule calling upon the judge of the County Court of Wolverhampton to state a case for the opinion of this Court.

It appeared that the action was brought to recover 40l. for monies lent by the plaintiff, a banker, to the defendant. The case was tried by the judge of the County Court and a jury on the 29th of October, 1860. One Cross, the manager of the plaintiff's bank, proved that he paid the defendant 40l., and obtained his signature to a check for that amount.

The defendant's case was, that he was in the employment of Cross, who carried on ironworks; that he was in the habit of calling on Cross at the bank for money due to him on account of the works, and that on the occasion in question he went to ask for money which was due to him, when Cross gave him the 40l. and he signed a receipt, but never signed any check. The jury found a special verdict, as follows—"That Green received the 40l. from Cross, believing it to be payment to him on account of a large sum of money owing from Cross to Green, and that he signed the check believing it to be a receipt for the 40l." The judge thereupon directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him, or for a new trial. On the same day the plaintiff's attorney asked for leave to move for a new trial. The motion was made on the 21st of November, on the grounds that the finding of the jury did not warrant [794] the entry of a verdict for the defendant; and that the verdict was against evidence; also on the grounds of misdirection, and surprise. The hearing of the motion was adjourned from time to time till the 1st of March, 1861, when the judge gave judgment, refusing either to enter a verdict for the plaintiff or to grant a new trial, but without costs. Within ten days after the 21st of March the plaintiff's attorney gave notice to the defendant of his intention to appeal against the determination of the judge in point of law on the motion made on his behalf on the 21st of March. The case was prepared by the plaintiff's attorney, and transmitted by him to the defendant's attorney, who refused to settle or approve of it. At the Court on the 8th of April, being the next after that held on the 21st of March, the case was presented to the County Court judge, who refused to settle or sign it, on the ground that the judgment of the Court in refusing to enter a verdict for the plaintiff or for a new trial, was not a determination or direction in point of law within the 13 & 14 Vict. c. 61, s. 14.

J. E. Davis now shewed cause. The plaintiff's notice of appeal was too late. In a trial before the judge of a County Court and a jury the verdict is the judgment. [Bramwell, B. The plaintiff does not appeal against the verdict, but against the decision on the motion for a new trial.] There is no power to appeal from the decision of the judge on the motion for a new trial. The parties cannot appeal except from a judgment, and the only judgment was the verdict. The language of the 14th section of the 13 & 14 Vict. c. 61, shews this: the appellant is to give security "for the amount of the judgment, if he be the defendant, and the appeal be dismissed. Provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required [795] in any case where the judge of the County Court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the County Court." This section was considered by Patteson, J., and Erle, J., in *Rackham v. Blowers* (15 Jur. 758), where it was held that no appeal was given against an act of committal, under the 99th section of the 9 & 10 Vict. c. 95, Patteson, J., saying that the appeal given by the statute applied only to judgments. [Wilde, B. The County Court judge reserved leave to the plaintiff to move to enter a verdict, which was in effect saying he would not decide the question until there had been a further argument upon it. Pollock, C. B. It is as if the judge had said, "The jury have found a verdict, but it is doubtful what is the effect of their verdict; I reserve my opinion upon the question of law, and, therefore, to comply with the usual form, I give the plaintiff leave to move to enter a verdict."] Secondly, the plaintiff having elected to move for a new trial and failed, cannot now appeal to this Court.

Gray, who appeared in support of the rule, was not called upon.

MARTIN, B. We are all of opinion that the rule must be absolute. It seems to me that there was no final determination or direction in point of law by the judge

until he pronounced judgment on the motion to enter a verdict, or for a new trial. The plaintiff had a right of appeal from the judgment then given, and consequently the case was prepared and tendered by him in time.

BRAMWELL, B., and WILDE, B., concurred.

Rule absolute.

[796] GEORGE SHIEL, *Appellant*, THE MAYOR, ALDERMEN AND BURGESSES OF SUNDERLAND, ACTING BY THE COUNCIL OF THE BOROUGH AS THE LOCAL BOARD OF HEALTH, *Respondents*. SAME v. SAME. April 22, 1861.—A bye-law made by a Local Board of Health, pursuant to the 21 & 22 Vict. c. 98, s. 34, directed that “every building to be erected and used as a dwelling-house, shall have an open space exclusively belonging thereto to the extent at least of one-third of the entire area of the ground on which the said dwelling-house shall stand and which shall belong thereto, &c.” By the 21 & 22 Vict. c. 98, s. 34, no bye-law shall affect any building erected before the date of the constitution of the district, but the re-erecting of any building pulled down to or below the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, shall be considered the erection of a new building. —The proprietor of a house, which had been erected before the constitution of the district, and was used for an hotel, having a yard with coach-house and stables in the rear, for the purpose of making an addition to the hotel, pulled down the coach-house and stables below the ground floor, and erected upon the same site a building three stories high; the only means of access to the upper chambers being by going up the staircase of the old house and through a passage into the new building. On an information against the proprietor for an offence against the bye-law in not leaving an open space equal to one-third of the area of the ground on which the dwelling-house &c. stood, the justices found that the building erected in the yard being a new building built up to and adjoining the old building must either be considered with the old building as one house, or that the old house and new building must be considered as two erections, and that both old and new buildings must be considered in reckoning the ground upon which the building stood; and convicted him of a breach of the bye-law. Held, that the conviction could not be sustained, because the new erection was not a new dwelling-house but merely an addition to an old dwelling-house: Or, per Bramwell, B., because the justices had not found that it was a new dwelling-house, which was essential to the validity of the conviction.—By the 21 & 22 Vict. c. 98, s. 34, local Boards are empowered to make bye-laws “with respect to the level, width and construction of new streets,” &c. A local Board made bye-laws with a general heading, following the language of the 34th section. The first bye-law was also headed, “width and level of new streets.” It provided for the width of new streets, dividing them into front streets, cross streets and back streets; and went on, in a subsequent paragraph, to provide “that no dwelling-house shall be built immediately adjoining any back street without the special permission of the local Board.” Held, that this provision applied only to new back streets, and not to a new building in an old back street.

[S. C. 30 L. J. M. C. 215. Applied, *Hobbs v. Dance*, 1873, L. R. 9 C. P. 36.]

These were two cases stated by justices of the borough of Sunderland under the 20 & 21 Vict. c. 43, the material parts of which were, in substance, as follows:—

By “The Borough of Sunderland Act, 1851,” the Public Health Act, 1848, except certain parts therein mentioned, was incorporated with that Act. The Local Government Act, 1858, 21 & 22 Vict. c. 98, embraces within its provisions the borough of Sunderland; and, under the authority of the 34th section of that Act, the Local Board of Health [797] made certain bye-laws, which were duly certified by the Secretary of State.(a)

(a) The bye-laws, the heading of which follows the language of the 21 & 22 Vict. c. 98, s. 34, are as follows:—

Bye-Laws.

With respect to level, width and construction of new streets and the provisions for the sewerage thereof, with respect to the structure of walls of new buildings, for

[798] In the first case it was proved that the appellant was the proprietor of a house recently converted into an hotel in Fawcett Street, in the borough of Sunderland, and that, at the back or east of the yard of the hotel, there is a back street. Both the front and back streets were streets which were made and formed several years before the passing of the Borough of Sunderland Act, 1851.

Before and at the time of the notice hereafter mentioned, there was an open yard immediately behind the house, and at the end of it next the back street was a coach-house and stable one story in height. The yard was enclosed with walls and formed part of the hotel premises.

On the 16th of March, 1860, the appellant gave a written notice of his intention to make alterations and additions to his hotel. The Local Board of Health disapproved of the plan, and by their orders their engineer gave the appellant notice of such disapproval, giving as a reason the want of sufficient open space in the yard.

Notwithstanding the disapproval of the Board the appellant commenced erecting the building, partly on the open yard behind the house, and partly upon the coach-house and stable which were pulled down below the ground floor. The height of the building is three stories. On the ground floor there was avowedly intended to be a billiard room, shoe-house and smoking room; and there is a passage from the old building (which passage was a portion of the old yard) to the back street. The entrance to the smoking room, shoe-house and billiard room is direct from the old or main [799] building through the passage. There is also a coach-house on the ground

securing stability and the prevention of fires; with respect to the sufficiency of the space about buildings, to secure a free circulation of air; with respect to the ventilation of buildings and with respect to drainage of buildings; to water closets, ash pits, cesspools, in connection with buildings; and to the closing of buildings or parts of buildings unfit for human habitation; and to the prohibition of their use for such habitation, made by the Local Board of the borough of Sunderland, in the county of Durham.

1. Width and level of new streets.

The minimum width of new streets shall be as follows:—For front or cross streets, the houses of which on both sides are to be only one story in height, thirty feet; for front or cross streets, the houses of which, on either one or both sides, are to be two stories in height, forty feet; for front or cross streets, the houses of which, on either one or both sides, are to be three or more stories in height, fifty feet; for all back streets eighteen feet; and that the stories alluded to by these bye-laws shall be exclusive of attics, &c.

It is intended that a front street shall mean a street with which the front doors of the houses communicate; a cross street shall mean a street, intersecting other streets, to break the continuity of buildings therein, and a back street shall mean a street with which the back doors leading from yards of houses communicate; but no such front street or cross street shall be construed to be a back street on account of any such back door communicating therewith.

No dwelling-house shall be built immediately adjoining any back street without the special permission of the local Board.

Every new street shall be formed at such level as the local Board shall in each case determine.

All new streets that are eighteen feet wide and do not exceed nineteen feet wide shall have a footpath on each side of not less than two and a half feet wide, &c.

Every new street shall have an entrance at each end of the full width thereof and open from the ground upwards.

11. "Every building to be erected and used as a dwelling-house shall have in the rear or at the side thereof an open space exclusively belonging thereto, to the extent at least of one-third of the entire area of the ground on which the said dwelling-house shall stand and which shall belong thereto, reckoning from the front wall of the said dwelling-house to the outer back and side walls of the premises, free from any erection thereon above the level of the ground."

12. "Wherever any open space has been left belonging to any building, either on the front, back or sides thereof, when the sanction of the local Board has been obtained for its erection, such space shall never afterwards be built upon without the approval of the local Board."

floor, the entrance to which is from the back street. There is no staircase or other entrance from the ground floor to the rooms in the upper stories. The entrance to these rooms is by a staircase built out from the old house and over a corresponding amount of what was formerly open space, and cannot be approached except by going up the staircase of the old house. The yard or open space is capable of being used for both old and new buildings.

The new erection occupies a space of 1713 feet, and there is an open space at the side thereof of 871 feet, which space is the yard spoken of. The old building occupies a space of 1934 feet. If, therefore, the whole space left of the yard were to be considered appropriated exclusively for the new building, and the old building to have no yard at all, there would be a sufficient space left and no offence in that respect against the bye-law, but if the old and new buildings are to be regarded as one building there will be a deficiency of space of 634 feet; and so also, if the old and new buildings are to be regarded as separate buildings, and the space to be enjoyed by both equally, there will be a deficiency of one-third space of 354 feet in respect of the old building and 280 feet in respect of the new building; so that in either of these cases there would not be one-third open space left.

It was admitted by the engineer for the respondents that he could not get into the ground floor of the new erection without entering by the door of the front house, or by the passage door that formerly led to the old house.

The appellant contended:—First, that the proviso in the 34th section of the Local Government Act, that no bye-laws should affect any building erected before the date of the constitution of the district, extended to this case, as the new erection was only an extension of the old house and built within its curtilage.

[800] Secondly. That the bye-laws only extended to buildings adjoining new streets.

Fifthly. That one-third open space had actually been left, there being an excess of the requirement of ten feet, excluding the old building from the computation, &c.

Sixthly. That there was no evidence that the building was intended to be used for sleeping rooms, neither was the same finished, nor has it ever been occupied or fit for occupation.

As to the first and second objections, the justices were of opinion that they were met by the 34th section of the Local Government Act, 1858, the stables and coach house having been pulled down to the ground floor and built upon.

As to the fifth objection, the justices were of opinion that the buildings erected in the yard being a new building built up to and adjoining an old one, must either be considered with the old building as one house, or that the old house and the new buildings must be considered as two erections; and that both the old and new buildings must be considered in reckoning the ground upon which the building stands, and that as there is access for both buildings to the open space, the new building could not have the exclusive use of the yard.

As to the sixth objection, they considered that the buildings were intended for human habitation. They, therefore, proceeded to convict the appellant of a breach of the eleventh bye-law, for that he "did erect a certain building intended to be used as a dwelling-house without having at the rear or at the side thereof an open space exclusively belonging thereto, to the extent of one-third of the entire area of the ground on which the said dwelling-house stands, contrary to the provision in the eleventh bye-law," &c.

Second Case.

The facts, as to the building of the premises in question by [801] the appellant, are to a great extent the same as those in the former case, arising from one act of building,—the offence in the former case being for building without leaving sufficient open space for sanitary purposes,—and the offence in the present case being for building immediately adjoining a back street, contrary to the first bye-law made by the Sunderland Corporation, being the Local Board of Health.

The appellant being possessed of the hotel, yard, coach-house and stables, mentioned in the first case, the coach-house and stabling adjoining Back Fawcett Street, pulled down the coach-house and stable below the level of the ground floor, and then, without the sanction of the Local Board of Health, erected a building on the site of the coach-house and stables, and extending beyond them into the adjoining yard.

The appellant contended (*inter alia*), that the first bye-law was void as not being authorized by the Local Government Act, 1858. Secondly, assuming the bye-law to be legal it did not apply to this case; that the heading of the first bye-law distinctly pointed out that new streets only were in question, and that new buildings might be erected adjoining any old back street, and yet no offence be committed.

The justices found that the evidence was distinct that a building was in course of erection adjoining a back street and was intended for human habitation, though no evidence was given that the rooms were intended to be used as sleeping rooms. The coach-house and stables were pulled down below the level of the ground floor. The buildings were new though the street was old.

The appellant was convicted of an offence against the first bye-law, for that he "did build a certain dwelling-house, in the said borough, immediately adjoining a certain back street therein, called Back Fawcett Street, without the special permission of the Local Board," &c.

[802] Manisty, in support of the convictions. The 11th bye-law directs that "every building to be erected and used as a dwelling-house shall have in the rear or at the side thereof an open space exclusively belonging thereto, to the extent, at least, of one-third of the entire area of the ground on which the said dwelling-house shall stand. [Martin, B. It would appear that this bye-law is intended to govern the mode in which new houses are to be built.] The bye-laws are made in pursuance of the 21 & 22 Vict. c. 98, s. 34, which contains a proviso that "for the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, &c., or the conversion into a dwelling-house of any building not originally constructed for human habitation, shall be considered the erection of a new building." [Pollock, C. B. The expression pulling down of a building in this section seems to refer to cases where the whole building is taken down.] The meaning of the bye-law is that if a building is taken down, and a new building erected on the site of it, it is to be treated as if it were wholly a new building. [Pollock, C. B. There are a great number of houses in London and other places where the open space is not a sixth of the area on which the house stands. Suppose a wash-house in the yard of such a building was out of repair and pulled down, might it not be rebuilt?] On the other hand, it is not right that a person who owns a large hotel, having a proper space for ventilation, should be at liberty to block it up by erecting a building three stories high, the object of the bye-law being that throughout the whole town one-third of the area of ground occupied for habitations should consist of open space. The justices were competent to decide that a building of three stories high, consisting of a billiard and other rooms, with apartments over them, was a dwelling-house. [Bramwell, B. Suppose the owner of a house one story high built rooms over the ground floor, that would not [803] be a new dwelling-house; but if a person erected a detached building with sleeping-rooms at the bottom of his garden, that would be a new dwelling-house. Therefore, whether this was a new dwelling-house or not was a question of fact.] The Court will not on that point review the decision of the justices. [Pollock, C. B. We have all the facts before us. I think this was not a dwelling-house in the ordinary sense, but only an addition to an existing dwelling-house. Martin, B. The language of the bye-law does not appear to apply to the case where an old building is enlarged.] The bye-law applies to "every building to be used as a dwelling-house"—that is, either wholly or in part.

As to the second conviction. The first bye-law provides that no dwelling-house shall be built immediately adjoining any back street, without the special permission of the Local Board. [Martin, B. The heading of the bye-law is, "width and level of new streets." This is an old street.]

Hindmarch, who appeared for the appellants, was not called upon to argue.

POLLOCK, C. B. We are all of opinion that these convictions cannot be sustained. The first bye-law by its heading professes to deal with nothing but new streets, and if there is any ambiguity in the language of the subsequent part of it, it must be held to apply to new streets only. It classes new streets as front streets, cross streets, and back streets, and then goes on to say, "No dwelling-house shall be built immediately adjoining any back street" without permission. That refers to such streets as are before spoken of.

As to the 11th bye-law, Mr. Manisty was right in calling upon us to give effect to

the obvious scope of the Act so far as the language of it would enable us. But being an Act in restraint of the use which a person may make of [804] his own property, coupling such restraint with pains and penalties, we must be careful to see how far the restraint is really imposed by the Act. We are not at liberty to consider what the Legislature would have done if this particular case had been before them, but must see what they have done. On reading the 11th bye-law, I cannot come to the conclusion that it applies to the case of a person who pulls down a building in the rear of his dwelling-house, such as a wash-house or beer-cellar, and builds a small room in the place of it. Mr. Manisty, with great ingenuity, pointed out that if a building like this of three stories high could be erected, the object of the Legislature would be defeated. I think that not unlikely; but I cannot distinguish between a large and a small adjunct to an existing dwelling-house. It would have been different if the appellant had built a separate dwelling-house, which he could have let or used for his own purposes as such. Here, however, there was an old house, which *prima facie*, is not within the Act, with a coach-house and stable. The coach-house and stable were pulled down, and an addition made to the house. The addition of one or two bedrooms to a house does not bring it within the 11th bye-law, and though the appellant has made a large addition, it is a mere difference in degree, and does not affect the principle.

MARTIN, B. I am of the same opinion. As to the conviction on the first bye-law; the bye-law is made in pursuance of the 21 & 22 Vict. c. 98, s. 34, by which every Local Board is empowered to make bye-laws "with respect to the level, width and construction of new streets, and the provisions for the sewerage thereof," &c. The heading of the bye-laws follows the words of the Act, and the first bye-law is headed "Width and level of new streets." It makes provision for the width of streets when the houses are of a certain height, and defines what is meant by a [805] back street; and then provides that "no dwelling-house shall be built adjoining any back street." It is plain that what the bye-law is dealing with is the width of new back streets. To this street, which is an old street, the bye-law does not apply.

As to the conviction on the 11th bye-law, my impression is, that the Act gives the Local Board power to make bye-laws with respect to the alteration of existing buildings; but I do not wish to give a decided opinion on the point. However that may be, in my judgment the 11th bye-law does not apply to such a building as that now in question. The words "every building to be erected and used as a dwelling-house" point to dwelling-houses to be built—new buildings of which a dwelling-house is the principal part. Such building is to have "an open space exclusively belonging thereto to the extent of one-third of the entire area of the ground on which the dwelling-house shall stand, and which shall belong thereto." Here was an old building, the hotel; part of the space behind was covered by a coach-house and stable, which the owner intended to convert into hotel buildings. It appears to me that any open ground at the back did not belong to the new buildings, but to the hotel. It would be impossible to apply this bye-law unless we could read it as providing that no new building shall be added to an old house unless an open space is left equal to one-third of the whole space occupied by both the old and new buildings and the ground belonging thereto.

BRAMWELL, B. I think that we ought to give the plain, natural and obvious construction to this bye-law; and, doing so, I come to the conclusion that the respondents must fail. I had some little doubt upon the first bye-law; but, as pointed out by my Lord and my brother Martin, the bye-law is headed "Width and level of new streets," [806] and one would think that was a general heading to which everything subsequent was to be referred, according to the mode of construction adopted by the House of Lords in *Marriage v. The Eastern Counties Railway* (9 H. L. Cas. 32). Then come these words, "A back street shall mean a street with which the back doors leading from yards and houses communicate." Taken by itself, that might mean old or new streets. But I come to the conclusion that it does not. It is reasonable when people are laying out new streets to say that they shall lay them out in a particular manner; but it is a very different thing to say that people whose property has been laid out long ago shall only make a particular use of it. The expression "It is intended that a front street shall mean," &c., with which the clause commences, seems to shew that the framers of the bye-law meant to give it a prospective operation, and had in view

future streets; therefore, it appears to me that the next provision, that no dwelling-houses shall be built immediately adjoining any back street without leave, applies only to new streets.

As to the 11th bye-law, it appears to me that this building is a dwelling-house; that being a matter of fact which the justices have found. But is it a new dwelling-house, or part of the old one? If the justices had found this distinctly, upon the authority of *Newman, App., Baker, Resp.* (8 C. B. N. S. 200), I think we could not have reviewed their decision. But I think the justices have not determined this as a question of fact, but have referred it to us, because they say, We were of opinion that the "building erected in the yard being a new building, built up and adjoining the old one, must either be considered with the old building as one house, or that the old house and the new erection must be considered as two erections." Thus, they say, assuming this to be a new building, or an addition to an old building, the appellant was properly convicted. In that they are wrong. So far as the question [807] is referred to us, I think that this was an addition to the old building, and not a new building. The bye-law does not apply when the new erection is a mere addition to an old building, and this erection is either an addition to the old house, or the justices have not found the fact which is essential to the validity of the conviction.

Determinations of justices reversed.

DARVILL v. TERRY. May 7, 1861.—A bill of sale by way of mortgage of personal chattels, if executed as a security for money actually lent, is not fraudulent and void within the 13 Eliz. c. 5, though its object is to defeat the expected execution of a judgment creditor.—The registration, under the 17 & 18 Vict. c. 36, of a bill of sale as of the day of its execution, is not invalidated by reason of the consideration money not having been paid, nor the deed attested until two days after the execution.

[S. C. 30 L. J. Ex. 355.]

This was an interpleader issue, to try whether certain goods, taken in execution by the sheriff of Surrey, under a writ of *fi. fa.* issued on a judgment recovered by George Terry (the now defendant) against one Beaty, were at the time of the seizure the property of the now defendant, as against James Darvill (the now plaintiff).

At the trial, before Channell, B., at the Middlesex Sittings in the present term, the following facts appeared. On the 9th of January, 1861, Beaty executed a bill of sale, by way of mortgage, of certain goods in his possession, as a security for 130*l.*, previously lent him by the plaintiff, and a further loan of 160*l.* By the terms of the deed the above sums were to be repaid, with interest at the rate of 5*l.* per cent., on the 29th of July, 1861, and until default in payment Beaty was to keep possession of the goods. There was an indorsement on the deed of the receipt of the 160*l.* by Beaty, on the 9th of January, 1861, but the money was not, in fact, paid, nor the execution attested, until the 11th of January, the bill of sale having remained until that time in the hands of the attorney who prepared and attested it. The bill of sale was registered, under the 17 & 18 Vict. c. 36, as if executed on the 9th of January. On the 16th of January Beaty presented a petition to the Court of Bank-[808]-ruptcy for an arrangement with his creditors, and obtained an order for protection of his person and goods from process until the 12th of February. On the 29th of January this petition was dismissed, and on the same day the sheriff seized the goods of Beaty under a writ of *fi. fa.*, issued on a judgment obtained against him by the now defendant.

It was submitted on behalf of the defendant, first, that the bill of sale was not executed *bonâ fide*, and with the intention of vesting the property in the goods in the plaintiff, but was a mere contrivance for the purpose of defeating the defendant's execution, and consequently void under the 13 Eliz. c. 5. Secondly, that the consideration money not having been paid until two days after the bill of sale was executed, there was no valid registration under the 17 & 18 Vict. c. 36, s. 1.

The learned Judge left it to the jury to say whether, taking all the circumstances into consideration, the bill of sale was *bonâ fide*—the transaction it purported to be, or merely colourable. If they were of opinion that it was the intention of the parties that the goods should continue to be the goods of Beaty, and that the bill of sale was

resorted to for the purpose of defeating the defendant's execution, and without any intention that the property should pass to the plaintiff, then the bill of sale, though good in form, would be void; and (as described by counsel) a mere "sham" or contrivance of no avail in law. But if the jury were of opinion that the parties really intended that which the transaction purported to be, viz., in consideration of money advanced, to pass the property in the goods to the plaintiff, though with the right in Beaty to retain possession of the goods until default in payment of the money advanced, it was no objection to the bill of sale that the parties had come to that arrangement with a view of defeating the defendant's execution. The jury found that the transaction was *bonâ fide*, and a verdict was entered for the plaintiff.

[809] Montagu Chambers now moved for a rule to shew cause why a new trial should not be had on the ground of misdirection. The case was not properly left to the jury. The learned Judge should have told them that, if they were of opinion that the object of the bill of sale was to defeat the execution creditor, it was fraudulent and void as against him, though good as against the party executing it. The transaction is within the scope of the 1st and 2nd sections of the 13 Eliz. c. 5, and is not protected by the 6th section. Whether it was the intention of the parties to vest the property of the goods in the plaintiff is not the question; but whether the deed was meant to protect the goods of the debtor if the execution creditor attempted to assert his right. [Channell, B. You contended at the trial that the not taking possession of the goods was a test of fraud. But this bill of sale is by way of mortgage, and, although its object may have been to defeat an execution, that would not, of itself, render the bill of sale void: it is a fact to be taken into consideration, but is not conclusive. The 13 Eliz. c. 5 was intended to apply to voluntary conveyances for the purpose of defeating creditors, not to cases where there is a valid consideration for the conveyance. Martin, B., referred to the judgment of Parke, J., in *Martindale v. Booth* (3 B. & Adol. 498, 505).] A party has no right to advance money to a debtor and obtain a mortgage of his goods simply for the purpose of defeating an execution creditor. The authorities collected in Smith's *Lead. Cas.* vol. 1, p. 10, 4th ed., shew that such a transaction is fraudulent, within the meaning of the 13 Eliz. c. 5. In *Nunn v. Wilsmore* (8 T. R. 521, 530) Le Blanc, J., said: "Whether or not a deed is to be considered as fraudulent with respect to creditors, must depend on the motives of the party making the deed." That doctrine has never been overruled. [810] [Wilde, B. In *Wood v. Dixie* (7 Q. B. 892), Coltman, J., told the jury that "if there really was a payment, still, if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him," but the Court held that a sale of property for good consideration is not, either at common law or under the statute 13 Eliz. c. 5, fraudulent and void, merely because it is made to defeat the expected execution of a judgment creditor.] He also argued that the jury were misled by the use of the word "sham."

Secondly, the bill of sale was not duly registered, as required by the 17 & 18 Vict. c. 36, and is therefore void as against the execution creditor. It was executed by Beaty on the 9th of January, and the consideration purports to have been paid, and the execution to have been attested on that day; whereas, in fact, the consideration was not paid, nor was the execution attested, until the 11th of January. The object of requiring the registration of bills of sale, was to prevent fraud on creditors, by enabling them to ascertain the real time when they were given. The execution, attestation, payment of the consideration and registration, ought to take place on the same day. If not, the Act would afford no protection to creditors against fraud; for a bill of sale might be executed by a debtor, without any consideration being paid to him, or any intention that it should operate until an execution creditor seized the goods, and then the consideration would be paid, and the bill of sale registered. [Wilde, B. The registration required by the Act is only a true statement of what the bill of sale purports to be.]

POLLOCK, C. B. I am of opinion that there ought to be no rule. The objection to the direction of the learned Judge is based on two grounds. First, it is said that he did not sufficiently point out to the jury that the bill of [811] sale, if given to defeat a judgment creditor, was void as against him. But there are many circumstances under which a conveyance by a debtor of his property is valid, although its object is to defeat creditors. The most remarkable case is where a debtor voluntarily assigns over his property for the benefit of his creditors; and such assignment is valid,

though made for the express purpose of defeating a particular creditor. Here, if the mortgage was *bonâ fide* for the consideration of 160l., and the money was actually paid, the transaction may well be sustained under the present view of the law (which has varied from that as laid down in the earlier cases,) although the intention was to defeat an execution creditor. In the case of *Wood v. Dixie* (7 Q. B. 892), Coltman, J., laid down the law precisely as Mr. Chambers says that it ought to have been laid down in the present case, but the ruling of the learned Judge was corrected by the Court of Queen's Bench.

Then, as regards the registration, the jury have found that the transaction was *bonâ fide*, and that the 160l. was actually paid. It is true that the deed was executed one day and the money paid a few days afterwards, but there is nothing in the Act requiring registration which says that if the consideration is not paid at the time the bill of sale is executed it shall be void. If the consideration had not been paid, and never was meant to be paid, the case would have been different; but the evidence shews that the parties intended that it should be paid, and that it was paid. It seems to me, therefore, that there is no valid objection to the registration, and that no rule ought to be granted on either ground.

MARTIN, B. I am also of opinion that there ought to be no rule. The first point raised by Mr. Chambers was [812] expressly decided in the case of *Wood v. Dixie* (7 Q. B. 892), which was determined in the year 1845; so that for upwards of fifteen years the law on this point, with respect to bills of sale, has been settled. The precise point which has been raised to-day was raised in that case, viz., whether, where a debtor executes a bill of sale, by way of mortgage of his goods, as a security for money lent, if the object be to defeat an execution creditor, the bill of sale is void. *Wood v. Dixie* is an express authority that it is not; in that case Coltman, J., told the jury that, if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him, and the Court of Queen's Bench held that direction wrong. I am not aware of any case in which the law so laid down has since been disputed.

Then, with respect to the other point. All that the Bills of Sale Registration Act requires is that every bill of sale, with its schedule, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, and of every attesting witness, be filed within twenty-one days after the making it. That has no reference to the payment of the consideration money. All that is necessary is to register the bill of sale and particulars as required by the Act; and if that be done, the most fraudulent deed will be well registered. The real fact is, that though this bill of sale was executed on the 9th January and the money not paid until the 11th, the bill of sale remained in the hands of the attorney who prepared it until the money was paid. During the whole of that period it was a continuing transaction, which commenced on the 9th and was perfected on the 11th.

[813] WILDE, B. I am of the same opinion; and I concur in the law as laid down by my learned brothers.

CHANNELL, B. I agree with the rest of the Court on both points. In summing up, I used the word "sham" because that word had been frequently used by the counsel in their address to the jury, but I think I explained to the jury, so as not to be misunderstood, in what sense I used it.

Rule refused.

REID AND ANOTHER v. DREAPER. May 8, 1861.—D., the defendant, entered into the following contract with R., the plaintiffs: "22nd March, 1860. From J. D., Corn Broker, to Messrs. R., Liverpool. Dear Sirs,—I have this day sold to you two cargoes of French maize, to consist of 800 to 1000 quarters, shipment all April, from the port of Bordeaux, at 33s./3d. per 480 lbs. cost and freight, payment in London, less 60 days' interest and 1% brokerage. Mr. J. Walker, London, will send contracts." On the following day Walker forwarded contracts for the two cargoes on behalf of T. of Bordeaux, the owner of the maize, but omitting the stipulation as to the brokerage. The plaintiffs remonstrated, and the defendant said he would write to Walker, but the plaintiffs, in order to obtain

the cargoes, were subsequently compelled to pay the 33s. 3d. without any deduction for brokerage. Held, that the defendant was responsible for the failure of Walker to send the contracts stipulated for. And *semble*, per Martin, B., and Bramwell, B., that the defendant's liability was not affected by the fact that the plaintiffs, instead of returning the contracts sent by Walker, accepted the maize under them.

[S. C. 30 L. J. Ex. 268 ; 4 L. T. 650.]

Declaration. That, by agreement between the plaintiffs and the defendant, the defendant bargained and sold to the plaintiffs, and the plaintiffs bought of the defendant, two cargoes of white French maize, one to consist of from 800 to 1000 quarters, to be shipped by the 20th of April, A.D. 1860, and the other to consist of about 1000 quarters, to be shipped during the said month of April, both from the port of Bordeaux, and to be delivered to the plaintiffs at 33s. 3d. per 480 lbs., including cost and freight, the said price to be paid in London, less sixty days' interest, and one per cent. brokerage ; and the defendant thereby also agreed that J. Walker should send to the plaintiffs contracts embodying the said terms : that all conditions were performed, and all times elapsed necessary to entitle the plaintiffs to have the said contracts sent to them [814] by the said J. Walker, and to have the maize delivered to the plaintiffs at the said price, less interest and brokerage, yet the said J. Walker did not at any time send to the plaintiffs contracts embodying the said terms, nor was the maize delivered to the plaintiffs at the said price, less interest and brokerage, &c., but the plaintiffs, in order to obtain the delivery of the maize, were obliged to pay for the same the price without being allowed to deduct the brokerage of one per cent., &c. Second count—That, in consideration that the plaintiffs would, at the defendant's request, enter into a contract with the defendant for the purchase of certain maize at a certain price, the defendant promised the plaintiffs that they should be paid or allowed a brokerage of one per cent. on the said price, and the plaintiffs accordingly, at the defendant's request, entered into the said contract with the defendant on the terms aforesaid : that all conditions were performed, &c., and all things happened, yet they have not been paid or allowed the same, &c.

Pleas (*inter alia*). First : Non assumpsit. Secondly : That the defendant did not commit the breaches. Fourthly : That after the contract, and before any breach thereof, it was agreed by and between the plaintiffs and the defendant that the said contract and agreement should be waived, abandoned and rescinded, and the same was waived, abandoned and rescinded accordingly.

The plaintiffs took issue on the pleas.

At the trial, before the Assessor of the Court of Passage of the Borough of Liverpool, it was proved that the plaintiffs, who were corn merchants at Liverpool, being instructed to buy corn for a correspondent, entered into the following contract with the defendant, a corn broker, (the words in italics being written under a printed heading) :—

[815] MEMORANDUM.

"From John C. Dreaper, Corn Broker, Liverpool, to Messrs. *Reid and Glasgow*.

"22nd March, 1860.

"Dear Sirs,—I have this day sold to you two cargoes of white French maize, one to consist of 8/1000 qrs., shipment by the 20th of April ; another about 1000 qrs., shipment all April ; both from the port of Bordeaux, at 33s. 3d. ¶ 480 lbs., cost and freight, payment in London, less 60 days' interest and 1% brokerage. Mr. J. T. Walker, London, will send contracts."

The defendant said he would telegraph to London. On the 23rd of March the plaintiffs received from the defendants the following documents :—

"London, 50 Mark Lane,

"22nd March, 1860.

"Sold for Monsieur Ticher, fils aîné, of Bordeaux, per John Thos. Walker, to Messrs. Reid & Glasgow, of Liverpool.

"A cargo of about 1000 quarters white maize, of fair average quality, for shipment at Bordeaux (by a first class vessel), in sound merchantable condition, before the 20th

of April next, at 33s. 3d. per 480 lbs., including cost, free on board and freight to a safe port of discharge in United Kingdom. Destination to be given by buyers in due time.

"Weight to be calculated at 1015 kilos. French as equal to the ton English, and payment by cash against shipping documents, less 60 days' interest at 5 % per annum.

"JOHN A. WHEALER & SONS,
"As agents."

[816] The other contract was similar in its terms.

The plaintiffs at once pointed out to the defendant that the terms, that the brokerage of one per cent. should be allowed, were omitted. The defendant said he had observed the omission, and would write to Walker about it. The plaintiffs then gave the defendant notice that they should hold him responsible for the brokerage. They afterwards received the maize, which they paid for in full without deduction for the brokerage, and brought this action to recover 28l., being the brokerage at 1 per cent. The learned Assessor nonsuited the plaintiffs, reserving leave to them to move to enter a verdict for 28l., and accordingly,

Aspinall, in this term, obtained a rule to enter the verdict for the plaintiffs, on the grounds that there was evidence that the plaintiffs were entitled to the deduction on brokerage claimed, and that they were also entitled to contracts from Walker, embodying these terms.

Leofric Temple now shewed cause. First, the plaintiffs should have repudiated the contracts as sent by Walker. Instead of doing so they chose to adopt them as sent. Secondly. The contract shews that the defendant was a broker. A broker is an agent, and, in order to make an agent liable upon a contract, it must appear on the face of it that the intention of the parties is that he shall be personally bound.

Aspinall, in support of the rule. The defendant did not make this contract as agent merely. There is nothing to exclude his personal liability upon it. The description "broker" is consistent with the presumption of his having contracted as principal. The actual principal was not known at the time of the contract; Walker himself was a mere middleman. In *Parker v. Winlow* (7 E. & B. 942), where a charter-[817]-party was expressed to be made "between P., of the good ship 'C,' and G. W., agent for E. W. and Son," to whom the ship was to be addressed, and was signed by G. W. without restriction, it was held that G. W. was personally liable. In *Deslandes v. Gregory* (2 El. & El. 602), where the contract was made by "Gregory Brothers, as agents to S. F." and signed "for S. F. Gregory Brothers, as agents," it was held that Gregory Brothers were not liable as principals. There Crompton, J., points out that the rule is "that persons signing a document, if they wish to exclude their own liability, must shew that they sign for some other person." *Lenhard v. Robinson* (5 E. & B. 125) was decided upon that principle. [Wilde, B. In the present case, there is nothing on the face of the instrument to shew that the defendant contracted as agent.] Again, suppose the defendant had no authority to bind his principal as to the term that the plaintiffs were to be allowed brokerage; then, as it must be conceded, that if the defendant had entered into this contract wholly without authority he would have been responsible; he is equally responsible for having inserted in the contract one clause as to which he had no authority to bind his principal. *Tanner v. Christian* (4 E. & B. 591) is an instance where an agent, contracting that his principal should do a certain act, was held responsible upon his contract.

POLLOCK, C. B. We are all of opinion that the rule must be absolute to enter a verdict for the plaintiffs. The first count of the declaration sets out the contract contained in the memorandum of the 22nd of March, and the only question is whether the contract declared on was proved. It is not necessary to consider whether the defendant was bound as to the whole or a portion only of the matters to which the [818] contract relates; because it is clear that he did agree that Walker should send contracts containing certain terms. In consequence of the refusal of Walker to do so, the plaintiff sustained a loss in respect of which he is entitled to recover in this action.

MARTIN, B. The facts appear to be that the defendant had received a communication from Walker that he had these cargoes of maize for sale. An agreement was made that the plaintiffs should purchase from the defendant's principal two cargoes of maize at certain prices, less sixty days' interest and one per cent. brokerage, and that Walker should send contracts. In effect, the defendant, a broker, contracted that

he had authority to sell on the terms he had thus agreed on with the plaintiffs, and that Walker should send formal contracts on the same terms. That was the personal contract of the defendant made by him as principal. If that is not so, a broker makes no contract at all. If a person gives authority to a broker to sell goods for him, and the broker sells, naming the principal, the broker is not liable. But here the defendant sold in his own name, and agreed that Walker should send contracts, that is, contracts containing the terms before mentioned. Walker would not insert, in the contracts sent by him, the stipulation as to the deduction of brokerage. It is said that the plaintiffs might have returned the contracts. But were they bound to return them? I think they were not, and that they were entitled to keep the maize. If not, in the event of a rise in the market, the vendor would be able to put the vendee in the position of being obliged either to lose the benefit of an advantageous contract, or to accept the goods on terms less advantageous than those contracted for.

[819] BRAMWELL, B. I do not think this a clear case. The question is, what is the meaning of the memorandum signed by the defendant? First, it may mean that the defendant contracts personally, so as to be liable if the maize is not sent from Bordeaux. Or, secondly, that the defendant contracts for a third person. Or, thirdly, that in respect of the sale he contracts for another, but binds himself that contracts shall be sent by Walker. But for the words "Walker, London, will send contracts," I should infer that the defendant was liable as principal. In a case put by my brother Wilde during the argument, of a house-agent saying to a person "I will let you a house,—A. shall send the contract," the inference would be that the house agent did not bind himself to let the house. Suppose Walker had sent contracts in the terms of the defendant's contract, and the maize never arrived, would the defendant have been liable? On the whole I think the question would be, Are the contracts sent those which were to come from London? If not, the defendant is liable. The contract stated in the first count is therefore proved. I am inclined to think that the defendant's liability is not affected by the fact that plaintiff did not send back the contracts forwarded by Walker. But, if there is anything in that point, it should have been raised by plea.

WILDE, B. I also think that the verdict must be entered for the plaintiffs. The defendant was a broker at Liverpool employed through Walker, of London, for a foreign principal to sell two cargoes of maize. If the defendant had authority to sell in the way in which he did, Ticher was his principal, but undisclosed. When the principal was disclosed, the plaintiff might have had an option, if the maize was not delivered or the contract otherwise not performed, to sue either the principal or the agent. The defendant was [820] either authorized to make the contract or not. If he was authorized, I have shewn that the plaintiffs might have sued him at their election. If not, the defendant was liable for having assumed to make a contract for his principal which he had not authority to make. Therefore I think that the defendant would have been liable on either branch of this contract, viz. as well for a failure to deliver the maize as for the breach of his agreement that written contracts should be sent by Walker. It may be that if the contracts sent by Walker had been in all respects in conformity with the defendant's contract, we might have read the defendant's contract as stipulating that he should be responsible for the sale of the corn by the principal; and that when the principal should be disclosed, and the formal contracts completed, the defendant should be relieved—that might have been open to argument. Then it was suggested that the plaintiffs' retention of the contracts sent by Walker, and acceptance of the maize under the contracts as sent, varied the defendant's liability. But there is no plea which raises that point. The only plea which bears upon it is the fourth, viz. that before any breach it was agreed that the contract should be waived, abandoned and rescinded. But the evidence proves exactly the reverse.

Rule absolute.

[821] SMITH AND ANOTHER v. WRIGHT. May 3, 1861.—If a distrainer takes the distress out of the place where it was originally impounded, for the purpose of making an unlawful use of it, the owner may interfere and take it out of his possession without rendering himself liable either for a rescue or for pound breach. —The plaintiffs, the owners of a colliery, having distrained two horses belonging

to the defendant for rent in arrear from one H., the lessee of the colliery, impounded them in the stable of an inn about half a mile from the pit. Two days afterwards the plaintiffs' servant brought the horses to the colliery for the purpose of letting them down into the pit where they had been accustomed to work. One of the horses was placed in a moveable stable near the pit's mouth and the other in a skip ready to be let down into the pit. The defendant then forcibly took away both horses: Held, that the distrainer having misused the distress, the defendant was at liberty to retake his property without being liable for a rescue or pound breach.

[S. C. 30 L. J. Ex. 313; 7 Jur. (N. S.) 1169.]

The first count of the declaration stated that the plaintiffs by their bailiff had taken certain goods, to wit horses, which then were on certain lands and premises held and enjoyed by one G. Hickman, as tenant thereof to the plaintiffs, under a demise at a certain yearly rent, as and in the name of a distress for a certain sum, to wit 559l., then due and in arrear from G. Hickman to the plaintiffs, for and on account of the said rent, and had impounded and secured the said goods in a certain pound on the most convenient part of the demised premises, with intent to appraise and sell the same according to the statutes, &c. And the defendant with force and arms broke the said pound, and rescued the goods contrary to the form of the statute, &c., whereby the plaintiffs have been delayed in recovering their said rent in arrear, and have been deprived of the means of obtaining satisfaction of the said rent, and of the costs and charges of the distress, and are likely to lose the same.

The second count (after stating the taking as above) alleged that the plaintiffs by their bailiff were about to impound the goods, with intent to appraise and sell the same according to the statutes, &c., and had the goods in their custody and possession under the distress, when the defendant, with force and arms, rescued, took and carried away the goods, and thereby prevented the plaintiffs from impounding the same as they otherwise would have done, whereby, &c.

[822] Pleas. First, not guilty. Secondly, to the first count, that the plaintiffs did not impound and secure the goods. Thirdly, to the second count, that the said lands and premises were not held or enjoyed by G. Hickman, as tenant thereof to the plaintiffs, nor was the sum of 559l., or any part thereof, due or in arrear, and that at the time of the making of the said distress, and of the impounding thereof, the goods in the second count mentioned were the goods of the defendant, and he had the right to the immediate possession thereof, and requested the plaintiffs to deliver the same to him, which they refused to do; wherefore the defendant took away the goods and prevented the plaintiffs from impounding them. The plaintiffs took issue on the pleas.

At the trial, before Blackburn, J., at the Spring Staffordshire Assizes, the following facts appeared. One Hickman was tenant to the plaintiffs of a colliery under an ordinary mining lease, at the yearly sum of 50l., as a surface rent, and a further sum by way of a mining rent. The lease contained a proviso for re-entry on nonpayment. The defendant was a butty collier under Hickman, and used his own horses in the mining operations. On the 8th of September, 1860, the plaintiffs distrained for rent due from Hickman, and seized, amongst other things, three of the defendant's horses. These were removed from the demised premises to the stable of an inn, about half a mile off, and notice was given that they were impounded there. The plaintiffs then took possession of the mine and plant under the proviso for re-entry. On the 10th of September, by order of Murrell, one of the appraisers acting generally for the plaintiffs, two of the horses were brought to the colliery for the purpose of being let down the pit, and employed in removing the timber. One of them was locked up in a moveable stable near the pit's mouth, and the other was placed on a skip ready to be let down the shaft. The defendant, with the assistance [823] of some other persons, broke open the stable and forcibly took away both the horses. The value of the horses was 20l.

It was objected, on behalf of the defendants, that neither of the counts of the declaration was proved,—the rescue being after the impounding, and after the removal of the horses from the pound for an unlawful purpose; that the case was not within the statute 2 W. & M. sess. 1, c. 5, and that treble damages were not claimed in the

declaration. A verdict was entered for treble damages, under the statute leave being reserved to move to enter the verdict for the defendant.

Gray having obtained a rule nisi for that purpose,

Pigott, Serjt., and Matthews shewed cause. The distress was originally lawful; the horses were regularly impounded, and the defendant was guilty of a pound breach. At the time the horses were taken by the defendant they had been removed from the stable where they had originally been placed; but, though no doubt the plaintiffs' servants contemplated working them, they had not actually commenced. It is clear, upon the authorities, that the distrainer may impound the distress wherever he pleases: Com. Dig. tit. Distress (D. 1). According to the rules there laid down, at the time of the rescue the horses were sufficiently impounded. It may, perhaps, be contended that the circumstance of the removal of the horses from the stable in which they were originally, makes a difference; but that is not so. In many cases some change of the place of pouncing might become absolutely necessary. The original pound may cease to be in a condition proper for the safe custody of the distress; in which case it would clearly be proper to remove goods distrained to another pound: *Wilder v. Speer* (8 A. & E. 547). Mere change of place, therefore, does not necessarily destroy the [824] legality of the custody. It is said that the removal here was for an improper purpose; but it will be found that in all the cases in which the abuse of a distress has been held to make the distrainer a trespasser ab initio, the abuse has taken place before the impounding. The reason is clear; it is the duty of the distrainer at once to put the distress in the custody of the law: the omission to do so indicates an intention to apply the goods distrained to the use of the distrainer. In the case of a distress for rent, tender after impounding does not make the detainer tortious: *The Six Carpenters' case* (8 Rep. 147 a.; 1 Smith Lead. Cas. 111). The principle upon which this proceeds applies equally to the case where, after impounding, there is an abuse of the thing distrained. As soon as the distress is impounded it is in the custody of the law, and no longer in that of the distrainer. It is laid down by Chief Baron Gilbert:—"When the beasts are in the custody of the law, the person distraining cannot be said unlawfully to detain what is in the custody and care of the law." (b) For the same reason a *parco fracto* lay though the distress and impounding were without cause: Com. Dig. tit. Distress (D. 2). Since the statute 11 Geo. 2, c. 19, a sale of the distress, contrary to the enactment of 2 Wm. & M. c. 8, s. 1, has been held not to make the distrainer a trespasser ab initio: *Wallace v. King* (1 H. Bl. 13). [Pollock, C. B. That was the case of a sale within five days which is an irregularity. Using the distress is a very different thing. Suppose the distrainer of a horse rode him out hunting, could not the owner stop him? Wilde, B. Would you contend that the hunter was still in the pound?] The distress would be lawful, notwithstanding that the owner might have an action for the irregularity. [Pollock, C. B. The act done was one which the distrainer was not authorized [825] to do at all,—not an irregularity, which is the doing something which the party has a right to do but in an improper manner,—but a wrongful act altogether. It put an end to the custody of the law, and took away the protection of the pound.] Surely a sale before the time permitted by the statute is a wrongful act, yet that does not render the distrainer a trespasser ab initio. [Wilde, B. Doing a right thing at a wrong time is not the same as doing an act wholly wrongful. In *Rodgers v. Parker* (18 C. B. 112) Jervis, C. J., says, in reference to the construction to be put upon the 11 Geo. 2, c. 19, s. 19:—"A subsequent irregularity is not to make the distrainer a trespasser ab initio. For the original taking there is to be no action; the distrainer is to be considered as being in possession of the goods, notwithstanding a subsequent irregularity." The defendant could not have maintained either trover or trespass: *Wallace v. King* (1 H. Bl. 13), *Rodgers v. Parker* (18 C. B. 112). [Wilde, B., referred to *Winterbourne v. Morgan* (11 East, 395).] At all events there was a clear act of trespass proved; the defendant could have no right to go upon the plaintiff's premises and break into his stable, and the Court has power to allow the declaration to be amended by the insertion of a count to meet the facts. [Bramwell, B. The Court will not amend where the damages would be nominal.]

Gray and Davis, who appeared in support of the rule were not called upon.

POLLOCK, C. B. We are all of opinion that the rule should be absolute to enter

the verdict for the defendant. We think that there was no pound breach, and no rescue. As to the application made to us to amend the [826] declaration, I have no wish to encourage actions, where the statute gives treble damages, by turning them into mere actions of trespass, for the purpose of entitling a plaintiff to save his costs in cases where we think he ought not to recover.

MARTIN, B. I am of the same opinion. All that the distrainer of goods obtained at common law was, not the property in the goods, but a sort of pledge; and the law directs how that pledge is to be used. No case has been cited to shew that, where the distress is being used in a manner which the law will not justify, the owner may not interfere to prevent the abuse; and it would be contrary to the spirit of the law if he were not permitted to do so. I have no doubt that, in principle and reason, an owner of property which has been seized as a distress is entitled to prevent the use of it by the distrainer in a manner not allowed by the law. This is well illustrated by a case, put by the Lord Chief Baron in the course of the argument, of a sheep being taken as a distress and the distrainer afterwards attempting to kill it; where it is impossible to doubt that the owner would be justified in interfering to prevent him from doing so.

BRAMWELL, B. I am of the same opinion. The argument for the plaintiff comes to this: that, when once a distress has been impounded, the quality of "impoundation" sticks to it, so that it cannot afterwards be got out of the pound. I cannot agree to that. The rule ought to be made absolute.

WILDE, B. I am of the same opinion. I can well understand that in some cases questions of great nicety might arise respecting the right of the owner of a distress to interfere with the distrainer in his dealing with it. In the pre-[827]-sent case the distrainer was guilty of a misuser, which was of a nature to leave no doubt as to the owner's right to interfere. Therefore, I think, there was no rescue: and I think also that there was no pound breach; for it seems to me that, under the circumstances of this case, the horses cannot be considered, in any sense, to have remained in the pound, out of which they had in fact been taken. On these grounds I think that the rule should be absolute.

Rule absolute to enter the verdict for the defendant.(a)

[828] EASTER VACATION, 24 VICT. IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

CASTLE AND OTHERS v. SWORDER. May 15, 1861.—The plaintiffs, wine and spirit merchants, kept a bonded warehouse, where they took in other persons' goods as well as their own, charging warehouse rent. Of this warehouse the plaintiffs had one key and the custom-house officer another. The defendant agreed to buy of the plaintiffs two puncheons of rum which were to remain in bond till wanted, the defendant to have six months further credit. The plaintiffs sent to the defendant an invoice describing the puncheons by marks and numbers with the words "free six months," which was explained to mean that they might remain in the plaintiffs' warehouse without charge for six months. The plaintiffs entered in the rum book of their warehouse the puncheons of rum as sold to the defendant, and proved that after this entry they had no power to get the goods out. The rum remained in the warehouse for two years, during which time the defendant on several occasions asked the plaintiffs to take back the goods or buy them of him. Held, by the Court of Exchequer Chamber (reversing the decision of the Court of Exchequer), that there was evidence to go to the jury that the character in which the plaintiffs held the goods was changed; and that, if they held as warehousemen for the defendant, there was evidence of an acceptance and receipt of the goods by the defendant so as to satisfy the 17th section of the Statute of Frauds.

[S. C. 30 L. J. Ex. 310; 8 Jur. (N. S.) 233; 9 W. R. 697; 4 L. T. 865. Referred to, *Hopton v. M'Carthy*, 1882, 10 L. R. Ir. 266. Distinguished, *In re Roberts; Evans*

(a) Reported by J. A. Yonge, Esq.

v. *Roberts*, 1887, 36 Ch. D. 200. Referred to, *Dublin City Distillery, Limited v. Doherty*, [1914] A. C. 846.]

This was an appeal from the decision of the Court of Exchequer in discharging a rule to enter a verdict for the plaintiffs, reported 5 H. & N. p. 281.

The case on appeal set out a copy of the Judge's notes of the evidence, which was as follows:—The plaintiffs are distillers and wine and spirit merchants at Bristol. The defendant is a wine and spirit merchant at Dowlais in the county of Glamorgan.

Henry Penn. Traveller for plaintiffs. February, 1867, I called on defendant, took order for two puncheons of rum and one of brandy. Sold by sample in bond. He has a brewery in Dowlais. They were to remain in bond till he wanted them. He was to have six months' further credit, [829] and at that time account to be due. I informed the plaintiff. Invoice read:—

“Mr. R. Sworder.

“Bought of Castle and Company, distillers and importers of foreign wines and spirits [D M] 2 punⁿ rum, ex ‘Maria.’

“138 98 31·7 p. ct.
139 95 25·6

193 galls. @ 4/2 £40 4 2
Hhd. Bry. ex ‘J. Lake.’
C C 456 57·41 p. ct. @ 14/ 39 18 0

“Free 6 months £80 2 2

“Sir,—The above remain in bond and which you will find of a very good quality, and hope will merit the continuance of your favors. “CASTLE & Co.”

That price was market price. Saw him again several times. After sale, brandy both rose and fell; shortly after, it rose. After credit expired I presented the account. He asked me if I would take the goods back or sell them for him; he gave no reason. I said I would do nothing of the kind. I subsequently applied. He asked me again to take them back. I recommended him to apply to the house. It is not uncommon for goods to remain in bond a long time after they are sold and paid for.

Cross-examined. I did not sell the brandy by sample. Defendant declined to pay.

Nathaniel Fox, now partner with plaintiff. I was a clerk there; we sell goods to remain in bond till ordered. On receiving advice from traveller we write off in our warehouse bonding book, the goods in question. The goods were in our bonded cellar in Bristol. We have one key and the [830] Customs another. It is not for our goods alone. We take in goods for other parties. We are the keepers and charge for warehouse room. “Free six months” means they may remain six months without charge. This is our book. Entry read.

Rum Book, page 128.

Mark.	No.	Ullage.	Per Cent.	O.P.	Bonded by.	Ship.	Of whom Bought.	Ware-house.	To whom Sold.	When Sold.	Dip.	When Delivered.
[D M]	138	98	31·7	31	T. Daniel & Sons, 10th Dec. 1856. Ex “Deme-rara.”	“Maria.”	Rent free 6 months.		R. Sworder, Dowlais.	23 Feb. 1857.		
	139	95	25·6	24								
The above from Rum Book.												

After that entry we have no power of getting the goods out. This is our book. (There was a similar entry in the brandy book as to the cask of brandy.)

This is the way we do it, and it is the custom generally at Bristol. Most wine merchants here have their bonded warehouse. When goods are warehoused in the warehouse of others a transfer order is lodged.

February 10th, 1859, defendant to plaintiffs:—

“Messrs. Castle & Co.

“Merthyr,
“10th Feb. 1859.

“Sirs,—You will oblige by informing me the present value of the rum and brandy, that is to say, what you are willing to give for it.—Yours truly,

“ROBERT SWORDER.”

The invoice identifies articles.

The order for the rum and brandy was a verbal one.

At the close of the plaintiffs' case the learned Judge directed the jury to return a verdict for the defendant, on the ground that there was no delivery or acceptance of the goods to satisfy the 17th section of the Statute of Frauds; [831] giving the plaintiffs leave to move to enter a verdict for the amount claimed, if there was any evidence on which the jury might find for the plaintiffs.

H. T. Cole argued for the plaintiffs.(a) There is evidence of an acceptance and receipt of the spirits sufficient to satisfy the 17th section of the Statute of Frauds. The defendant asked the plaintiffs' traveller to take the goods back; and on the 10th of February, 1859, two years after the date of the contract, wrote a letter asking the plaintiffs to name the price which they would give him for the spirits. That is a constructive dealing with the goods, and evidence of acceptance of them by the defendant. The plaintiffs had delivered to the defendant an invoice of the spirits, identifying the puncheons by marks and numbers, shewing that the plaintiffs had appropriated specific goods, and agreed to hold them for the defendant. After this appropriation of particular spirits to the contract by the plaintiffs, the goods were entered in the plaintiffs' warehouse book, and stood in their bonded warehouse as the goods of the defendant. The effect was, that the plaintiffs' position with respect to the goods was altered, and they had no power to get the goods out. The case therefore falls within the authority of *Elmore v. Stone* (1 Taunt. 458), where the plaintiff, a horse dealer and livery stable keeper, sold a horse to the defendant and by his direction removed it from his sale stable to his livery stable, and it was held that this was a sufficient delivery of the goods within the Statute of Frauds. The offer to resell the goods is evidence of acceptance: *Blenkinsop v. Clayton* (7 Taunt. 597). In some cases it has [832] been said that there can be no acceptance while the plaintiff has power to object to the quality of the goods. But that is contrary to *Morton v. Tibbett* (15 Q. B. 428), *Bushel v. Wheeler* (15 Q. B. 442, n.) and *Browne v. Hare* (4 H. & N. 822). [Crompton, J. Those cases at least establish that the power of objecting to the quality of the goods is not conclusive to shew that there has been no acceptance and receipt within the statute. Cockburn, C. J. It must not be assumed that I assent to the decision in *Morton v. Tibbett*.(d) Crompton, J. Perhaps the true rule is, that there can be no acceptance while the purchaser continues at liberty to reject the goods as not being according to sample or contract.] In *Meredith v. Meigh* (2 E. & B. 364), it was suggested that the acceptance and retention of the bill of lading by the consignee might be equivalent to an actual receipt of the goods; and on that ground *Currie v. Anderson* (2 El. & El. 592) was decided. [Crompton, J. In the case of *Meredith v. Meigh* (2 E. & B. 364) there must have been an invoice; but an invoice is not the indicia of property like a bill of lading.] The defendant could at any time have gone to the warehouse and obtained the goods on producing the invoice identifying particular casks as his. After having retained the goods, at the end of two years he is found to be dealing with them as his own. Surely that was evidence to be submitted to the jury that he had accepted them. The plaintiffs might have sued him for warehouse rent. In *Beaumont v. Brengeri* (5 C. B. 301), a carriage having

(a) Before Cockburn, C. J., Williams, J., Crompton, J., Byles, J., and Keating, J.

(d) 15 Q. B. 428. He referred to *Norman v. Phillips*, 14 M. & W. 276, and *Hunt v. Hecht*, 8 Exch. 814.

been purchased by a verbal contract, at the purchaser's request certain alterations were made in it, and it was removed by the seller into a back shop, the purchaser then called and [833] requested the seller to hire a horse and man for him, and to send the carriage to his house on the following day that he might take a drive in it, having previously intimated his intention to take the carriage out a few times in order that, as he was about to take it abroad, it might pass the Custom-house as a second hand carriage; it was held that this was evidence of the acceptance of the carriage. So in *Parker v. Wallis* (5 E. & B. 21), the spreading out seed thin was held to be some evidence of acceptance.

Welsby (with whom was Prideaux), for the defendant. By the 17th section of the Statute of Frauds, no verbal contract for the sale of any goods, &c., for the price of 10l. sterling or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so sold and actually receive the same, &c. Therefore, in order to satisfy the statute, there must be both an acceptance and a receipt. [Crompton, J. I have sometimes doubted whether there is much distinction between "receipt" and "acceptance."] There must be an actual receipt, just as if the word "accept" was struck out. It is a good test, whether there has been a receipt of the goods, to inquire whether the seller's right of lien remains; whether the character in which the seller holds the goods is so changed as to divest his right of lien. [Cockburn, C. J. That is only another way of putting the question, whether he has parted with the possession. Byles, J. In the present case the plaintiff would have had no answer if he had been sued in trover. He had no lien, because the goods were sold upon a credit of six months.] On the expiration of the credit, the goods remaining in the possession of the seller, the lien revived: *New v. Swain*.^{(b)¹} [Williams, J. However that may be, there was a period [834] when the plaintiffs had not a lien, and if the statute was once satisfied the subsequent revival of the lien cannot affect the present question.] Though in bond, the goods were in the vendor's own warehouse. [Byles, J. The warehouse is one of which the plaintiffs kept one key and the officer of the Customs another. It was proved that "after the entry" in the book the plaintiffs "had no power of getting the goods out."] The entry appears to have been made without the knowledge of the defendant. To constitute a receipt and acceptance within the statute, it is not enough that the purchaser has exercised some act of dominion over the goods. In *Carter v. Toussaint* (5 B. & Ald. 855), a race horse was sold by verbal contract, but no time was fixed for the payment of the price. It was to remain with the vendors for twenty days without any charge to the vendee. At the expiration of that time the horse was fired and sent to Kimpton Park, for the purpose of being turned out to grass there, by the direction of the vendee, and by his desire was entered as the horse of one of the vendors; it was held that there was no acceptance of the horse within the statute by the vendee. *Tempest v. Fitzgerald* (3 B. & Ald. 680) is to the same effect. [Cockburn, C. J. *Carter v. Toussaint* has always appeared to me a startling case. [Williams, J. It proceeds on the ground that the seller had a lien; here the plaintiffs had none.] There can be no acceptance where the purchaser retains the right of objecting to the goods as not according to contract. That appears from *Howe v. Palmer* (3 B. & Ald. 321) and *Hunt v. Hecht* (8 Exch. 814). [Crompton, J. Say rather—until he has had an opportunity of examining the goods, unless he has [835] waived examining them. Byles, J. There was some evidence that the defendant agreed that the plaintiffs should hold the goods as warehouse-keepers, because after six months the plaintiffs were to be at liberty to charge rent.] In *Tempest v. Fitzgerald* (3 B. & Ald. 680), after the contract the purchaser rode the horse and asked the vendor to keep it for him for a week. [Crompton, J. The plaintiffs are much in the same position as if they had not been vendors, but mere warehousemen with whom a delivery order had been lodged.^{(b)²}]

Cole, in reply. The plaintiffs have done all in their power to transfer the goods to the defendant. *Marvin v. Wallis* (6 E. & B. 726) seems to overrule *Carter v. Toussaint* (5 B. & Ald. 855) and *Tempest v. Fitzgerald* (3 B. & Ald. 680). In that

(b)¹ Dan. & Lloyd, p. 193. Crompton, J., observed that this case is referred to without comment in Addison on Contracts, p. 236, 1120, and Cross on Lien, p. 328. Byles, J., said that its authority is questioned in Parsons on Contracts, p. 441. See also Blackburn on the Contract of Sale, p. 324.

(b)² *Farina v. Home*, 16 M. & W. 119, was referred to.

case there was the same apparent possession throughout, but the evidence shewed that the character in which the seller held the horse was changed. It shews that it is immaterial whether the seller retained any lien or not. The invoice conveyed to the defendant an intimation that the goods were warehoused for him.

COCKBURN, C. J. We are all of opinion that the judgment of the Court below must be reversed, and the rule made absolute to enter a verdict for the plaintiffs. The question for us is, not how the jury would have found if it had been left to them, but, whether there was any evidence of an acceptance and receipt of the goods to satisfy the statute. I think that those terms are equivalent, and in my opinion there was such evidence. It appears that the defendant had entered into a contract with the plaintiffs' traveller to buy the goods, and he was to have a right to take them whenever he thought fit. In the mean time the goods were to remain in the warehouse of the plaintiffs [836] for six months without payment, and afterwards subject to the payment of rent. The plaintiffs had a bonded warehouse in which they kept not only their own goods but those of other people. The plaintiffs appropriated particular goods to the defendant, and sent him an invoice specifying the goods so appropriated. Some time after this, the defendant finding that it did not suit his convenience to keep the goods, proposed to the plaintiffs' traveller to take them back, and wrote to the plaintiffs suggesting that they should do so. The question is, whether these facts amount to evidence of a constructive acceptance of the goods by the defendant. The important particular which has existed in several of the cases, viz., a lien on the part of the seller, which imports a right of possession incompatible with the possession of the purchaser, did not exist here. The goods were sold on credit, and it is incontestable that during six months the buyer might have claimed these specific goods. The first point then is, whether, upon these facts, the possession which the sellers retained was a possession by virtue of their original property, or as bailees of the buyer. I think there was evidence that the possession of the plaintiffs, which had originally been as owners and sellers, had been converted into a possession by them as bailees for the buyer; for as soon as the goods had been specifically appropriated, the defendant, by virtue of his right as purchaser, evidenced by the terms of the invoice, availed himself of his right by having the goods warehoused in the general warehouse of the sellers, and by requesting the sellers to take back the goods, and failing that to resell them for him. Under the contract he was entitled to have the goods warehoused for a certain period free of charge, and after that at a rent; and he dealt with the goods as if they had been warehoused for him. This was a constructive [837] possession in the buyer, and a constructive acceptance of the goods by him. It is unnecessary to consider whether, if the goods had not been according to the contract, the defendant might have repudiated them; or whether the case falls within the rule, that where a person chooses to accept goods without exercising his right to inspect them he waives his right to reject them, and must be taken to have accepted them without examination. The defendant was content that the goods should remain in the plaintiffs' warehouse till it suited him to deal with them as owner. Therefore that difficulty does not arise. A buyer may well waive his right to examine goods and accept them, trusting to his remedy by action if they turn out not according to contract. I am clearly of opinion that there was evidence for the jury; and, that being so, according to the arrangement at *nisi prius*, the verdict must be entered for the plaintiffs.

CROMPTON, J. I am of the same opinion. The only question in the Court below was whether there was any evidence to go to the jury in support of the plaintiffs' case. We do not differ from the Court of Exchequer except in thinking that there was some evidence of the plaintiffs' character being changed from that of seller to that of warehouse-keeper. I take it to be clear that where goods are left by a buyer in the hands of the seller, who is also a warehouse-keeper or livery stable keeper, there may be a change in the character in which he holds the goods so as to make him the agent for the buyer. Here I think that there was evidence to shew that the defendant had admitted that the goods had become his, and remained in the plaintiffs' hands as warehouse-keepers. After that I think he could not have rejected them, though he might have had a remedy by action for damages if they were not according [838] to contract. I think it is settled by the cases, that where the goods are left by the purchaser with the seller his character may be changed; and that where he becomes the bailee for the purchaser the statute is satisfied. In *Farina v. Home* (16 M. & W. 119, and see

Bentall v. Burn, 3 B. & C. 423), it was held that the mere giving of a transfer order for the goods was not sufficient, because they were held by a warehouse-keeper as agent for the seller; but where a delivery order is lodged and attorned to by the bailee he holds for the buyer, and the Statute of Frauds is out of the question. The only peculiarity of this case is that the same person was both seller and warehouse-keeper. In such case, in order to satisfy the statute, it is necessary that there should be some evidence of a change in the character in which the plaintiffs held the goods. Now it is impossible to say that there was not some evidence to shew that the goods were in the hands of the plaintiffs as warehouse-keepers. The defendant made statements and wrote letters which shew that he acquiesced in the plaintiffs holding the goods as his agents. Particular casks were appropriated to the defendant by the invoice. The defendant kept the invoice and may be presumed to have assented to the terms of it. The invoice states that the goods were to remain "free for six months." This shews that the plaintiffs would keep the goods as warehouse-keepers free of charge for a certain time. It may therefore be inferred that the defendant knew that the plaintiffs were warehouse-keepers, and assented to their keeping the goods in that capacity for him. When applied to for payment he asks what the plaintiffs will give him for the rum. That is strong evidence of acceptance. When this is taken in connection with the entries in the rum and brandy books, and the proof that after that entry the plaintiffs could not get out the goods, there is evidence of a change of cha-^[839]racter. After that I think that the defendants could not say that these goods did not pass to them, though they might have brought an action if they were not according to contract.

WILLIAMS, J., BYLES, J., and KEATING, J., concurred.

Rule absolute to enter verdict for the plaintiffs.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

JULIA TREW AND GARDNER HIORNS, Executrix and Executor of Frederick Hiorns Deceased v. THE RAILWAY PASSENGERS' ASSURANCE COMPANY. May 14, 1861. —H. effected with the defendants a policy of assurance, whereby they agreed that if he should sustain any injury caused by accident or violence, within the meaning of that policy and the conditions thereto, and should die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the defendants should be subject and liable to pay the sum thereby assured. The policy contained a proviso that no claim should be made in respect of any injury unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors. On a Saturday afternoon H. went to Brighton by railway, having a ticket which entitled him to return by it on the following Monday. About seven o'clock on Monday evening he left his lodgings, having expressed his intention to bathe before he returned to London. His clothes were found on the steps of a bathing machine, and about six weeks afterwards a body was washed ashore on the Essex coast, which his brother and some acquaintances deposed at the inquest was his body, but the jury found that it was the body of a person unknown. Held, in the Exchequer Chamber: First, that assuming H. died from drowning, that was a death by "accident" within the meaning of the policy. Secondly, that it was a question for the jury whether H. died from the action of the water or from natural causes.

[S. C. 30 L. J. Ex. 317; 7 Jur. (N. S.) 878; 9 W. R. 671; 4 L. T. 833. Followed, *Winspear v. Accident Insurance Company*, 1880, 6 Q. B. D. 42. Referred to, *Minifie v. Railway Passengers' Assurance Company*, 1881, 44 L. T. 554.]

This was an appeal against the judgment of the Court of Exchequer in discharging a rule calling on the defendant to shew cause why the nonsuit should not be set aside and a new trial had. The pleadings, policy of assurance ^[840] and facts sufficiently appear in the report of the case in the Court below. (5 H. & N. 211.)

The questions for the decision of the Court of Appeal were:—First, whether,

assuming the said F. Hiorns to have been drowned at Brighton on the evening of the 15th of September, 1856, and that his death was not caused by suicide, either felonious or otherwise, or by his wilful act in exposing himself to unnecessary danger or peril, or whilst he was in a state of intoxication, the plaintiffs are entitled to recover in this action.

Secondly, whether there was any evidence proper to be submitted to the jury, that the said F. Hiorns was so drowned.

If the Court should be of opinion in the affirmative on both questions, then the nonsuit to be set aside and a new trial had. If the Court should be of opinion in the negative on either of the said questions, then the nonsuit to stand.

G. Francis, for the plaintiffs. First, there was evidence that the deceased was drowned whilst bathing. In the Court below Martin, B., said:—"I am of opinion that the rule ought to be discharged; and I am of that opinion, on the assumption that there was evidence for the jury, that the person assured died whilst bathing." Watson, B., was of opinion that, looking at all the circumstances, there was some evidence for the jury that the deceased was drowned. Then, secondly, is drowning an accident within the terms of this policy? The policy provides that, "if at any time during his life, &c., the assured shall sustain any injury caused by accident or violence within the meaning of this policy and the conditions hereto, and if the assured shall die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the Company shall be subject and liable to pay the full sum [841] hereby assured to the legal representatives or assigns of the assured," &c.: "Provided that no claim shall be made under this policy by the assured in respect of any injury, unless the same shall be caused by some outward and visible means of which satisfactory proof can be furnished to the directors." Here the assured died from injury resulting from accident and caused by some outward and visible means. In Taylor's Medical Jurisprudence, p. 721, 6th ed., it is said:—"No doubt now exists among physiologists that death by drowning is due to apnœa or suffocation, in which condition breathing is arrested, and the blood is at first circulated in a state unfitted to support animal life, and sooner or later its circulation through the minute vessels of the lungs is wholly arrested; thus producing the state of asphyxia." Assuming that the deceased was drowned, his death was not caused by natural causes. [Cockburn, C. J. That would apply to cramp; but suppose he died of apoplexy whilst in the water. Crompton, J. If his death was caused by cramp preventing him from swimming, then he died from injury caused by accident; but death by apoplexy is a death from natural disease. The Court below evidently considered that the question before them was, whether the deceased died from drowning or apoplexy.] If drowning be held a death from natural disease, all cases of drowning would be excluded from this policy. This subject was considered in *Sinclair v. The Maritime Passengers Assurance Company* (3 El. & El. 478), where Cockburn, C. J., in delivering the judgment of the Court said: "It is difficult to define the term 'Accident' as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from natural causes, such as shall be of universal application. At the same time we think we may safely assume, that in the term 'Accident,' as so used, some violence, casualty, or [842] vis major is necessarily involved." The fact that the deceased died in the water was evidence for the jury that his death was caused by a vis major. If he had caught a cold from which he ultimately died, that would not have been within the terms of this policy. *The Midland Railway Company, Appts., Bromley, Resp.* (17 C. B. 372), was relied upon in the Court below; but there Crowder, J., in delivering judgment, said: "Where the evidence is quite as consistent with one view as with the other, the party upon whom the onus lies fails to make out his case."

Lush (with whom was Phipson), for the defendants. First, death by drowning is not death by "Accident" within the terms of this policy. The policy was intended to compensate the assured, either where injury short of death was caused by accident or violence, or where death resulted from such injury. But the injury or death must be caused by some outward and visible means capable of satisfactory proof. It is true that if a person walks into the water and is drowned, that is in one sense a death from accident, because it was uncertain whether the event would occur, but it is no more a death from accident, within the terms of this policy, than a death from sun-stroke. It may be different if a sailor falls overboard and is drowned. This is

the case of a person voluntarily going into an element which might or might not cause his death: it is like the case of a person who exposes himself to the influence of a tropical sun. But the policy only protects the assured against injury, or death arising from injury caused by violence. [Cockburn, C. J. Suppose a person rushed into a house whilst it was on fire to save his child, and was burnt to death, would that be death from "Accident" within the meaning of this policy?] Since the act of entering the [843] house was voluntary, the death could not be said to be accidental. In the case of *Sinclair v. The Maritime Passengers Assurance Company* (3 El. & El. 478), the assurance was against "any personal injury from, or by reason, or in consequence of any accident." Cockburn, C. J., in delivering the judgment of the Court, said: "It is true, that in one sense disease or death through the direct effect of a known natural cause, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes." Secondly, assuming that death from drowning is within the terms of this policy, there is no evidence that the assured died from drowning. His death may have been caused by apoplexy or cramp in the heart. [Cockburn, C. J. The probability is greater that he died from drowning than from other causes.] By the terms of this policy it is not enough that, probably, the assured died from drowning, but the nature of the death must appear. [Crompton, J. The same argument would apply to the case of a person who fell overboard from a ship.] There must be evidence from which a jury may reasonably and properly conclude that the assured died from drowning: *Toomey v. The London, Brighton and South Coast Railway Company* (3 C. B. N. S. 146). He then argued that there was no evidence that the assured was dead.

Francis in reply. It appears by Taylor's Medical Jurisprudence, p. 725, 6th ed., that where death occurs in the water, it is in very few instances caused by apoplexy. The policy must be construed most strictly against the assurers. The proviso that "No claim shall be made under this po-[844]-licy by the assured in respect of any injury unless the same shall be caused by some outward and visible means, of which satisfactory proof can be furnished to the directors," refers to cases of personal injury, not death; and therefore does not apply to a claim made by the representatives of a deceased person.

COCKBURN, C. J. We are all of opinion that this nonsuit was wrong, and that the judgment of the Court of Exchequer, in refusing to set it aside, was erroneous. It is said that, assuming the deceased died by drowning, drowning is not one of the cases comprehended in this policy of assurance. Mr. Lush ingeniously argued that the policy only applies to cases where from accident or violence some injury occurs from which death may or may not ensue; and if it ensues within three months, the sum assured is payable. But he contended, in effect, that where the cause of death produces immediate death without the intervention of any external injury, the policy does not apply; and whereas from the action of the water there is no external injury, death by the action of the water is not within the meaning of this policy. That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed; or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to those policies a construction which will defeat the protection of the assured in a large class of cases. We are therefore of opinion that, if there was evidence for the jury that the deceased died by drowning, that was a death by accident within the terms of this policy.

[845] The next question is whether there was evidence for the jury that the assured met his death by drowning. It appears that he went to Brighton for recreation, and there is no reason to suppose that he intended to commit suicide. He left his lodgings for the purpose of bathing, and his clothes were found by the water-side, but he himself was not afterwards seen. A body was found in the water at a distance from the place where he went to bathe, but not at such a distance that it might not have been carried there by the waves. There was some evidence that this was the body of the assured, and, assuming that it was, the question ought to have been submitted to the jury whether he met with his death by drowning. If they found

that he died in the water, they might reasonably presume that he died from drowning. It is true, that death occurs in the water in some instances from natural causes, as apoplexy or cramp in the heart—but such cases are rare and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water or natural causes. If they are of opinion that he died from the action of the water causing asphyxia, that is a death from external violence within the meaning of this policy,—whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth. For these reasons we think that there must be a new trial.

Award of trial *de novo*.

[846] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

SWINFEN v. BACON. May 15, 1861.—B., who held lands as tenant from year to year under S., after the death of S. took the same with other lands at an increased rent from the devisee of S. The heir-at-law disputed the will. The devisee gave to B. notice to quit. B., acting under a *bonâ fide* belief that the heir-at-law was entitled, refused to give up possession of the land to the devisee: Held, by the Court of Exchequer Chamber (affirming the decision of the Court of Exchequer), that B. was not liable to pay double rent under the 4 Geo. 2, c. 28, which applies only when the tenant holds over though conscious that he has no right to retain the possession.

[S. C. 30 L. J. Ex. 368; 7 Jur. (N. S.) 897; 9 W. R. 740; 5 L. T. 83.]

This was a proceeding in error upon the judgment of the Court of Exchequer on a special case, reported ante, p. 184.

Kennedy, argued for the plaintiff.(a) In order to render a tenant who holds over after the expiration of his term, and after demand made and notice in writing given for delivering up possession by his landlord, liable for double value under the 4 Geo. 2, c. 28, s. 1, it is not necessary to shew that he held over fraudulently. The preamble states the object of the act, “for securing to lessors and landowners, their just rights, and to prevent frauds frequently committed by tenants.” With that object, certain acts are positively prohibited under penalties. If it had been intended that the enacting part should apply to those cases only where the tenant is actually guilty of fraud, it would have been so expressed. Holding over is an act of a dangerous character which may lead to fraud. [847] Under the old practice in the action of ejectment, as it existed at the time of the passing of the 4 Geo. 2, c. 28, several terms might have elapsed before the landlord could obtain possession. A similar system of legislation is found in other statutes passed about the time when the 4 Geo. 2, c. 28 became law. For instance, the 9 Geo. 2, c. 36, s. 1; 15 Geo. 2, c. 30, and 19 Geo. 2, c. 37, contain positive prohibitions of acts which might be harmless in themselves, on account of their mischievous tendency. Full effect is given to the word “wilfully” by the interpretation now suggested. If that word had been omitted a tenant would be liable for holding over even though he might not know that his term had expired. “Wilfully” means no more than intentionally. [Cockburn, C. J. Does it not imply an intention to hold over and resist the known right of another?] Suppose a landlord gave notice to his tenant to quit at Christmas, and the tenant believed that his term commenced at Lady Day, and that the notice to quit was invalid; if the tenant held over *bonâ fide*, which would be a question for the jury, he would not be liable for double value under this statute. But the question when a tenancy commences is one of fact, and often difficult of solution. Again, suppose a man holding over under a lease for lives had reason to believe that a life had not dropped, and held over *bonâ fide*, he would not be liable. [Crompton, J. Why may not a tenant lawfully be in doubt to whom he is bound to give up possession as landlord?]

(a) Before Cockburn, C. J., Williams, J., Crompton, J., Willes, J., Byles, J., Hill, J., and Keating, J.

The word "wilfully" must be construed with reference to the law of landlord and tenant. [Cockburn, C. J. If a person is to be visited with a penalty for doing a certain act, viz., holding over with intent to keep out his landlord, it must be shewn that he intended to do the act. Here the defendant did not intend to keep out his landlord. There was no mens rea.] The defendant would have had no [848] defence to an ejectment; he was estopped from denying the plaintiff's title: *Doe d. Marlow v. Wiggins* (4 Q. B. 367), 2 Smith's Leading Cases, 654, and he knew that his title under her had expired. [Crompton, J. If you could shew that the defendant had read Smith's Leading Cases, and knew what an estoppel was, your argument might be better founded.] Where two parties are severally claiming as landlords, a tenant may protect himself by going to a Court of equity; but he must be neutral. Here the defendant was the partisan of a person whose claims he was bound to resist: 11 Geo. 2, c. 19, ss. 11, 12.

Manisty (with whom was Macnamara), appeared for the defendant; but was not called upon.

COCKBURN, C. J. We are all of opinion that the judgment of the Court below must be affirmed. Ever since the case of *Wright v. Smith* (5 Esp. 203, 215), decided more than half a century ago, the interpretation put upon the 4 Geo. 2, c. 28, has been that when a person holds over not contumaciously as against the person entitled to the possession, but under a bonâ fide belief that he has a right to do so, the statute does not apply. I think it would be very mischievous, as well as contrary to the true construction of the Act, if we were to hold otherwise, for I am strongly of opinion that "wilfully" holding over applies only when a tenant holds over in the absence of a bonâ fide belief that he is justified in doing so. In the present case, the defendant, who held under the testator as tenant from year to year, accepted a fresh grant from the devisee; after that he found the heir-at-law disputing the will, and was in doubt whether he was tenant to the heir-at-law or the devisee, not knowing whether the devisee had power to grant him a fresh term or not, but [849] bonâ fide believing that the grant was inoperative. It is in fact admitted that the defendant acted under a bonâ fide belief that Captain Swinfen had the better title, and that the devisee had no title. We do not think that this is a case to which the statute was intended to apply. It has been long held, and we think rightly, that the statute applies only to the case of a tenant who holds over though he is conscious that he has no right to retain possession.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

CLARKE AND OTHERS, Representatives of Dickenson, Deceased v. WRIGHT. Feb. 8, 1861.—D., a widow, being possessed of certain real property, by settlement in contemplation of her marriage, dated the 17th May, 1830, reciting that, upon the treaty for the marriage, it was agreed that her property should be appointed, released and conveyed as thereafter mentioned, limited the property to trustees in trust for herself for life, with remainder, as to part, to her husband for life, remainder to the use of her illegitimate son, the plaintiff, in fee, and as to the residue, to the plaintiff in fee in case he should attain the age of twenty-one years, &c. She and her husband subsequently mortgaged the property. In ejectment by the plaintiff against a person claiming title under the mortgagee, it was proved that in October, 1830, the husband and wife let the property to T., and received the rents of it for some years. The plaintiff gave secondary evidence of the above settlement, which was afterwards put in by the defendant. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer): First, that the limitation in the marriage settlement to the plaintiff, though a bastard, was not fraudulent and void as against the mortgagee by the 27 Eliz. c. 4. Dissentiente Williams, J.—Per Cockburn, C. J., and Wightman, J. Because although the limitation in the marriage settlement to the illegitimate son of the wife, being the settlor, could not be deemed within the consideration of the marriage and was therefore voluntary, yet the case came within the principle

of the exception engrafted upon the rule, viz. that a provision in a marriage settlement in favour of existing children cannot be deemed fraudulent within the statute 27 Eliz. c. 4.—Per Blackburn, J. Because the limitation so interfered with those which would naturally be made in favour of the husband, wife and issue, that it must be presumed to have been agreed upon by all parties as part of the marriage bargain that the estate should be so settled.—Secondly: that there was evidence of the seisin of D. at the time of the execution of the settlement: Per totam Curiam.

[S. C. 30 L. J. Ex. 113; 7 Jur. (N. S.) 1032; 9 W. R. 571; 4 L. T. 21. Not applied, *In re Browne's Estate*, 1862, 13 Ir. Ch. R. 283; *Smith v. Cherrill*, 1867, L. R. 4 Eq. 396. Commented on, *Price v. Jenkins*, 1876, 4 Ch. D. 490: reversed on another ground 5 Ch. D. 619; *In re Cameron and Wells*, 1887, 37 Ch. D. 37. Distinguished, *In re D'Angibau*; *Andrews v. Andrews*, 1880, 15 Ch. D. 242. Dissented from, *De Mestre v. West*, [1891] A. C. 264. Referred to, *In re Cullin's Estate*, 1864, 14 Ir. Ch. R. 506; *Gale v. Gale*, 1877, 6 Ch. D. 150; *Tucker v. Bennett*, 1887, 38 Ch. D. 11; *Godfrey v. Poole*, 1888, 13 A. C. 504; *Attorney-General v. Lord Rathdonnell*, 1893, 32 L. R. Ir. 590; *Attorney-General v. Jacobs-Smith*, [1895] 2 Q. B. 349.]

This was an appeal by the defendant against the decision of the Court of Exchequer in discharging a rule to enter a [850] nonsuit, or for a new trial. It appeared that the plaintiff in the first instance gave secondary evidence of the settlement which was afterwards put in by the defendant. In other respects the facts of the case fully appear in the report, 5 H. & N. 401. W. T. Dickenson, the plaintiff, having died since the trial, the above mentioned claimants were made parties by suggestion.

Mellor (Field with him), argued for the defendant.^(a) The first question is whether a limitation in a marriage settlement to the use of an illegitimate son of the settlor, is voluntary, and therefore fraudulent and void, by the 27 Eliz. c. 4, as against a mortgagee who is a purchaser, within the meaning of that Act. In order to render a settlement void as against creditors, it is necessary to shew that it was not bonâ fide, or that the settlor was in debt at the time he made it. Therefore a settlement may be good as against a creditor, though not good as against a purchaser for valuable consideration. For a long time it was thought that the question whether a settlement, in consideration of natural love and affection, was void as against a subsequent purchaser for valuable consideration, depended upon whether the purchaser had notice of the prior settlement; but it is now established that it is immaterial whether the purchaser had notice, because, as against him, the law implies fraud. The authorities on that subject are reviewed by Lord Ellenborough in *Doe d. Otley v. Manning* (9 East, 59). The law as there laid down is commented on in a note to Shep. Touch., by Atherley, p. 64, 8 ed., where it is said:—"Upon the whole, there can be no doubt but the Act of the 27 Eliz. avoids voluntary conveyances, as such, against subsequent purchasers for a valuable consideration. But it only does this, it is [851] apprehended, where the purchaser has no notice of the voluntary settlement." Here, however, the mortgagee had no notice of the settlement. [Willes, J., referred to *Currie v. Nind* (1 Myl. & C. 17).] In *Taylor v. Jones* (2 Atk. 600) a post-nuptial settlement was held void as to creditors. Fortescue, M. R., there said:—"I must decree for the plaintiffs, the creditors, against the wife and children; for though I have always a great compassion for wife and children, yet, on the other side it is possible, if creditors should not have their debts, their wives and children may be reduced to want." In this case, if Mrs. Dickenson could not, prior to her marriage, have made a settlement in favour of her illegitimate son, which would be valid as against a subsequent purchaser for valuable consideration, what additional right did she acquire by her marriage? Marriage is a valuable consideration, but it is a consideration limited to the objects of the marriage. In Sudgen's Vend. and Purch. p. 589, 13 ed., it is said:—"The marriage consideration runs through the whole settlement as far as it relates to the husband and wife and issue; but the marriage consideration will not extend to remainders, to collateral relations, so as to support them against a subsequent sale to a bonâ fide purchaser." However, such a remainder, when after a vested estate tail, has been supported, on the ground that the intent of the settlor

(a) In last Michaelmas Vacation, Dec. 1 and 3. Before Cockburn, C. J., Wightman, J., Williams, J., Willes, J., and Blackburn, J.

could not have been fraudulent, since he interposed a limitation which might prevent the ultimate remainder from taking effect: *White v. Stringer* (2 Lev. 105). An illegitimate son is a stranger, and consequently the marriage consideration does not extend to him. In *Osgood v. Strobe* (2 P. Wms. 245; 10 Mod. 533) Lord Macclesfield first laid down the rule that the marriage consideration supports only the limitation to the husband and wife and their issue, and that a remainder in fee to a [852] collateral relation is voluntary. There is, however, a dictum of Lord Eldon, in *Pulvertoft v. Pulvertoft* (18 Ves. 84, 92), that if there be father, tenant for life, with remainder to his son in tail, they may agree, upon the marriage of the son, to settle, not only upon his issue, but upon collaterals, and that the limitations to the latter, though not within the marriage consideration, may be supported, as being within the contract between the father and son. In *Roe d. Hamerton v. Milton* (2 Wils. K. B. 356) a limitation to collaterals, in an ante-nuptial settlement was held not to be voluntary and void as against a purchaser for valuable consideration. But there, as observed by Lord Campbell, C. J., in delivering the judgment of the Court in *Tarleton v. Liddell* (17 Q. B. 390, 415), the party conveying and settling the land took a benefit, and had a good consideration, in having part of his lands, of which he was seised in fee, discharged from an annuity. Other cases are collected in Roberts on Voluntary Conveyances, sect. 7, p. 120. [Cockburn, C. J. Suppose two persons about to marry, one of whom has children by a former marriage, and that they agree by articles to make a provision for those children, would not that be valid? If so, why should not the same law apply to illegitimate children?] The settlement was made before the passing of the Poor Law Amendment Act, 4 & 5 Wm. 4, c. 76, s. 57, by which the mother of an illegitimate child, so long as she remains unmarried, is bound to maintain it as part of her family until it attains the age of sixteen. *Newstead v. Searles* (1 Atk. 265) decided that a settlement by a widow, previously to her second marriage, of her estate on the children of the first marriage, is not fraudulent and void as against purchaser or creditors. That case is cited in Sugden's Vend. and Purch., p. 589, 13th ed., but not approved of. It is also reviewed in Roberts on Voluntary Conveyances, p. 363, where the author says, "At most, perhaps, when clearly understood, it is an isolated case." *Doe d. Otley v. Manning* (9 East, 59) has settled the construction of the 27 Eliz. c. 4. In *Chapman v. Emery* (1 Cowp. 278, 280), where Lord Mansfield held, that a settlement by a man after marriage on his wife and children was void as against a subsequent mortgagee, he said: "Where a woman, about to marry a second husband, makes a settlement of her estate upon the children by her first husband, such settlement has been held good." But it does not appear that he approved of that decision. In *Doe d. Otley v. Manning* (9 East, 59), Lord Ellenborough said: "Much property has, no doubt, been purchased, and many conveyances settled upon the ground of its having been so repeatedly held, that a voluntary conveyance is fraudulent, as such, within the statute 27 Eliz." *Johnson v. Legard* (6 M. & Sel. 60) is also an authority that a limitation in a marriage settlement in favour of collateral relations is void as against a subsequent purchaser with notice. [Cockburn, C. J. In *Clayton v. The Earl of Wilton* (6 M. & Sel. 67, n.), a limitation in favour of the issue of a second marriage by the settlor was held good as against a subsequent purchaser for valuable consideration.] There is a notice of that case in Sugd. Vend. and Purch., p. 589, n., 13th ed., where it is said: "It is observable, that in order to support the limitations to the daughters of the first marriage, it was necessary to support the remainders to the sons of the second marriage. That was of itself a sufficient ground to support the remainder. It has, on the same principle, been considered that an estate to a stranger may be supported, under a covenant to stand seised, if required to give effect to subsequent limitations within the consideration." So in *Shep. Touch.* 513, it is said: "If I covenant with B., in consideration of the marriage of my son with the daughter [854] of B., to stand seised to the use of R. (a stranger) for life, and after to the use of my son and his wife in tail; in this case the use shall rise to R. albeit he be a stranger; and that for the supportance of the remainder, which cannot be without a particular estate." In the case of *St. Saviour's in Southwark* (Lane, 21) it was held, "that if a man doth, in consideration that his son shall marry the daughter of B., covenant to stand seised to the use of his son for life, and after to the use of other his sons, in reversion or remainder, these uses thus limited in remainder are fraudulent against a purchaser though these first be upon good consideration, viz. for marriage." That case is commented on in Sugden's Vend. and

Purch., p. 557, 5th ed. Also in 2 Roll. Abridg. "Uses" (1.) pl. 5, and Viner's Abridg. "Uses" (1.) pl. 5, it is said: "If a man, in consideration that B. shall marry his daughter, covenants to stand seised to the use of B. and his daughter, the remainder to C.; this is a void remainder to C., because he is a stranger to the consideration." *Bellingham v. Wentworth* (1 Chan. Ca. 243), *Sutton v. Chetwynd* (3 Meriv. 249), *Cornick v. Trapaud* (6 Dow. 60, 86), are also authorities that a limitation in a marriage settlement in favour of a stranger to the consideration is void. In *Johnson v. Legard* (Tur. & Russ. 281), Lord Eldon expressed an opinion that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary. [Wightman, J. The settlement recites that upon the treaty for the contemplated marriage it was agreed that the estate should be conveyed as thereafter mentioned; therefore it would appear that in consequence of the treaty and upon the faith of the settlement the marriage took place.] It must be admitted that the brothers of the settlor are strangers to the consideration of the marriage: [855] *Colterell v. Homert* (13 Sim. 506). [Blackburn, J. In that case there was no discussion as to whether the settlement was voluntary or not, or as to what makes a settlement voluntary; it was merely held that that particular settlement was voluntary.] In *Staplehill v. Bully* (Prec. Chan. 224) there is a dictum to the same effect. In *Jenkins v. Keymis* (1 Lev. 150, 237. See also *Hardres*, 395; 1 Chan. Ca. 103), by settlement made on the marriage of C. and B., certain estates were limited to the use of C. for life, remainder to the use of the heirs of the body of C. and B., remainder to the heirs of the body of C., with remainders over; and it was held that the consideration of the marriage extended to the children of the second marriage of C. But Lord Hale appears to have thought that the consideration of the marriage might extend to all the estates in the settlement,^(d) which is clearly contrary to the later cases. In *White v. Stringer* (2 Lev. 105) there was a covenant in consideration of the marriage of the first son to settle to him in tail, remainder to the second son; and it was held that the limitation to the second son was not voluntary and fraudulent; but that was because the limitation, being after the determination of a vested estate tail which might endure for ever, could not be intended to deceive a purchaser; and, secondly, the purchaser had collateral security by deed against the remainder. A bastard is a mere stranger: he is not considered in law as the child of his reputed parent. [Willes, J. Is not that too wide a proposition? For some purposes he is considered as next in blood, as in the case of marriage within the prohibited degrees. So, in the doctrine of bastard eigne and mulier puisné.] He is not so connected with the parent as to come within the marriage consideration. The marriage consideration is only valuable quoad the parties to the marriage, or the issue of the marriage. If the children of a former or subsequent marriage take as purchasers, there is no reason why collaterals should not. [Blackburn, J. In the cases which have been referred to there was no evidence that it was any part of the bargain that there should be a settlement for the use of collaterals. On which side in the onus of proof?^(a) Williams, J. In *Johnson v. Legard* (6 M. & Sel. 60, 64) Giffard argued that it could not be contended that the marriage was the inducement for a limitation to the brothers of the settlor.] In *Johnson v. Legard* the only question was whether collaterals took as purchasers; there is nothing in that case to support the distinction contended for on the other side. In Littleton, sect. 188, it is said, "No bastard may be a villein unless he will acknowledge himself to be a villein in a Court of record. He is in law quasi nullius filius." In Co. Litt. 123, it is laid down that "A bastard is not a child within the statute of Wills, 32 H. 8, c. 1." In *Gerrarde, q. t. v. Worsley* (3 Dyer, 374 a.), it was held, that the consideration of natural affection will not raise a use to a bastard. In 4 Vin. Ab. Bastard (C.), and 22 Vin. Ab. Uses (K.) pl. 4, 5, the same doctrine is laid down. In *Fursaker v. Robinson* (Prec. Chan. 475) the Court of Chancery refused to supply the want of a surrender on behalf of an illegitimate child. In *Holloway v. Millard* (1 Madd. 414) a voluntary settlement by one indebted, in favour of his illegitimate child, was upheld as against subsequent creditors; but the Vice Chancellor said that the illegitimate child could not be considered otherwise than as a stranger; and the decision is rested on the ground that the word "voluntary" is not to be found in the statute 13 Eliz. c. 5.

(d) 1 Lev. 152.

(a) On this point *Currie v. Nind*, 1 Myl. & Cr. 17, and *Kekewich v. Manning*, 1 De Gex, M. & G. 176, were referred to.

[857] Lastly, the deeds were mere waste paper without proof of the previous seisin of Mary Dickenson. [Blackburn, J. There was some evidence of Mary Dickenson's seisin at the end of the plaintiff's case. But at the end of the whole case, after the defendant had put in the settlement, there was ample evidence. Willes, J. If a plaintiff proves that A. and B. received rents at a particular time he may shew from whom they had taken a conveyance.] The deed is a mere statement by Mary Dickenson, who is not shewn to have had an interest in the property when it was executed. A party is not bound by every recital in a deed, merely because he claims under one who executed it. [Blackburn, J. The acts of ownership proved were *prima facie* evidence of seisin in fee. The deed being put in shewed that the parties were not seised in fee, but only interested under the settlement.] The presumption is as to the status quo, not as to the statu quo ante. [Cockburn, C. J. It is not necessary to prove a possession exactly contemporaneous with the execution of a deed. Blackburn, J. Take the case of a lease which has subsisted for a hundred years, proof of possession and payment of rent under it would be *prima facie* evidence of the seisin of the grantor.]

A. Willes, for the plaintiff. A bastard is not a mere stranger as regards the parent. It is true that a covenant to stand seised to the use of the bastard does not raise a use; but that is because a covenant to stand seised requires one of two particular considerations, viz., marriage or blood; and there might be a difficulty in saying that a bastard is related in blood. But he is recognised by the law as having a claim to be maintained by his parent, by the statute 18 Eliz. c. 3, s. 2. There is no obligation enforceable at common law on a parent to support even his legitimate [858] children: *Mortimore v. Wright* (6 M. & W. 482). If there is a purchase in the name of an illegitimate child, it is deemed an advancement of the child, and the use does not result to the person who pays the money, as it would if the purchase were in the name of a stranger: Sugden's Vendors and Purchasers, p. 578, 13th ed.; Fearn's Posthumous Works, p. 327; 2 Fonblanque on Equity, p. 124; *Beckford v. Beckford* (Loft, 490). The parent is under a legal as well as moral obligation to support his illegitimate as well as his legitimate children. Then, can a limitation in a marriage settlement to an existing illegitimate son of the mother be said to be voluntary and void, consistently with the authorities on this subject? According to the principle of *Jenkins v. Keymis* (1 Lev. 150), it would seem that he is within the consideration of the marriage. In *Osgood v. Strode* (2 P. Wms. 245), *Jenkins v. Keymis* is treated as an existing authority. [Blackburn, J. One of the grounds of the decision in *Jenkins v. Keymis* as reported both by Levinz and Hardres, appears to have been that the Court could not import fraud into a special verdict which did not find it.] It has not been treated as depending upon that ground in any subsequent case. The decision in *Newstead v. Searles* (1 Atk. 265), is rested by Lord Hardwicke, not upon any technical grounds, but upon the broad basis of public policy. [Blackburn, J. Suppose, independently of any marriage, the wife had settled the property on her illegitimate son?] The marriage enabled her to make a binding settlement which she could not have done without it. There was a legal as well as a moral obligation on the mother to provide for the plaintiff. The concurrence of these obligations brings this case within the principle which was applied in *Newstead v. Searles* (1 Atk. 265), [859] and *Clayton v. Lord Wilton* (6 M. & Sel. 67, n.; 3 Madd. 302), and distinguishes it from *Johnson v. Legard*.^(b) Here the wife in effect said to the intended husband, "I will not marry unless you give up a certain interest, to which you would be entitled as tenant by the curtesy." Every presumption must be made in favour of the settlement: *Ex parte Vernon* (2 P. Wms. 549). In *Kekewich v. Manning* (1 De Gex, M. & G. 176), the Lords Justices were inclined to infer a consideration in favour of a collateral. Again, the limitation may be supported as purchased by the intended husband according to the suggestion in the Court below. He also referred to *Pulvertoft v. Pulvertoft* (18 Ves. 84), *Roe d. Hamerton v. Mitton* (2 Wils. K. B. 356).

Mellor, in reply. Sir E. Sugden, who argued the case of *Clayton v. The Earl of Wilton* (6 M. & Sel. 67, n.; 3 Madd. 302), states the principle on which it was decided: Vendors and Purchasers, 13th ed., p. 589, n. [Willes, J., referred to *Scott v. Scott* (11 Ir. Eq. Rep. 487; 4 H. L. Cas. 1065).]

(b) 6 M. & Sel. 60. On this point he also referred to Dart's Vendors and Purchasers, p. 469.

Cur. adv. vult.

The following judgments were now delivered.

BLACKBURN, J. In this case the decision of the Court of Exchequer was appealed against upon two grounds. First, that there was no evidence fit to be submitted to the jury of title on the part of Mrs. Dickenson to convey the premises in question by the settlement made on her marriage with Mr. Doncaster, dated the 17th of May, 1830. This ground of appeal was disposed of on the argument; there was ample evidence, and the decision of the Court of Exchequer on this point was clearly right.

[860] The second ground of appeal was, that the limitation in that settlement in favour of the plaintiff was voluntary and void against the defendant, he being a purchaser for value. On this point the Court of Exchequer Chamber took time to consider.

On consideration, I have come to the conclusion that the limitations in question are not voluntary, and consequently that the decision of the Court of Exchequer ought to be affirmed.

We are bound by decided cases to hold that a settlement of real estate, if not made for a valuable consideration, is void against a subsequent purchaser, even with notice. Such a settlement is deemed voluntary, and therefore fraudulent and void, though made honestly and openly to provide for the settlor's wife and children: *Chapman v. Emery* (Cowp. 278, 280), or his mother and younger brothers and sisters: *Doe v. Manning* (9 East, 59); for no moral consideration, however strong, is sufficient to support a settlement against a purchaser. In the present case the plaintiff was the illegitimate son of the settlor, treated by her as if he were her legitimate son; and though, in my opinion, the moral obligation on her part to provide for him was as strong as if he had been her legitimate son, it was not stronger. The limitations, therefore, in his favour are, in my opinion, void as against the defendant, unless it can be shewn that they were made for a valuable consideration.

No extraneous evidence was given for the plaintiff to shew that there was any valuable consideration, not expressed on the face of the deed in which the limitations in favour of the plaintiff are contained. We must say, on the construction of that deed alone, whether the limitations are voluntary or not.

It is a settlement made on the marriage of a woman, Mary Dickenson, who was seised of real estate in fee, with [861] William Doncaster. She had no legitimate children. If no settlement at all had been made, the husband would, on the marriage, have become seised in right of his wife; during the coverture he would have had the chance of being tenant by the curtesy if there were issue of the marriage, and the issue of the marriage, if there had been any, would have been the heirs of the wife, and would, in the ordinary course of things, have inherited the estate. But, by the settlement which the husband, William Doncaster, executes for the purpose of testifying his assent to it, the estate is settled to the separate use of Mary Dickenson for life, remainder as to one part of the premises to William Doncaster, the husband, for life, with remainder to the plaintiff in fee, and as to the residue of the property, with remainder to the plaintiff in fee, in case he should attain the age of twenty-one, but if he should die under that age, unmarried and without issue, to such use as Mary Dickenson should by her will appoint, and, in default of appointment, to her in fee.

So that, by this settlement, the intended husband takes different interests in the landed property from that which he would otherwise have taken. As to the part which is settled on him for life, he takes a greater interest than he otherwise would have taken; as to the residue, a smaller interest, inasmuch as he is not to have the chance of the tenancy by the curtesy; and he consents to a settlement by which the children of the marriage are totally deprived of the chance of the succession which they would otherwise have had. It seems to me that, though in general it may be supposed that on a marriage-treaty, after the interest of the intended husband and wife, and the issue of the marriage, is provided for, the remainder of the estate is left to be disposed of as the party to whom it would revert pleases; yet, when we find the interests of the husband, wife and issue so [862] much affected by the settlement, we must take it that it was agreed by all parties, as part of the marriage bargain, that the estate should be thus settled—that the wife agreed to marry the husband on the terms that this settlement should be thus made, varying his interest and depriving his children of what would otherwise have been theirs; and that the husband agreed to marry the wife on the terms that this settlement should be so

made. If this be so, the question comes to be, if a limitation in favour of a third person, not merely inserted in the marriage-settlement, but appearing from its nature to have been made one of the terms of the marriage bargain, is to be considered voluntary, or is to be considered as made for the valuable consideration of the marriage?

In the argument the possible liability of the husband to support the illegitimate son of the woman about to be his wife was mentioned, and it was suggested that the husband might have required his intended wife to provide for her son, to prevent the possibility of his coming on the parish. I merely notice this argument to say that I attach no weight to it. I do not believe that any such consideration ever was thought of, and I think that such a consideration for the settlement would have been merely illusory.

In my opinion the case would have been the same if the plaintiff had been some distant relative of Mrs. Dickenson's first husband, or an absolute stranger in blood whom she had adopted and bred up as her child. The suggestions of Lord Justice Knight Bruce in *Kekewich v. Manning* (1 De Gex, M. & G. 176), are to some extent adopted in the judgment of the Court below in this case. I cannot say that they are satisfactory to my mind. In *ea quæ frequentius accidunt preveniunt jura*; and though doubtless it is possible that a high-minded bridegroom might insist on his intended wife providing, out of the estate which would otherwise have come to him and [863] his children, for her illegitimate child, yet, in the ordinary course of things, it is to be presumed that the stipulation for such a provision originated with the wife, and was assented to by the husband with more or less reluctance. But, though this is so, it does not follow that there was no consideration for the limitations. The husband got the enjoyment of some part of the wife's property, which he could not have had if the marriage had not taken place. He may have got this on cheaper terms; he may have been allowed to take a larger portion of her personal estate than he would have been permitted to take if this settlement on the plaintiff had not been made; or he may have been allowed to keep free a greater portion of his own property than he would otherwise have done; and, in consideration of these substantial benefits to himself, he may have become a party to a contract for this limitation. I do not know that in this case these matters did occur, but it seems to me that, as on every marriage settlement there are, to use the language of Lord Hardwicke, reciprocal considerations between husband and wife, we ought not to hold a limitation which is not merely included in the marriage settlement, but appears from its nature to have been really one of the terms of the marriage bargain, voluntary.

The marriage bargain is like any other mutual agreement in which there are many terms,—the promise by the one party to be bound by all the terms is a consideration for the promise of the other party to be bound by all the terms, so that none of them are without consideration; though it would be quite possible that other matters mentioned at the same time were not made part of the terms of the bargain and were therefore without consideration. And it is forcibly observed in *Dart's Vendors and Purchasers*, p. 580, that in case of marriage the impossibility of restoring the consideration by replacing either party in their original status is a sufficient [864] reason why full effect should be given to any arrangement that formed part of the equivalent for the change. It is true that the estate here belonged to the wife, and that it is presumably at her instance that the stipulation was inserted. But it seems to me that, when once it is shewn that the intended husband and wife bargained that part of what would otherwise have been the joint fund of the matrimonial firm, should on the marriage go in a particular way, it is immaterial whether it is part of what the husband would have brought in that is so settled, leaving the wife's contribution in the firm, or part of the wife's contribution that is so settled, leaving the husband's in the firm. It is equally part of the bargain, and so not voluntary.

There are some very sensible observations in *Dart's Vendors and Purchasers*, pp. 578 and 579, in which I thoroughly concur, and which I adopt as part of my judgment. It is there said:—"Unnecessary difficulty appears to have been thrown over the cases upon the subject by a confusion between the contract and the consideration for the contract; the common form of objection is, that collaterals are not within the consideration of the marriage.(a) Now this expression is, it is submitted,

scarcely accurate. If A. agreed with B. to pay him 10,000l. in consideration of his conveying his estate to the use of A. for life, with remainders over in favour of strangers, and the money were paid, and the conveyance executed accordingly, a question might arise whether the remaindermen took beneficially or in trust for A.; but subsequent purchasers from B. could hardly contend that the limitations in the settlement, ultra A.'s life estate, were void, upon the ground of the remaindermen not being within the consideration of the 10,000l.(b) In the case of a marriage settlement the important question seems to [865] be, first, whether the collaterals were within the contract; and secondly, whether, if so, there was a sufficient consideration for such a contract."

"Upon the first question, considered merely as one of principle, it is submitted that where the limitations over are in favour of collateral relations or connections not of the settlor but of the other contracting party (whether wife or husband), the settlement itself may be considered *primâ facie* evidence of such other party having stipulated for their insertion. So where, on a settlement of the intended wife's estate, the limitations over are in favour of her own collateral relations in derogation from the husband's marital right by survivorship (in case of personalty) or as tenant by the curtesy (in case of realty). Where, in any case other than that last referred to, the limitations over are in favour of the collateral relations or connections of the settlor, such presumption cannot so readily arise; but it might be proved that the other party stipulated for their insertion. If such a stipulation cannot be presumed or proved, the limitations must, it is conceived, be considered voluntary and void as against a subsequent *bonâ fide* purchaser."

Mr. Dart states this only as his own opinion, without asserting that it is established by the authorities; but it seems to me that, on the principle he thus states, the different decisions can be reconciled, and that they cannot be reconciled in any other way. *Johnson v. Legard* (6 M. & Sel. 60) is the case mainly relied upon by the defendant. There Sir John Legard, on his marriage, in consideration of the marriage and marriage portion, settled his estate on himself for life, then to trustees to receive a rentcharge by way of jointure to his intended wife, then to trustees to raise portions for the younger sons and daughters of the marriage, remainder to the sons of the marriage in tail male, remainder to the [866] sons of Sir John Legard by any future wife in tail male, remainder to the use of Sir John Legard's brother as tenant for life, with remainder to his sons. The Court of King's Bench, on a case sent to them, certified that none of the limitations, subsequent to those in favour of the first and other sons of Sir John Legard by any future wife, were good as against a purchaser for value. Unfortunately, according to the practice then existing, no reasons are given for this judgment. The Vice Chancellor confirmed it (3 Madd. 283), but his reasons are not reported. On appeal, the Lord Chancellor (Lord Eldon) reversed the decree on a ground not material to the present question; he stated, however (Turn. & R. 295), that he did not wish anything which he did to involve a doubt as existing upon his mind as to the opinion of the King's Bench. But he did not state what he considered the principle of that decision.

In *Sutton v. Chetwynd* (3 Meriv. 249), Sir W. Grant, M. R., says that "the decision in *Johnson v. Legard* expressly negatives the proposition that every limitation in a settlement is protected and rendered valuable by the consideration of marriage, and to that extent (says he) I entirely concur in the opinion given. I say to that extent, because the negative of the general proposition is sufficient for the decision of the present case, and I do not wish to prejudice any other question that may be made when the certificate comes before the Court."

To the extent to which Sir W. Grant thus cautiously limits his judgment the case of *Johnson v. Legard* certainly goes, and so far it seems to me quite consistent with the principles I have been stating, and with the judgment in the present case being in favour of the plaintiff. But there are two other decisions which, though consistent with the decision in *Johnson v. Legard*, thus limited, do not seem to [867] me consistent with it, if it is to be understood as a decision adverse to these principles, and in favour of the defendant in the present case.

The first of these is *Newstead v. Searles* (1 Atk. 268). There, a widow having children, and being about to marry again, made a marriage settlement under which

(b) And see *Ford v. Stuart*, 15 Beav. 493 499.

her husband took an interest in the real estate of the wife, in some respects (as in the principal case) greater than he would have done if there had been no settlement, and in some respects less; and the ultimate remainder was settled for the benefit of her existing issue as well as those, if any, of the contemplated marriage. Lord Hardwicke, C., held that the limitations in favour of her existing issue were good as against a purchaser. It was said in the argument before us that this decision proceeded merely on the ground of public policy; but Lord Hardwicke does not say so. He states the question to be, whether the articles of the 30th of April were for a valuable consideration, and binding, or ought to be considered as voluntary; and he concludes by what I understand as a terse compendium of what I have before endeavoured to state as a reason for supporting all limitations shewn not merely to be included in the marriage settlement, but to be part of the marriage contract. He says that there are reciprocal considerations both on the part of the husband and wife. It was said also in the argument that *Newstead v. Searles* was an anomalous case, and not approved of; but no case was cited, nor do I find any, in which it has been questioned or disapproved of.

Lord Mansfield in *Doe v. Routledge* (Cowp. 705) cites it as an authority. Lord Ellenborough in his elaborate judgment in *Doe v. Manning*, (9 East, 59, 65), in differing from Lord Mansfield, treats *Newstead v. Searles* with great respect, as if he thought it a weighty authority, as, no doubt, every [868] decision of Lord Hardwicke's must be, and expressly cites it as a case where the settlement was founded on no valuable consideration. The next case is *Clayton v. Lord Wilton* (6 M. & Sel. 67, n.). There the settlement was to the use of the husband, remainder to trustees to receive the wife's jointure, remainder to the sons of the marriage in tail male, remainder to the sons of the husband by any future wife in tail male, remainder to the daughters of the marriage. The Court of King's Bench, including Lord Ellenborough, C. J., and Bayley, J., who afterwards formed part of the Court certifying in *Johnson v. Legard*, certified that a conveyance for value to a purchaser was not good against the issue of a second marriage, and Lord Eldon, as Chancellor, confirmed this. The reasons for this decision are not given, so that, as in the case of *Johnson v. Legard*, we cannot be sure on what principle it proceeded. It is suggested in a work of high authority (Sugden on Vendors), that it may have been because the limitations to the sons by the second marriage were necessary to support the limitations to the daughters by the first marriage; but, as there were trustees to preserve contingent remainders, this was not necessary even if the reason itself were sufficient. It is sometimes said that the decision is to be supported because the persons benefited in this case were children of the settlor, whilst in *Johnson v. Legard* they were collaterals. But though the consideration for a settlement in favour of a child may be better, of higher morality than the consideration for one in favour of a brother, it is in no respect more of a valuable consideration; and after the elaborate judgment in *Doe v. Manning* (9 East, 59) it seems to me impossible to suppose that Lord Ellenborough decided *Clayton v. Lord Wilton* on the ground that any voluntary conveyance could be good against a purchaser for value. *Clayton v. Lord Wilton* may be supported [869] and reconciled with *Johnson v. Legard* on the principle that, though, as Sir W. Grant says in *Sutton v. Chetwynd*, it is not true that every limitation in a settlement is protected and rendered valuable by the consideration of marriage, or even, as is said by Lord Macclesfield, C., in *Osgood v. Strode* (2 P. Wms. 245, 255), "though it is to be presumed that the wife and her friends stipulated only for the limitations in favour of the husband, wife and issue of the marriage;" yet when, as in *Newstead v. Searles*, and in *Clayton v. Lord Wilton*, and, as I think, in the principal case, the limitations so interfere with those which would naturally be made in favour of the husband, wife and issue, as to indicate that the limitations must have been discussed, and made part of the marriage contract, part of the reciprocal considerations between the husband and wife, that presumption is rebutted, and the limitations are not voluntary.

It is, I think, impossible to suppose that Lord Eldon, Lord Ellenborough and Bayley, J., in *Johnson v. Legard* overruled the decision in *Clayton v. Lord Wilton*, to which they themselves were parties.

I cannot see, in any way, how the two cases are to be reconciled except on the principle which, as it seems to me, is involved in the judgment in *Newstead v. Searles*. I cannot find that this principle is impeached by any of the other cases, and, thinking

it sound and bearing on the present case, I am of opinion that the judgment ought to be affirmed.

WILLES, J., said—I am also of opinion that the judgment ought to be affirmed: but, after the elaborate statement I have heard, and anticipating those which will follow, I think that I should not usefully occupy time in stating my reasons at large.

[870] COCKBURN, C. J. I am of opinion that the decision of the Court of Exchequer in this case should be affirmed; but I am unable to concur in the reasons on which the decision of that Court appears to have proceeded. The Court seems to have assumed that the limitation in the settlement, made by the settlor on her marriage in favour of her illegitimate son, was not her own spontaneous and voluntary act, but was introduced into the settlement at the instance of the intended husband, who is supposed to have insisted on it as a condition of his marrying the settlor, which, if true, would bring this provision within the consideration of the marriage. I cannot concur in the assumption of fact on which this view is founded, and I am desirous of distinctly stating the ground on which my judgment rests. To me it appears that this limitation cannot, in any way, be brought within the consideration of the marriage: nevertheless, I am of opinion that it may be upheld.

If the construction of the statute of the 27th Elizabeth had been *res integra*, there has been no Judge who, in modern times, has had to apply the statute, who would not probably have excluded from its operation family settlements made honestly and without any intention of defrauding creditors or future purchasers. The statute has seldom come under review without eliciting judicial observation on the forced and harsh construction put upon it by its first expounders; but its operation in avoiding, in favour of purchasers for value, whether with or without notice, conveyances in favour of relations, however honest and otherwise praiseworthy, if made without valuable consideration, is now too firmly established to admit of being questioned; and it must now be taken as definitively settled that a provision even for a man's wife and children, however sacred in a moral point of view the duty of making such a provision may be, is bad against a future purchaser as being without consideration and voluntary.

[871] On the other hand, it is equally well established that a settlement, made with a view to marriage, on a wife and the issue of the marriage, will undoubtedly be good against a future purchaser for value although without notice.

Why this distinction? Simply because the estates and interests created by the settlement are acquired from the settlor for a valuable consideration, namely, the marriage of the party for whose benefit, or the benefit of whose issue, the disposition of the property so made is to enure, either with the settlor, or some near relative of the settlor, in which latter case the bargain may be said to be made with the settlor just as much as if it had been made with an intended husband. In every such case it is manifest that, as to a disposition of property for the benefit of the opposite party or their issue, the consideration moves to the settlor. The disposition has been purchased by the marriage of the party by whom it may be assumed to have been stipulated for, and having been thus obtained for a valuable consideration it is good against the settlor and against any future disposition of the property which he or she may make, even to an innocent purchaser.

On the other hand, a disposition made by a settlor in favour of his or her own relatives not being the issue of the marriage, cannot, as it seems to me, be said to be made for a consideration arising from the marriage. The settlor is only exercising a right which he or she had before. No additional right or power in this respect is derived from the marriage. No doubt, such a disposition would not be made without the knowledge and acquiescence of the other contracting party, but that acquiescence adds nothing to the previously existing right of the settlor. Nor, except under very special circumstances, can it be supposed that a disposition in favour of the settlor's own relations, would be stipulated for by the opposite party. Certainly, such circumstances, as being [872] contrary to the ordinary course of things, would require to be specially shewn. In the absence of such proof, there being no consideration moving to the settlor, not only is the disposition voluntary in that sense of the word, but it also is so in the largest sense, inasmuch as it is plain that if, at any time before the settlement is actually executed, the settlor should change his mind, and desire the omission of such part of it, this would be no breach of the antenuptial contract, and there would be no party who would have a right to insist on the provision being

retained. I can come to no other conclusion, therefore, than that a limitation in a marriage settlement in favour of the relations of the settlor, other than the issue of the marriage, is not within the consideration of the marriage, and therefore, in the absence of any other consideration, must be taken to be voluntary.

The case of a father tenant for life who joins his son, the remainderman in tail, in a settlement on the marriage of the son, stands on an entirely different footing, and is open to very different considerations. There, the co-operation of the tenant for life being necessary to the resettlement of the estate, he has a right to stipulate for what terms he pleases as the price of his concurrence; among others, that of a provision for his other children and their issue, or the like. The consideration, there, is not the marriage, but the consent of the settlor to give up his existing life estate, and resettle the estate.

The limitation introduced in this case by the settlor in favour of her illegitimate son being thus in my opinion not within the consideration of the marriage as moving to the settlor, let us see whether there is anything to shew that it can in any way have been stipulated for by the intended husband so as to make it part of that which he purchased by marrying the settlor. The probabilities are certainly all the other way. It is suggested that he may have insisted [873] on a provision being made for the son, lest, the latter being left destitute, he, the husband, might have to maintain him; or that from a high-minded generosity he may have declined to profit by his wife's estate, unless a provision were made out of it for her son. But these suggestions are purely speculative, and rest on no proof of any sort; while it is infinitely more consistent with probability and the common experience of life that such a stipulation should have emanated from the settlor, to whom both duty and affection would suggest the propriety of making a provision out of her own estate for her own offspring. The suggestion as to the intended husband having insisted on the provision for the son from an apprehension of having to provide for him, is altogether answered by the fact that an estate for life is secured by the settlement to the husband, and that consequently the limitation in favour of the son could not come into operation until after the husband's death; and, therefore, could afford him no protection against the contingency suggested. Under these circumstances I can come to no other conclusion, than that in no point of view can this limitation be considered as within the consideration of the marriage upon which this settlement was made, and therefore that it must in this sense be held to be voluntary.

Nevertheless, I am of opinion that this limitation should be upheld. Upon the rule that in a marriage settlement a limitation in favour of the relatives of the settlor, other than the issue of the marriage, will be invalid, two exceptions have, it seems to me, been engrafted by very high authority. In *Newstead v. Searles* (1 Atk. 265), Lord Hardwicke held that in a marriage settlement the settlor might introduce a limitation in favour of the children of the former marriage; while, in *Clayton v. The Earl of Wilton* (6 M. & Sel. 67, n.) [874] Lord Ellenborough and the Court of King's Bench upheld, against a purchaser for value, a similar limitation in a marriage settlement in favour of the issue of the settlor by a future wife in default of issue of the intended marriage. These decisions have never, so far as I am aware, been impugned. The decision of Lord Hardwicke, in *Newstead v. Searles*, which has now stood for upwards of a century, is cited by Lord St. Leonards in a recent work as an existing authority. It is evident that Lord Hardwicke considered that a provision in a marriage settlement in favour of existing children could not be deemed fraudulent within the statute. It may be that these decisions would not stand the test of a very strict analysis or rigorous logic; but it must be borne in mind that the rule on which this exception was engrafted was itself the result of a forced and arbitrary construction of the statute. It is not to be wondered at, that judicial exposition stopped short of applying it when the consequence was to prevent the owner of property, on making a settlement on marriage, from making any binding provision for his existing children. We ought not, in my judgment, to overrule the cases to which I have referred. Having stood thus long unimpeached, they may have led to the introduction of similar provisions into many settlements, and we cannot tell what mischief we may occasion by overturning them, while no mischief can arise from sanctioning such limitations beyond what arises from their introduction in favour of the issue of an intended marriage.

The present case appears to me to come directly within the principle of *Newstead v.*

Searles. It was as much the duty of the settlor, Mary Dickenson, to make provision for her illegitimate son as though he had been legitimate. It is impossible not to concur in the very appropriate remarks on this point made by Channell, B., in delivering the [875] judgment of the Court of Exchequer. This being so, on the authority of *Newstead v. Searles*, which I think we ought not to overrule, I am of opinion that the decision of the Court of Exchequer should be affirmed.

WIGHTMAN, J., said,—I agree with the Lord Chief Justice and for the reasons given in the judgment he has read. Though for a considerable time I entertained very great doubt on the point, on the whole I have come to the conclusion that the judgment should be affirmed.

WILLIAMS, J. I am of opinion that the judgment of the Court of Exchequer ought to be reversed.

The authorities on the question raised in this case, viz., what shall be deemed a fraudulent conveyance under the statute 27 Eliz., are so irreconcilable that it seems more advisable to consider and apply the principles which have been settled respecting it than to rely on the authority of any particular decisions.

It is established, after no little conflict of cases, that though the statute speaks only of conveyances, &c., “for the intent to defraud and deceive such persons as shall purchase the same lands,” &c., yet (to use the words of Lord Ellenborough, in delivering the judgment of the Court in *Doe v. Manning* (9 East, 59), “every conveyance without valuable consideration is made void by the statute, against a subsequent purchaser for such consideration,” because, as against him, the Court presumes fraud from the absence of consideration, and will not admit such presumption to be contradicted. It follows that settlements, though made on what is called meritorious consideration, as when made in the honest fulfilment of the moral duty of a husband or parent to provide for his wife and children, are within [876] the statute, and void as against a subsequent purchaser for value. Again, it has never been doubted that marriage is a valuable consideration; so that an ante-nuptial settlement is not rendered void by the statute, but is good against any subsequent purchaser. There has been much difference of opinion respecting the extent to which the consideration of marriage ought to be carried in supporting the limitations of such a settlement, and cases are not wanting in which it has been laid down that every limitation in such a settlement is protected and rendered valuable by the consideration of the marriage. But subsequent decisions (as Sir W. Grant said, in *Sutton v. Chetwynd* (3 Meriv. 249, 254)), have negatived this general proposition, and the question left open is that which has been the subject of the argument before us, viz., what class of limitations in the settlement the consideration of marriage can properly be said to support.

Now, in order that he who claims under any limitation may be deemed, as against subsequent purchasers, to take for a valuable consideration, and not as a volunteer, it is obviously necessary that he, or some one on his behalf, should have purchased the limitation in question.

If he can support the limitation in his favour against a subsequent conveyance for valuable consideration, he must also be able to support it against a prior voluntary one, and avoid the latter under the statute, in the character of a purchaser for value by reason of a purchase made by himself,—or some one else for his benefit. Thus Turner, V. C., in *Heap v. Tonge* (9 Hare, 90, 104), speaking of the cases in which limitations to collaterals in marriage-settlements of the husband's estate have been held void, says:—“These cases proceed on the ground that the wife cannot be considered to stipulate on the part of the relations of the husband, and there is, therefore, no one who purchases anything for the benefit of [877] those relations. If there be any one purchasing on behalf of collaterals, the limitations are supported.”

Now, in a settlement, in contemplation of marriage, of the estate of the husband or wife, he or she, to whom the estate to be settled belongs, being the grantor of the estates created by the settlement, cannot, it should seem, be deemed to have thereby purchased any one of them; but the party to whom the estate does not belong may be regarded as having purchased by the marriage all those limitations of the estate for which he or she can be proved, or fairly inferred, to have stipulated, such as the limitations in favour of themselves respectively, or their issue. And so with respect to limitations in favour of the collateral relations of the party to whom the estate does not belong; for it may well be presumed that such party stipulated, as part of the marriage bargain, for their insertion into the settlement, and so may be properly

regarded as having purchased them on behalf of those who are to be benefited thereby. But an intended wife cannot be inferred to have stipulated on the part of the relations of the intended husband, nor the intended husband for the relations of the intended wife.

Applying these principles to the case before us, the circumstances of which are, that the estate belonged to the wife and the limitation under discussion was in favour of her illegitimate son; the question is whether, from the terms and nature of the settlement (for there is no external proof), it can be inferred that the husband stipulated for this limitation. If it was introduced at the instance of the wife, she cannot be deemed to have purchased the estate, in consideration of the marriage, on behalf of her son, because she cannot be regarded as purchasing the limitation which she carved out of her own estate.

But it has been contended that wherever the limitations [878] of a marriage settlement diminish the ordinary interests which the party to whom the estate does not belong would have acquired by the marriage, it ought to be inferred that the limitations of the settlement were the subject of arrangement and bargain in contemplation of the marriage; and accordingly that, in the present case, it must be presumed that there was a bargain between the parties, to the effect that, if the wife predeceased the husband, he should take an interest for his life in one moiety of his wife's estate absolutely, whether there was a child of the marriage, so as to entitle him to curtesy, or not; and that the wife might limit the other moiety to her son in fee to the exclusion of the issue of the marriage. I do not at all dispute this proposition, but the existence of such a bargain does not justly lead to an inference that the husband stipulated for these limitations; on the contrary, when the ordinary rights of the husband, or of his issue by the marriage, are diminished, the natural presumption is that the wife insisted on such diminution, and he must be deemed to have been induced, by the consideration of her acceding to the marriage, to allow her to deal with her estate according to her own wishes, at the sacrifice of his. It cannot be properly asserted that such a bargain is a concession to the husband in consideration that he will marry the wife; but it is rather a concession to the wife that, if she will marry him, she shall be allowed to settle her own estate, as her wishes may guide her, in favour of the objects of her bounty: in other words, that she shall be allowed to make a voluntary settlement of it. Suppose a case of a marriage settlement where a still stronger inference arises that it must have been the result of a matrimonial bargain, as where the husband consents that the whole estate of the wife shall go, after her death, to such persons as she shall by deed or will appoint, would not her appointees under such a settle-[879]-ment be volunteers? Could it be said that they are not so, because the wife must be deemed to have bargained with the husband that she should have the power to give her estate to whomsoever she liked, and to deprive, if she wished it, both himself and his issue by her of any participation in her estate?

In the present case it appears to me, on the principles above stated, that since the limitation in question was created by the wife, in favour of her illegitimate son, out of her own estate, and it has not been proved, nor can it be justly inferred, that the son himself or the husband or any one else purchased the limitation on behalf of her son, it must be deemed to have been created without any valuable consideration, and so to be fraudulent within the statute.

But it is said that our decision ought to be governed by the authority of *Newstead v. Seales* (1 Atk. 265). In that case a widow, previous to her second marriage, with the consent of her intended husband, settled her estate upon her issue by a former marriage, provided that if there should be issue of the second marriage such issue should have an equal share with the issue of the former marriage; the husband and wife afterwards mortgaged the estate to a person who had notice of the settlement. Lord Hardwicke said the question was whether the articles were for a valuable consideration and binding, or ought to be considered as voluntary and fraudulent with respect to subsequent creditors or purchasers; and if he was to lay it down as a rule that such articles were not binding, it would become impossible for a widow, on her second marriage, to make any certain provision for the issue of a former marriage, and the second husband might then contrive to defeat the provision made for those children. Taking the case with all its circumstances, he thought the settlement no voluntary agreement, [880] but a binding one. He added, that it would be difficult

to shew that such a limitation had been held fraudulent and void as against subsequent purchasers or creditors.

It may be remarked, with respect to this judgment, that Lord Hardwicke does not say, expressly, that the limitation to the issue of the former marriage was upon a valuable consideration. He adverts, it is true, to the existence of reciprocal considerations, both on the part of the husband and wife, by the provision under the articles for the children of the second marriage; but this appears to me (with deference to what is said in the judgment of the Court in *Doe v. Manning* (9 East, 59, 64)), to be at least as much for the purposes of strengthening his observation, that such a limitation had never been held, nor ought to be held, fraudulent, as for asserting that it was supported by a valuable consideration. And it should be further observed that in the year 1737, when this decree was made, the law had not been yet settled, as it has since been, that every limitation without a valuable consideration was fraudulent under the statute as against a subsequent purchaser for value. Six years later, in *White v. Sanson* (3 Atk. 410, 412), Lord Hardwicke himself says:—"I have heard it said in this Court that there are reasonable voluntary settlements, which they will not interpose to disturb upon the construction of these statutes (13 & 27 Eliz.);" and in the same judgment he had previously said:—"I hardly know an instance where a voluntary conveyance has not been held fraudulent against a subsequent purchaser." And twenty years later, in *Cudogan v. Kennet* (Cowp. 432, 434), we find Lord Mansfield saying:—"The statute 27 Eliz. c. 4, does not go to voluntary conveyances merely, as being voluntary, but to such as are fraudulent." And in *Doe v. Roulledge* (Cowp. 705) the same Judge said that in the statute there was not a word that impeached voluntary [881] settlements merely as being voluntary, but as fraudulent and covinous.

It may likewise be observed, in order to prove how far from settled the law on this subject was at the time when *Newstead v. Searles* was decided, that Lord Hardwicke in that case relies on the fact that the mortgagees had notice of the marriage settlement, which, according to the doctrine since established, does not at all affect the right of the subsequent purchaser for value. And, further, that Lord Hardwicke speaks of the two statutes of the 13 & 27 Eliz. as if the one put voluntary conveyances exactly on the same footing, as to creditors, as the other puts them as to subsequent purchasers, which is a very different view from that taken of the two Acts at the present time.

I will add that Lord St. Leonards, in his treatise on Vendors and Purchasers, does not cite the case of *Newstead v. Searles* while discussing the question whether the marriage consideration runs through the whole settlement, but as an authority for a previous passage in his treatise, viz. "On the ground of policy, it seems that a settlement by a widow previous to her second marriage, of her estate on the children of the first marriage, will not be deemed fraudulent." And in Cruise's Digest, vol. 4, p. 72, 3rd ed., the case is stated as authorising the proposition that "there is one case in which a conveyance founded on a moral consideration only has been held good against a subsequent purchaser, viz. that of a widow making a settlement on her children by her first husband previous to her marrying a second."

If either policy or moral duty were really the ground of that decision, it might become a question whether it could be properly applied to a limitation in favour of the illegitimate son of the settlor; but it is difficult to understand how policy or moral duty can be sufficient to uphold Lord Hardwicke's decision at this day, seeing that the limitation [882] to the issue of the former marriage must still remain unsupported by any valuable consideration. It is more reasonable, I think, to say that Lord Hardwicke decided the case before the principles of law which would have guided him to a different conclusion were well understood; and that his decision, being in conflict with the doctrines which have since been firmly established, cannot now be regarded as binding; but must be classed with the numerous other cases which have been decided on this head of law by eminent Judges in earlier times, and have since been disregarded by the Courts on a fuller consideration of all the authorities on the construction of the statute.

Judgment affirmed.

JOHN GREENHOW AND EDWARD BURTON v. PARKER.(a) April 19, 1861.—The 3 & 4 Wm. 4, c. 42, s. 22, which empowers the Court or a Judge in any action, the venue in which is by law local, to order a suggestion to be entered, that the trial may be had in another county, applies to penal actions within the 31 Eliz. c. 5, s. 2.—A guardian of the poor who has knowingly supplied, for his own profit, goods for the use of the poor in the workhouse contrary to the provisions of 55 Geo. 3, c. 137, s. 6, and 4 & 5 Wm. 4, c. 51, is liable to the penalty thereby imposed whether the master of the workhouse to whom he sold the goods was authorized to enter into such a contract or not.

[S. C. 31 L. J. Ex. 4; 9 W. R. 578. Followed, *Davies v. Harvey*, 1874, L. R. 9 Q. B. 439.]

Declaration. That, at all times in this declaration mentioned, there was a union of the township of Preston Patrick, and divers other parishes and places, formed for the purpose of the administration of the laws for the relief of the poor by the name of the Kendal Union, which union was so formed pursuant to and in accordance with the laws in force relating to the poor, and was called the Kendal Union: that, at all the times, &c., there was a workhouse which had been, and was duly constituted to be, and was, one of the common workhouses or places of reception and relief of the poor of such township, parishes [883] and places, pursuant to and in accordance with the same laws: that there was a board of guardians of the poor for such union duly constituted and chosen, and the defendant was one of the guardians of the poor of such union, and had been elected, chosen, appointed and constituted such guardian pursuant to (4 & 5 Wm. 4, c. 76), and the other laws in force in that behalf, in respect of the township of Preston Patrick: that the defendant was appointed to be a person in whose hands the collection of the rates for the relief of the poor of the said townships, &c., forming the said union, and the providing for, ordering, management, control and direction of the poor of the said townships, &c., was placed, as such guardian, pursuant to, and in accordance with, the laws relating to the relief of the poor: and the defendant, while he was such guardian, and while he retained such appointment as such guardian, and while he was, and while he so retained such appointment as a person in whose hands such collection and such providing for, ordering, management, control and direction was so placed, did, before the commencement of this suit, in his own name, furnish and supply, for his own profit, and was directly concerned in furnishing and supplying for his own profit, divers goods and materials for the use of the said workhouse, and otherwise for the support and maintenance of the poor in the said townships, &c., so forming the said Union, he the defendant not having at any time obtained any certificate from any justice of the peace, or of any other person, permitting and suffering him so to do, or permitting him or suffering him to contract or agree for the purchasing, or supplying of the same, or any article or thing whatsoever, contrary to the form of the statute, &c., whereby an action hath accrued to the plaintiffs to demand and have of and from the defendant the penalty or sum of 100l., &c.

[884] Plea: Not guilty. (By statute 21 Jac. 1, c. 4, s. 4.)

The venue was originally laid in Westmoreland; but, by a Judge's order, made under the 3 & 4 Wm. 4, c. 42, s. 22, it was directed that the trial should be had in the Northern Division of Lancashire; and a suggestion for that purpose was entered on the record.

At the trial, before Keating, J., at the Spring Assizes at Lancaster, it appeared that the action was brought by the plaintiffs, who were two of the guardians of the Kendal Union in Westmoreland, against the defendant, for a penalty alleged to have been incurred by him under the 4 & 5 Wm. 4, c. 76, s. 51, and the 55 Geo. 3, c. 137, s. 6. It was proved that the defendant had been duly appointed a guardian of the Kendal Union, and that, while holding that office, he had sold a quantity of chaff for 30s. to one Jackson, the master of the Kendal Union Workhouse. The amount so paid was entered in the accounts of the workhouse. The chaff was used for making beds for paupers. The price was much greater than had ever previously been paid.

The defendant's counsel submitted, first, that the plaintiffs must be nonsuited,

because the trial should have been had in the county of Westmoreland, and, secondly, that though the goods were supplied to the master of the workhouse, it must be taken that the supply was personally to him; that there was no evidence of the supply of goods to the workhouse, and no contract with the guardians, or supply to them; and on this point he referred to the following orders of the Poor Law Commissioners. Art. 44. All contracts to be entered into on behalf of the union relating to the maintenance, clothing, lodging employment or relief of the poor, or for any other purpose relating to or connected with the general management of the poor, shall be made and entered into by the guardians. Art. 85. The guardians shall examine, &c., every bill exceeding in amount [885] one pound (except the salaries of officers) brought against the union; and, when any such bill has been allowed, &c., a note of such allowance shall be made upon the face of the bill before the amount is paid. Art. 209. The master shall not, except in case of necessity, purchase or procure any articles for the use of the workhouse, &c., nor pay any monies on account of the workhouse, or of the union, without the authority of the guardians, &c.

The learned Judge asked the jury, first, whether the defendant knowingly supplied the chaff for the use of the poor in the workhouse, and, secondly, whether he supplied it for his own profit. He told them that if the defendant really believed that he was furnishing the chaff to the master of the workhouse for his own personal use, they must find a verdict for the defendant: that, as to the suggestion that the master had no power to enter into such a contract, he did not think that was material; it was almost impossible that the board, who met but once a week, could make all the contracts; the master might make them in the first instance, and submit them to the board. The jury having found a verdict for the plaintiffs,

Overend now moved to arrest the judgment, or for a new trial. This is an action for an offence against a penal statute, which must be laid to be done, and be tried, where the offence was committed: 31 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 4, s. 2. [Wilde, B. The venue was originally laid in the proper county.] The 3 & 4 Wm. 4, c. 42, s. 22, after reciting that "unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen," enacts "that in any action depending in any of the said superior Courts the venue in which is by law local," the Court or a Judge may order a suggestion to be entered that the trial may be had in another county. [886] This enactment applies only to actions which are local at common law, such as actions for trespasses to real property. Secondly, the learned Judge misdirected the jury in leading them to believe that the master may have had authority to buy the chaff, which is contrary to Article 209; and by Article 85, it is clear that nobody could have had authority to pay the defendant without the allowance of the board of guardians.

POLLOCK, C. B. We think that the ruling of the learned Judge was correct. The 3 & 4 Wm. 4, c. 42, s. 22, empowers the Court or a Judge to order a suggestion to be entered "in any action depending in any of the superior Courts, the venue in which is by law local." This action comes within the words of the section. As to the other point, the language of the 55 Geo. 3, c. 137, s. 6, is very general; and I agree with the learned Judge who tried the cause that a guardian who, for profit, supplies goods to the poor is liable to the penalty, whether the person who contracts with him is authorized to do so or unauthorized. Therefore there will be no rule.

MARTIN, B. I am of the same opinion. I should regret it if we were obliged to hold the first objection valid; but the language of the 3 & 4 Wm. 4, c. 42, s. 22, is clear.

BRAMWELL, B. I agree that there ought to be no rule. As to the first point, the 21 Jac. 1, c. 4, s. 2, is out of the question, because it does not extend to any offence on any penal statute passed subsequently: *Rex v. Gaul* (1 Salk. 372), *Anonymous* (5 Mod. 425). The 31 Eliz. c. 5, s. 2, provides that "the offence against any penal statute shall not be laid to be done in any other county but where the contract or other matter alleged to [887] be the offence was in truth done." Here the offence was not laid to be done in any other county than where the supply took place. The statute goes on to provide that in any such action the defendant may traverse that the offence was not committed in the county where the same is alleged. Now if the statute directed that the trial should take place where the offence was committed, it would seem that the appropriate mode by which a defendant should avail himself of his privilege would be, not by traversing the allegation, but by moving in arrest of judgment, on the ground that, by law, the trial ought to take place where the offence

was committed. Mr. Overend contends that the statute is express that the trial shall take place in such county; that, however, is not expressly enacted—it is only an incidental consequence. When, therefore, we hold that the 3 & 4 Wm. 4, c. 42, s. 22, authorized us to order a trial to be had in another county, we do not decide that a particular statute is repealed by a subsequent general Act, because the right of the defendant to a trial in the county of Westmoreland is one which is given him by the general law of the land. This is an action in which the venue is, by law, local, and therefore the Judge had power to order the trial to be had in another county.

Rule refused.

The EXCHEQUER REPORTS. REPORTS of
CASES ARGUED and DETERMINED in the
COURTS of EXCHEQUER and EXCHEQUER
CHAMBER. Trinity Term, 24 VICT., to
Hilary Vacation, 25 VICT., both inclusive. By
E. T. HURLSTONE, of the Inner Temple, and
J. P. NORMAN, of the Inner Temple, Esquires,
Barristers-at-Law. Vol. VII. London, 1862.

[1] EXCHEQUER REPORTS. TRINITY TERM, 24 VICT.

SURTEES v. LISTER. May 29, 1861.—A declaration stated that B. and the defendant, joint owners of a horse and mare, agreed that the defendant should sell them, and pay one moiety of the proceeds to the plaintiff as the agent of B., who was abroad: that the defendant sold the horse to C. for 600*l.*, and the mare for 300*l.*, and did not receive the price of the horse, but took from the purchaser of the mare a promissory note for 300*l.*, which the defendant indorsed and delivered to the plaintiff as the agent of B., and the amount of which was received by the plaintiff as such agent: that the defendant afterwards requested the plaintiff, upon his own responsibility, to pay the defendant one moiety of the 300*l.* in the plaintiff's hands as such agent, and the plaintiff paid the defendant 50*l.*: that the defendant again requested the plaintiff, on his own responsibility, to pay the defendant 100*l.*, the residue of the moiety of the 300*l.*, which the plaintiff was willing to do provided the defendant, in consideration of the said sum of 50*l.* so paid and the further sum of 100*l.* when paid, would undertake either to deliver to the plaintiff a bill of exchange for 233*l.* 3*s.* (being B.'s moiety of the proceeds of the sale of the horse, less the forfeits in respect of the same), drawn by the defendant upon and accepted by C. at two months date, or pay the plaintiff 233*l.* 3*s.* in cash within two weeks; and thereupon the defendant wrote and delivered to the plaintiff the following undertaking:—"In consideration of your having paid me the sum of 150*l.* on account of my share of the mare, I hereby undertake to deliver to you a bill for 233*l.* 3*s.* drawn by me upon and to be accepted by C. at two months, or the above sum in cash within two weeks from this date." On demurrer: Held, that the declaration disclosed a sufficient consideration for the defendant's promise.

[S. C. 30 L. J. Ex. 369.]

The declaration stated that, before the making of the agreement and undertaking by the defendant hereinafter set forth, one Septimus Barrett and the defendant were joint owners and proprietors of a horse called "Rover," and a mare called "Brunette," which said horse and mare were in the defendant's possession, and the said Septimus Barrett and the defendant agreed that the defendant should sell and dispose of the same horse and mare on their joint account, and, upon receipt by the defendant of the proceeds of such sale, that the defendant should pay one moiety thereof as the plaintiff as the agent of the said Septimus Barrett in that behalf, who was, and still

is, abroad; and that the defendant accordingly sold the said horse "Rover" [2] to one Edward Clarke, at the price of 600*l.*, and the said mare "Brunette" for the sum of 300*l.*; and that the defendant did not then receive or obtain payment of the said price of the said horse "Rover" from the said purchaser, but that the defendant took from the purchaser of the said mare "Brunette" a promissory note for 300*l.* on account of the purchase money thereof, payable to the defendant or his order, which promissory note the defendant indorsed and delivered to the plaintiff as the agent of the said Septimus Barrett, and the amount of which promissory note, on the same becoming due, was received by the plaintiff as such agent as aforesaid: and that the defendant afterwards, and before the making of the said agreement and undertaking hereinafter set forth, applied to and requested the plaintiff, upon his own responsibility, to pay the defendant one moiety of the said sum of 300*l.* in the plaintiff's hands, as such agent, and that the plaintiff accordingly, on his own responsibility, paid to the defendant 50*l.*, part of the said moiety of the said sum of 300*l.* so received by the plaintiff on the said promissory note: and that afterwards, and before the making of the agreement and undertaking hereinafter set forth, the defendant again applied to and requested the plaintiff, on his own responsibility, to pay to him, the defendant, the further sum of 100*l.*, the residue of the said moiety of the said sum of 300*l.* so received by the plaintiff as such agent as aforesaid on the said promissory note, which the plaintiff was willing to do, provided the defendant, in consideration of the said sum of 50*l.* so paid, and the said further sum of 100*l.* when paid, would agree and undertake either to deliver to the plaintiff a bill of exchange for 233*l.* 3*s.* (being the said Septimus Barrett's moiety or share of the proceeds of the said sale of the said horse "Rover," less the forfeits in respect of the same horse,) drawn by the defendant upon and accepted by the said [3] Edward Clarke (being the same person who had so as aforesaid purchased the said horse "Rover") at two months after date, or pay to the plaintiff the said sum of 233*l.* 3*s.* in cash within two weeks, which the defendant consented to do: and thereupon the defendant wrote, signed, addressed and delivered to the plaintiff an agreement and undertaking in writing, in the words and figures following, that is to say:—"London, 8th Dec., 1860. Sir,—In consideration of your having paid me the sum of 150*l.* on account of my share of the mare 'Brunette,' I hereby undertake to deliver to you a bill for 233*l.* 3*s.*, drawn by me upon, and to be accepted by, Mr. E. Clarke at two months after date, or the above sum in cash within two weeks from this date.—I am, Sir, &c. Henry Lister. A. W. Surtees, Esq." Averments: that thereupon the plaintiff did, on his own responsibility, pay to the defendant the further sum of 100*l.*, being the residue of the defendant's moiety or share of the said sum of 300*l.* so received by the plaintiff, as such agent as aforesaid, on the said promissory note so given for the proceeds of the sale of the said mare "Brunette," and making, together with the said sum of 50*l.* before paid as aforesaid, the said sum of 150*l.* in the said agreement or undertaking mentioned: that the Mr. E. Clarke in the said agreement or undertaking mentioned was and is the same Edward Clarke to whom the defendant sold the said horse "Rover," and that he, the plaintiff, has done all things necessary on his part, and that acts, matters and things have been done and performed, and events have happened, and all things exist, and all times have elapsed to entitle the plaintiff to have either delivered to him by the defendant such bill of exchange for 233*l.* 3*s.*, drawn and accepted as aforesaid, or to be paid by the defendant in cash. Breach: that the defendant has not either delivered to him such bill of exchange for 233*l.* 3*s.*, or paid [4] him that sum in cash, but the defendant has always neglected and refused so to do.

Demurrer and joinder therein.

Hayes, Serjt. (Barnard with him), in support of the demurrer. The declaration discloses no consideration for the defendant's agreement. [Martin, B. The payment of the 100*l.* is a sufficient consideration.] The plaintiff was under a legal obligation to pay that sum to the defendant. The payment of a debt is no consideration to support a promise. [Martin, B. The defendant got by the agreement 100*l.*, which the plaintiff would not otherwise have paid him.] The doing an act which the party is in law bound to do is no consideration. [Bramwell, B. The 300*l.* was received by the plaintiff as the agent of Barrett, and I do not see what obligation he was under to pay 150*l.* to the defendant.] The plaintiff was a trustee with notice that half the 300*l.* belonged to the defendant. [Bramwell, B. The promissory note was indorsed

and delivered to the plaintiff as the agent of Barrett, and the 300l. was received by him as such agent.] The agency of the plaintiff was for the receipt of 150l. [Bramwell, B. The declaration states that the defendant indorsed and delivered the promissory note to the plaintiff as the agent of Barrett, and that the amount of the note, on its becoming due, was received by the plaintiff as such agent. These allegations are admitted by the demurrer, and must be taken to be true; and, if so, there was no obligation on the plaintiff to hand over any part of the money to the defendant.] The whole facts taken together shew that the defendant was entitled to half the 300l.

Aspland appeared in support of the declaration, but was not called upon to argue.

[5] Per Curiam (a) The defendant may amend by withdrawing the demurrer and pleading; otherwise there will be judgment for the plaintiff.

Amendment accordingly.

THE OFFICIAL MANAGER OF THE SOLVENCY MUTUAL GUARANTEE COMPANY v. FROANE AND ANOTHER. Jan. 3, 1861.—The plaintiffs, a Joint Stock Company, by deed, guaranteed the defendants, upon their gross annual returns, against loss in their business, during the term of two years, by purchasers of goods becoming bankrupt. The guarantee was subject to the following condition: "Every guarantee shall be made for a specified term, but all guarantees upon gross annual returns, floating risks, or rent, whatever may be the original term of the same, shall from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the member interested therein or the board of directors shall give two calendar months' notice of an intention not to renew the same." Held that, in the event of no notice being given, the guarantee became a renewed contract for only one period of two years from the expiration of the original term, and was not from time to time renewable.—To an action on the deed of guarantee, the defendant pleaded that, at the expiration of the original term, the guarantee was rescinded. On demurrer: Held, no objection to the plea that it did not state that the guarantee was rescinded by deed.

[S. C. 31 L. J. Ex. 193; 7 Jur. (N. S.) 899.]

Declaration. That heretofore, on &c., an agreement in writing was made between three directors of the said Company, by whom the said agreement was signed on behalf of the said Company as in the said agreement mentioned, of the one part, and the defendants of the other part, which said agreement was and is sealed with the seal of the said Company and signed by the said three directors and by the defendants respectively, and which said agreement was and is of the tenor and effect following. (The declaration then set out the agreement, which (so far as material) was as follows:—)

"A. No. 1. Gross Annual Returns.
Guarantee, No. 167. B.
Term two years.

Gross Annual Sum £8000.
Annual Consideration £52.
Class of Risk by maximum rate £5
per cent."

"Memorandum of agreement made the 13th day of July, 1855, between the undersigned three Directors of the [6] Solvency Mutual Guarantee Company, on behalf of the said Company, of the one part, and C. Froane and W. Charlesworth, trading under the firm or style of Froane and Charlesworth, of, &c., members of the said Company, hereinafter designated as the said members, of the other part: Whereas the said members carry on, at No. 26 Wellington Street, Leicester, the business of hosiers and shoefactors, and have delivered into the office of the said Company a statement and declaration in writing, dated on the 9th day of June, 1855, signed by the said members, containing a statement of the amount of their business and losses therein during the three years preceding such declaration, and of such other particulars

(a) Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.

as are required by the rules and bye-laws of the said Company, and the said members are desirous of being guaranteed by the said Company in respect of their future annual sales, according to the terms of the deed of settlement and the rules and bye-laws of the said Company, and subject also to the several provisions hereinafter contained and hereon indorsed. And whereas the said members have contributed to the funds of the said Company the sum of 5s. in part payment of the consideration for this guarantee, and have further agreed to pay to the said Company the sum of 103l. 15s., being the remainder of the consideration chargeable hereon, together with interest in manner hereinafter mentioned: Now it is hereby witnessed, that in consideration of the said sum of 104l. so paid and agreed to be paid by the said members as aforesaid, it is hereby agreed by and between the said members and the said directors on behalf of the said Company in manner following, that is to say, that if the members shall pay, or cause to be paid, to the said Company the remainder of the aforesaid consideration, with interest thereon, in such manner and at such times as are hereinafter mentioned, and shall fully comply with the provisions of the aforesaid deed of settlement and the rules [7] and bye-laws for the time being of the said Company; and further, if the total amount of the sales made by the said members in any or any one of the years to which this guarantee is hereinafter made to extend, shall not exceed 8000l., then and in such case the subscribed funds of the said Company standing to the credit of the debt guarantee fund mentioned in the said deed of settlement, after satisfying all guarantees granted by the said Company previously payable and all other prior charges on such fund, shall, according to the provisions of the said deed of settlement, rules and bye-laws, be subject and liable to pay or make good to the said members, their executors, &c., nine tenth parts of the loss or damage to be occasioned to the said members in respect of any goods sold by the said members during the term of two years, from the 1st day of January, 1855, unto the 31st day of December, 1856, by reason of any or any one of the purchasers of such goods being duly found and declared bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or making an assignment for the benefit of their or his creditors, or compounding with them under the sanction of the said Company, within such time aforesaid and during any future period in respect whereof the said members shall contribute to the funds of the said Company and the said Company shall consent to receive further payments at the rate aforesaid; but subject always to the provisions contained in the said deed of settlement, rules and bye-laws, and also to the provisions hereinafter contained and indorsed hereon, &c. And the said members hereby agree to pay to the said Company the further sum of 51l. 15s., being the remainder of the annual consideration payable hereon up to the 31st day of December, 1855, and also the sum of 52l. in each and every succeeding year during the term of this guarantee, at the times and in the amounts hereinafter mentioned, &c., with interest [8] upon such respective sums, after the rate of 5l. per cent. per annum from the date hereof, to the time or respective times when such sums shall be paid. In witness whereof," &c.

The declaration then stated that the said Company, in the said agreement mentioned, was and is the Solvency Mutual Guarantee Company, whereof the plaintiff is such official manager as aforesaid, and C. Froane and W. Charlesworth, therein mentioned, were and are the defendants; that the said conditions and provisions in the said agreement mentioned as indorsed thereon, and which were indorsed thereon, were and are of the tenor and effect following, that is to say. (The declaration then set out the conditions, of which the following only are material to the present case:—)

"4. Every guarantee shall be made for a specified term, but all guarantees upon gross annual returns, floating risks, or rent, whatever may be the original term of the same, shall, from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the member interested therein or the board of directors shall give two calendar months' notice of an intention not to renew the same."

"6. All guarantees or contracts shall be dated on the day when the same shall be completed and issued by the Company, and shall take effect from such date, unless some other time shall, under the special authority and sanction of the board of directors, be expressed or indorsed thereon. Provided however that a member guaranteed upon gross annual returns, or floating risks, shall have no claim for any loss accruing within two calendar months of the date of such guarantee; but such

proviso shall not extend to any renewal of guarantee or contract where the membership shall not have been interrupted."

The declaration then stated, that the defendant or any [9] member interested in the said agreement did not, nor did the board of directors of the said Company, give two calendar months or any notice of an intention not to renew the said guarantee or agreement, and thereupon, from and after the expiration of the original term in the said agreement specified, the same agreement became and was renewed; and then thereupon became and was a renewed contract between the said Company and the defendants of the like nature and conditions as the said agreement hereinbefore set forth, by virtue of and according to the true intent and meaning of the said condition in that behalf. First breach: that although the said Company did all things, &c., to entitle them to the performance by the defendants of such renewed contract and to be paid by the defendants the said several sums of 52l. and 52l., being the said annual subscriptions in and for the respective years 1857 and 1858, during the term of the said renewed contract, together with interest thereon, &c., by virtue of and according to the terms and conditions of the said renewed contract in that behalf, the defendants did not nor would pay the said several sums, or any of them, or such interest, &c. And the plaintiff further saith, that the defendants or any member interested in the said agreement did not, nor did the board of directors of the said Company, during the term of the said renewed contract, give two calendar months or any notice of an intention not to renew the said guarantee or agreement; and thereupon, from and after the expiration of the said term of the said renewed contract, the said agreement became and was again renewed, and then thereupon became and was a second renewed contract between the said Company and the defendants of the like nature and conditions as the said guarantee or agreement hereinbefore set forth, by virtue of and according to the true intent and meaning of the said condition in that behalf. Second breach: [10] that although the said Company did all things, &c., to entitle the said Company to the performance by the defendants of such renewed contract as last aforesaid, and to be paid by the defendants the said sum of 52l., being the annual subscription in and for the year 1859, during the term of such renewed contract as last aforesaid, together with interest thereon as aforesaid, by virtue of and according to the terms and conditions of the said last mentioned renewed contract in that behalf, the defendants did not nor would pay the said last mentioned sum of 52l., or such interest, &c.

Fourth plea. That, more than two calendar months before the expiration of the said original term in the said agreement specified, and thence hitherto, the board of directors and the said Company exonerated and discharged the defendants from giving notice of their intention not to renew the said agreement and guarantee, and dispensed with and waived such notice in order to terminate the same; and the said guarantee or agreement, at the expiration of the said original term, was by the defendants and the said directors and the said Company mutually waived, rescinded, and wholly abandoned. And the defendants say that they have never since the said expiration of the said original term made any claim whatever in respect of any renewed contract, or obtained or sought to obtain any benefit or advantage whatever under it.

The eighth plea was pleaded to the second breach, and alleged, in the same terms as the fourth plea, that the contract was rescinded at and from the expiration of the renewed term.

Demurrer to the second breach in the declaration, and joinder therein.

Demurrers to the pleas respectively, and joinders therein.

[11] Montague Smith, for the defendants. First, the second breach is bad. The fourth condition only provides for one renewal of the contract after the expiration of the original terms of the guarantee. It is well established that a covenant for renewal will not be construed as a covenant for perpetual renewal, unless it is perfectly clear that such is its meaning. In *Iggulden v. May* (7 East, 237; S. C. in Equity, 9 Ves. 325; S. C. in Error, 2 New Rep. 449), the lessor covenanted, at the end of eighteen years of the term of twenty-one years "granted by the lease, to grant a new lease for the like time and term of twenty-one years, with all covenants, grants and articles as in that indenture contained;" and it was held that this covenant was satisfied by the tender of a new lease for twenty-one years containing all the

former covenants, except the covenant for future renewal. All the authorities on this subject are collected in Platt on Covenants (page 233), where it is said (page 236):—"A covenant for perpetual renewal, however, can only be introduced on the ground that a clear intention for such perpetual renewal can be discovered. And although the parties might possibly have intended a perpetual renewal, yet if it is not so expressed, nor are there any general words, such as from time to time, from which such an intention can be collected, a perpetual renewal will not be decreed." Here the condition contains no words which shew any intention whatever to renew the contract in perpetuity. Secondly, the pleas are good. If the plaintiff had taken issue on the pleas they could not have been proved without the production of a deed; and therefore, on general demurrer, it must be assumed that the contract was rescinded by deed: *Brymer v. The Thames Haven Dock and Railway Company* (2 Exch. 549; S. C. in Error, 5 Exch. 696).

The Court then called on

[12] J. Brown, for the plaintiff. First, the second breach is good. According to the true construction of the fourth condition, this is a continuing guarantee, until either party gives notice of his intention not to renew it. On the expiration of the original term there was a renewed contract of the like nature and conditions, and therefore in the same manner renewable. The language of the fourth condition not only admits of such an interpretation but the intention of the parties requires it. There can be no apprehension of a perpetual renewal, because either party may determine the contract by notice. Considerable trouble, expense and loss would be incurred, if after the first renewal, it were necessary to enter into a new contract. The defendants would be obliged to deliver another statement of the amount of their business and losses during the preceding three years, and a new guarantee must be executed. Also, if a debtor of the defendants became bankrupt a few days before, but the loss did not occur until a few days after the expiration of the four years, the defendants would lose the benefit of their contract. Again, by the sixth condition, a member guaranteed upon gross annual returns cannot claim for any loss accruing within two months of the date of the guarantee, but that provision does not extend to any renewal of it. The reason and nature of the contract require it to be interpreted in the same way as a tenancy from year to year. There is no consideration which applies to a renewal of the contract for the first time which will not equally apply to any subsequent renewal. In *Coote's Landlord and Tenant*, p. 228, it is said:—"A covenant for continued renewals, as it tends to create a perpetuity, is not favoured by the Courts; but where it is express and unequivocal it will be duly enforced; whether it shall be satisfied by the lessor's once renewing, or whether it shall amount to an engagement for a perpetual [13] renewal, must depend on the words of the covenant." Here the first renewed contract is to be subject to the same conditions as the original contract, one of those conditions being that it shall be treated as renewed unless determined by notice.

Secondly, the pleas are bad. It appears on the face of the declaration that the contract was by deed, and, according to the well known rule of law, the exoneration must be by an instrument of as high a nature. It is said that is merely matter of evidence, but the plea, admitting of two interpretations, must be construed most strongly against the defendant. The law is thus stated in *Chitty on Pleading*, vol. 1, p. 571, 7th ed.:—"As it is a natural presumption that the party pleading will state his case as favourably for himself as possible, and that if he do not state it with all its legal circumstances the case is not in fact favourable to him, it is a rule of construction, that if a plea has on the face of it two intendments, it shall be taken most strongly against the defendant; that is, the most unfavourable meaning shall be put upon the plea" [Martin, B. The pleas state that the guarantee was rescinded, but omit to state that it was by deed. That would formerly have been bad on special demurrer; but it is good on general demurrer, because the demurrer admits that the contract was rescinded, and that could only be done by deed.] The form of a plea of release prescribed by the Common Law Procedure Act, 1852 (Sched. p. 42), states "that the plaintiff by deed released the defendant."

Montague Smith was not called upon to reply.

MARTIN, B. I am of opinion that the defendant is entitled to judgment. The plaintiff has failed to establish that the contract extended beyond the expiration of the period of its first renewal, and that he is bound to do for [14] the purpose of

supporting the second breach in the declaration. If I were to speculate upon what the contract in a case of this kind would be, I should say that it would be the contract contended for by Mr. Brown; but, for the purpose of imposing a liability on the defendant, it must be shewn that this contract will bear that interpretation. The 4th condition provides that "every guarantee shall be made for a specific term, but all guarantees upon gross annual returns, &c., whatever may be the original term of the same, shall, from the expiration of such original term, be treated as a renewed contract of the like nature and condition." If it had stopped there, at the expiration of the original term, there would have been another contract of the like nature and condition as that mentioned in the policy. Then follow these words: "Unless either the member interested therein, or the board of directors, shall give two calendar months' notice of an intention not to renew the same." That may mean either that at the end of the original term there shall be a renewed contract, unless the Company on the one hand, or the defendants on the other, give two calendar months' notice that they will not renew it; or that there shall be a renewed contract at the end of every two years in the event of such notice not being given. In my opinion it points to only one renewal in the event of either party not giving the prescribed notice. We cannot put upon it the construction contended for by Mr. Brown without inserting the words "from time to time," and we are not at liberty to add any words. Consequently the contract was at an end after the expiration of the second period of two years.

BRAMWELL, B. I am of the same opinion. The case of *Brymer v. The Thames Haven Dock Company* (2 Exch. 549; S. C. in Error, 5 Exch. 696) is an [15] authority that the pleas are good. With respect to the other matter, it is one of those embarrassments which are thought by some people to be appropriate to the law, but in truth there is no difficulty in the law: the difficulty arises solely from the ambiguity of the instrument. Possibly the parties did not advert to whether the contract would bind them for four years, or for an unlimited period, unless determined by notice. There are certainly considerations why the latter interpretation should not be put upon it. But, although I think that the obligation imposed by the fourth condition is that, if notice to determine the contract be not given, it shall be a renewed contract for two years only, yet, under the words in the policy (*ante*, p. 8) "during any further period in respect whereof the said member shall contribute to the funds of the Company, and the Company shall consent to receive further payments," I am not sure that if, after the expiration of the four years, the assured continued to make the payments, and the Company received them, the latter would not be liable on the policy. I do not, as at present advised, see why that should not be so, and that would render the whole sensible, and remove all difficulty. However, it is possible the parties meant that, in default of notice, the contract should be from time to time renewed; but, on the other hand, the argument is forcible, that if the parties meant that the contract should be renewable in perpetuity, why not have said that it shall be a renewed contract every successive two years, until notice be given to determine it. The language of the fourth condition is against such a construction, because the guarantee is to be "treated as a renewed contract." In *Iggulden v. May* (7 East, 237, 242) Lord Ellenborough said "a new lease is the same as *one* new lease." So here, "a renewed contract" is *one* renewed contract. Therefore, both upon the language and grammatical con-[16]-struction of the fourth condition, I think that our judgment ought to be for the defendant.

CHANNELL, B. I am also of opinion that upon both points the defendant is entitled to judgment. The pleas are clearly good; and the only matter which admits of doubt arises on the demurrer to the second breach. The fourth condition points to two sets of guarantees, the one upon gross annual returns, floating risks and rent; the other applicable to a different subject-matter. If the fourth condition had stopped at the word "unless," it would have provided that in the former set of guarantees, although the original term was satisfied, yet at the expiration of such term, the guarantee should be treated as a renewed contract for the like term; so that it would have provided for one renewal only. But it goes on to say, "unless either of the parties shall give notice of an intention not to renew the same;" and it is said that provision renders the guarantee renewable from time to time until the notice is given. But if such was the intention of the parties, nothing could have been more easy than to express it in writing. I do not think the cases upon leases strictly analogous: for

a lease is an instrument of a different nature from a policy of assurance; but, so far as the analogy extends, it is in favour of the view which the defendant has presented. The question depends on the construction of the fourth condition, and, in my opinion, the true meaning of it is that the provision in the former part of it, as to the renewal of the contract, shall not take effect in the event of the latter part being complied with.

Judgment for the defendant.

[17] THE OFFICIAL MANAGER OF THE SOLVENCY MUTUAL GUARANTEE COMPANY v. FREEMAN. June 3, 1861.—The plaintiffs, a Joint Stock Company, guaranteed a firm, consisting of two partners in trade, against loss in respect of their gross annual returns. The guarantee was subject to the following condition:—"If a member of this Company shall die, or if any member guaranteed with respect to his gross or particular trade debts shall cease to be such trader, his guarantee or contract shall become void upon such death, or (if such trader) on his retiring from such trade." Held, that under this condition the guarantee became void upon the retirement of one of the two partners from the trade.—To an action by the Company to recover the annual subscriptions in respect of the guarantee, the defendant pleaded, as an equitable defence, that before making of the agreement he delivered to the Company a proposal and declaration in writing, which were to form the basis of the agreement of guarantee; and that the contract of guarantee was to be made, subject to the deed of settlement, and rules and bye-laws of the Company; that when the said proposal and declaration were so made and delivered certain printed rules and regulations were delivered to the defendant by the Company, as and for the rules and regulations under and subject to which the said proposed agreement for guarantee was to be made and entered into between the parties: that the rules and regulations so delivered to the defendant contained a certain rule, condition and provision with respect to the payment of subscription; that the agreement for guarantee was made and entered into in consequence of the said proposal and declaration, and they formed the basis thereof, and the agreement for guarantee was made by the defendant in the belief and on the faith that it was to be subject to the said printed rules and regulations: that the agreement and guarantee did not and does not contain the said rule, condition and provision, but contained and was made subject to a certain other and different rule substituted therefor by the Company in the agreement and guarantee, and much less advantageous to the defendant: that neither before or at the time of making and signing the agreement of guarantee had the defendant any notice or knowledge whatever of any alteration of the said printed rules and regulations, or of the substitution of the said rule, but on the contrary thereof, before and at the time of making and entering into the agreement of guarantee, he believed and had good reason for believing, and was led and induced by the Company to believe, that the agreement and guarantee contained and was made subject to the said printed rules and regulations: that since the defendant became aware of the said alteration and substitution he had not in any way agreed to or acquiesced in the said agreement and contract; nor had he at any time received any value, benefit, advantage or payment whatsoever from the Company under or in respect of the said agreement and guarantee, but the same has always been wholly worthless. Held, that the plea was bad, inasmuch as, under the circumstances stated in it, a Court of Equity would re-form the agreement and not refuse to enforce it.

[S. C. 31 L. J. Ex. 197. Followed, *Harvey v. Mutual Permanent Investment Building Society*, 1884, 26 Ch. D. 281.]

The declaration was in the same form as that in the preceding case (ante, p. 5), on a similar deed of guarantee made between the Company of the one part, "and John Fletcher, and George Freeman, trading under the firm or style of Fletcher, Freeman and Company, of 51 Cannon Street, Manchester," of the other part, by which the Company guaranteed the members against loss on their gross annual returns from the 21st February, 1854, to the 31st December, 1857. The guarantee was subject to the following condition:—

[18] "27. If a member of this Company shall die, or if any member guaranteed with respect to his gross or particular trade debts shall cease to be such a trader, his guarantee or contract shall become void upon such death, or (if such trader) on his retiring from such trade; but in case of death, or in case of the member retiring from the trade, his executors or administrators shall be entitled to claim from this Company for all just demands which may become due on such guarantee or contract on sales effected or transactions happening prior to his death or his retirement from the trade, and coming within the scope of his guarantee or contract; and in either case, whether of death or retirement from trade, this Company shall have or be entitled to retain, receive or recover the gross amount of subscriptions paid or agreed to be paid by the member in respect of such guarantee for the then current quarter."

The declaration alleged two breaches: first, the nonpayment by the said John Fletcher or the defendant of the amount of their subscriptions for the respective years 1855, 1856 and 1857, with interest thereon: secondly, the non-payment of an increased subscription for the year 1854, their gross admitted claims in that year having exceeded the amount of subscription payable by them.

Third plea to first breach. That before the 1st day of January, 1855, and before the time when either of the said sums became payable, that is to say, on the 1st day of August, 1854, the said John Fletcher retired from the said trade and business in the said agreement mentioned and in respect of which it was made, and ceased to carry on the same, and the said partnership between the defendant and the said John Fletcher was then dissolved; whereby the said guarantee and contract became and were determined according to and within the true intent and meaning of the said conditions and provisions in the declaration in that behalf mentioned.

[19] Fifth plea, to declaration on equitable grounds. That, before the making of the agreement in the declaration mentioned, the defendant and the said John Fletcher made and delivered to the said Company a certain proposal and declaration in writing for the purpose of effecting an agreement for guarantee, which said proposal and declaration were to form the basis of the said agreement for guarantee between the Company and the defendant and the said John Fletcher, and which said contract for guarantee was to be made subject to the deed of settlement and rules and bye-laws of the said Company: that at the time when the said proposal and declaration were so made and delivered to the said Company as before mentioned, certain printed rules and regulations were delivered to the defendant and the said John Fletcher by and on behalf of the said Company, as and for the rules and regulations by and under and subject to which the said proposed agreement for guarantee was to be made and entered into between the said parties: that the said rules and regulations so delivered to him, and to the said John Fletcher, contained a certain rule, condition and provision in the words and figures following, that is to say:—"40. Where the gross admitted claims of any member guaranteed upon gross returns shall in any one year equal three times the amount of subscription payable by such member for such year, then the subscription of such member shall, for that year, be increased after the following rates of per centage upon the gross amount of such admitted claims, that is to say, if the admitted claims shall equal three times the amount of subscription, and not equal six times the amount, 10l. per cent.: if equal to six times the amount, and not equal to nine times the amount, 15l. per cent., and so on in like proportion: provided, however, that in the case of a guarantee granted for one year only, the subscription shall, in like cases, be [20] charged at double the rates before mentioned, unless two calendar months previous to the expiration of such guarantee, notice be given by the member interested therein of his intention to immediately renew the same for a term of not less than three years." Averments: that the said agreement for guarantee in the declaration mentioned and set out was made and entered into under and in consequence of the said proposal and declaration, and that the said proposal and declaration were made and formed the basis thereof, and that the said agreement for guarantee was made by the defendant and the said John Fletcher in the belief and on the faith that it was to be subject to the said printed rules and regulations hereinbefore mentioned: that the said agreement and guarantee so made as in the declaration mentioned did not and does not contain the said rule, condition and provision hereinbefore set out, but contained and was made subject to a certain other and different rule substituted therefor by the said Company in the said agreement and guarantee, and much less advantageous to the defendant and the said John Fletcher, which said last mentioned

rule, condition and provision is in the words and figures following, that is to say:—
 “32. When the gross admitted claims of any member guaranteed upon gross returns shall, in any one year, exceed twice the amount of subscription payable by such member for such year, then the subscription of such member shall, for that year, be increased after the following rates of per centage upon the gross amount of such admitted claims, that is to say, if the admitted claims shall exceed twice the amount of subscription, and do not exceed three times the amount, 10 per cent.; if they exceed three times that amount, and not four times the amount, 20 per cent., and so on in like proportion; and if the member guaranteed shall not have been in trade as a principal for three full years immediately preceding the date of his proposal, or does not come within the scope of any of the classes or rates published in the prospectus of the Company, then, should the gross admitted claims of such member in any one year exceed the amount of the subscription payable by such member for such year, the subscription of such member shall, for that year, be further increased after the rate of 5 per cent. upon the gross amount of such admitted claims: provided also that, in case of a guarantee granted for one year only, the subscription shall, in like cases, be charged at double the rates before mentioned, unless two calendar months previous to the expiration of such guarantee, notice be given by the member interested therein of his intention to immediately renew the same for a term of not less than three years.”
 Averments: that neither before or at the time of the making and signing of the said agreement and guarantee, had the defendant or the said John Fletcher any notice or knowledge whatever of any alteration of the said printed rules and regulations, or of the substitution of the said rule as hereinbefore mentioned, but, on the contrary thereof, before and at the time of the making and entering into the said agreement and guarantee, they believed, and had good reason to believe, and were led and induced by the said Company to believe, that the said agreement and guarantee contained and was made subject to the said printed rules and regulations hereinbefore mentioned: that since the defendant and the said John Fletcher became aware of the said alteration and substitution they have not, neither has either of them, in any way agreed to or acquiesced in the said agreement and contract; and that neither the defendant nor the said John Fletcher have at any time received any value, benefit, advantage or payment whatsoever from the said Company, under or in respect of the said agreement and guarantee, but the same has always been wholly worthless.

Demurrer to pleas respectively, and joinder therein.

[22] J. Brown, in support of the demurrers. The question raised by the demurrer to the third plea depends on the construction of the 27th condition, which provides “that if any member guaranteed with respect to his gross or particular trade debts shall cease to be such a trader, his guarantee or contract shall become void on his retiring from such trade.” That provision applies only to the case of a sole trader ceasing to carry on business, and has no application to the case of one of several partners retiring from the firm. If the condition was intended to apply to such a case, it would have been so expressed. Words in the singular cannot be read as if in the plural. The condition also provides “that if a member of this Company shall die, his guarantee or contract shall become void upon such death; and could it be contended that, under that provision, the guarantee would become void upon the death of one of several partners? According to the plain and natural construction of the condition, the guarantee becomes void if a single member or all the members of a firm cease to trade, but not if one of several partners retires from the trade. The deed contains an absolute contract by the Company to guarantee the members against loss from the 21st of February, 1854, to the 31st of December, 1857; on the other hand, there is an absolute contract by the members to pay their subscriptions during that period, and they cannot, by any act of theirs, annul such contract. Moreover, even if the guarantee became void by the retirement of one partner, according to the rule laid down in *Portage v. Cole* (1 Wms. Saund. 320 a.) the liability to pay the subscriptions remains.

The Court intimated an opinion that the third plea was good, and called on

Montague Smith to support the fifth plea. The facts [23] stated in the fifth plea afford a good equitable defence to the action. This is not a case in which a Court of equity would reform the contract, but one in which that Court would refuse to enforce it against the defendant. The Company prepared the deed and procured the defendant to execute it, without informing him of the alteration in their rules. [Channell, B.

The plea does not allege fraud, nor negative the means of knowledge of the alteration.] It states that the agreement for guarantee was made by the defendant and his partner on the faith that it was to be subject to the rules and regulations delivered to them by the Company, and that when they entered into the guarantee they were led and induced by the Company to believe that it was subject to those rules and regulations. Where a person, under a mistaken notion that, as heir-at-law of his father, he was entitled to shares in a joint stock Company as realty, executed a deed by which he joined in indemnifying the directors in respect of certain advances made by them, and he afterwards ascertained that the shares were personal estate, a Court of equity ordered the deed to be delivered up to be cancelled on the ground that it was executed by mistake: *Broughton v. Hutt* (3 De Gex & J. 501). [Channell, B. There it was assumed that the party who prepared the deed had some peculiar knowledge of which the other party was not cognizant, and therefore ought not to have allowed him to execute it without apprising him of the circumstances.] Here the defendant executed the deed under a mistake, and in consequence of the Company concealing from him a fact of which they had peculiar knowledge.

BRAMWELL, B. I am of opinion that the fifth plea is bad. I entertain a strong conviction that the matters dis-[24]-closed by that plea would not, in a Court of equity, afford sufficient ground for refusing to compel the defendant to perform his contract, but that the Court would only reform the contract, and place the defendant in the same position as if no alteration had been made in the rules and regulations of the Company. Therefore I think that the plaintiff is entitled to judgment on the demurrer to that plea.

With respect to the third plea, I am of opinion that the defendant is entitled to judgment. I am inclined to think that Mr. Brown is right when he said that the deed contains an absolute contract of guarantee by the Company for the term therein mentioned, and that, if it had not been subject to the 27th condition, the defendant would have been bound to pay the subscription during the whole of that term. But, by the 27th condition, the Company in effect say, "When you are no longer in a situation to derive any benefit from our assistance, you shall not be liable to pay the subscription." It is true that the 27th condition speaks of a member of the Company dying or ceasing to be a trader; but, although it does not use the word "members" in the plural, it ought to receive such a construction. If the language is examined it is against the plaintiff's view. It says, if any member shall cease to be a trader, the guarantee shall become void. Here a member has ceased to be a trader, because he has retired from a joint trade. Therefore I think that the defendant is entitled to judgment on the third plea.

MARTIN, B., and CHANNELL, B., concurred.

Judgment for defendant on third plea, for plaintiff on fifth plea.

[25] M'CORMICK v. GRAY. June 5, 1861.—The plaintiff was assignee of a patent, granted in 1850, for improvements in machines for cutting grain. The operating part of the machine consisted of a set of fingers, of a spear-head shape, affixed to the front edge of a platform, and immediately underneath these fingers was a cutting-blade formed of a thin plate of steel, toothed upon its front edge. There was also a gathering-reel which was made to revolve and so prevent the straws from being pressed forward when they came in contact with the cutting-blade. The specification, after describing the mode in which the cutting was effected, proceeded thus:—"The fingers greatly facilitate this part of the operation, as they hold the straws or stalks from yielding along with the lateral action of the cutting-blade; and it is for the more effectual accomplishing this object that they are formed of a shape like a spear-head, which causes the straws or stalks to slide into the spaces between them when in that position; and as the inclined edges of the roots of the fingers (that is, immediately over the cutting-blade) form an acute angle with the edge of the knife, the cutting through of the straws or stalks is sure to be effected by the reciprocating movement of the knife-blade. It has been found of great advantage to have the cutting edge toothed somewhat similar to a sickle." The claim was as follows:—"What I claim is the construction of reaping or grain-cutting and gathering machines, according to the improvements before described; that is to say, the constructing and placing

of holding-fingers, cutting-blades, and gathering-reels respectively, as before described, and the embodiment of those parts as so constructed and placed, all or any of them, in machines for reaping purposes." In the year 1845 the following description of an American patent, "For improvements in the machines for reaping grain," was published in this country. "This is for improvements on that kind of machines in which the grain is cut by the serrated edge of a straight and vibrating cutter operated by a crank, the grain being sustained by fingers. The blade is serrated like a sickle, except that the angle of the teeth is reversed for every alternate tooth; and the supporters of the blade are secured by screws to the front part of the platform, and bent down and then up to receive a free escape to straw which may enter the machine. The fingers for supporting the grain are spear-formed, and the angle of the edge begins to run in forward of the edge of the cutting-blade, so as to form an angular shear to ensure the support of the grain in the act of cutting." The defendant made and sold cutting-blades similar to those of the plaintiff, and which were capable of being used in his reaping machines.—Held: First, that the defendant had not infringed the plaintiff's invention. (Per Pollock, C. B., Bramwell, B., and Channell, B. Martin, B., dubitante.)—Secondly: that the patent was void for want of novelty.

[S. C. 31 L. J. Ex. 42; 9 W. R. 809; 4 L. T. 832. Followed, *Dunlop Pneumatic Tyre Company, Limited v. David Moseley & Sons, Limited*, [1904] 1 Ch. 164: affirmed *ibid.* 612.]

This was an action to recover damages for the infringement of a patent. The declaration alleged the grant of the letters patent to R. Brooman for his invention entitled "Improvements in Agricultural Machines," the enrolment of a specification of the invention, the assignment of the patent to the plaintiff, and an infringement by the defendant after the assignment.

The defendant pleaded (*inter alia*). First: not guilty. Secondly: that R. Brooman was not the first and true inventor. Sixthly; that the invention was not a new manufacture within the meaning of the 21 Jac. 1, c. 3. Upon which issues were joined.

[26] The particulars of the objections relied on by the defendant stated "that the said invention and several parts thereof were, prior to the granting of the said letters patent, published in England in and by means of (*inter alia*) certain volumes of an American printed work, called the Journal of the Franklin Institute, 2nd Series, vol. 15, page 44; 3rd Series, vol. 10, page 247."

The action came on to be tried, before Pollock, C. B., at the London Sittings after Michaelmas Term, 1860, when, by consent, a verdict was found for plaintiff, subject to the following case:—

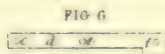
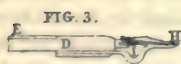
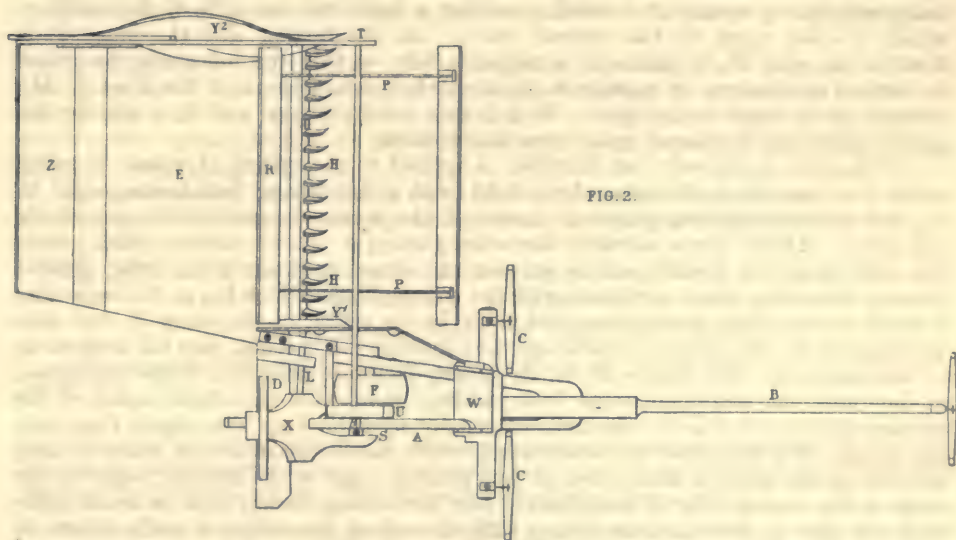
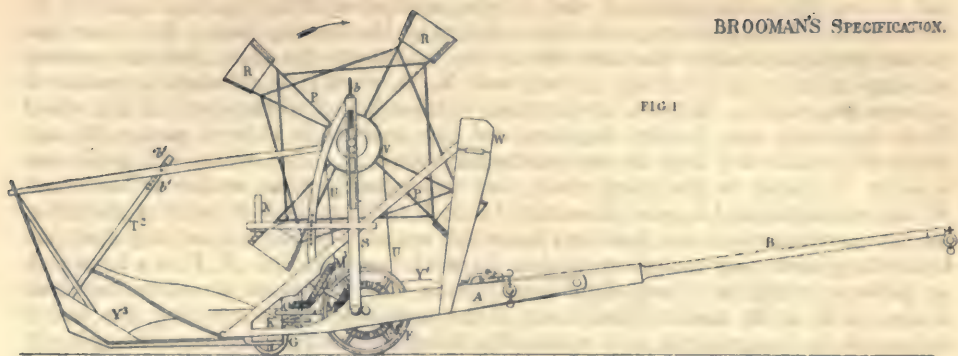
The letters patent, mentioned in the declaration, were granted to R. Brooman on the 7th December, 1850, for an invention intituled "Improvements in Agricultural Machines," communicated to the patentee by a foreigner residing abroad.

On the 7th June, 1851, R. Brooman, the patentee, in pursuance of the condition in the patent, caused a specification in writing, under his hand and seal, to be enrolled in Chancery. The specification (so far as material) was as follows:—

"The said invented improvements in agricultural machines have relation to that class of machines which are worked by horses in cutting or reaping wheat, corn, or other grain, and have for their object the holding of the straw or stalks of the grain in a favourable position while being cut, and the more conveniently arranging, collecting, and disposing of the same when cut.

"Figure 1, is a side elevation, and Figure 2, a plan of a reaping machine, constructed according to the said improvements. A, A, is a frame of wood of a triangular form, to the front of which there are fixed the pole B, and whippetrees C, C. The back rail D, of the frame is prolonged on one side of the machine, so as to project about six feet [27] beyond the frame, and the projecting portion forms the basis of a platform E. F and G, are two wheels upon which the machine is mounted; the wheel F, (from its position) bears the greater portion of the weight of the machine, and is employed for communicating motion to the moving parts, as hereinafter described. H, H, H, are a set of fingers, somewhat of a spear-head shape, which are affixed to the front edge of the platform, and placed at regular intervals apart from each other; immediately underneath these fingers is placed the cutting-blade I, which is formed

BROOMAN'S SPECIFICATION.



of a thin plate of steel, toothed upon its front edge, and fitted into a groove, or into bearings attached to the front of the platform. Figure 3, is a cross section of the rail D, and the cutting-blade I, shewing the method of attaching the fingers H, H, to the front of the platform, and their relation to the cutting-blade; this blade has perfect freedom to slide from one side of the machine to the other, but the amount of range given to it is limited by the crank K, to which it is attached by means of a connecting rod L. M¹, is a bevel wheel, which is keyed to the shaft of the wheel F, so that both may revolve together, and give motion to a bevel pinion M², and wheel M³, which are fixed to an intermediate shaft N. The wheel M³, gears into a pinion O, placed on the crank shaft, and consequently gives motion to the crank K, the connecting rod L, and the cutting-blade I. The number of teeth of the intermediate gearing which has just been described, are so proportioned and adjusted that the cutting-blade may reciprocate and do its work very rapidly. P, P, is a large reel, or gatherer, which is of very light construction, and carries at its extremities four blades, R, R, R, R, made of thin deal; at the near side of the machine this reel is supported by an upright S, and at the off side by a brace T, which is raised upon the back of the platform. When the machine is going forward, the reel is made to [28] revolve in the direction indicated by the arrow, by means of a band or belt U, which takes on to the hem of the bevel wheel M¹, and the rigger V, the latter of which is keyed to the reel shaft. The distance of the reel from the platform is capable of being adjusted by means of the sliding bearing *a*, (upon the near side of the machine) which is acted upon by the screwed rod *b*. At the further side the brace T, is fixed to the spur T², by means of a moveable bolt, so that the brace may be raised or lowered at pleasure, by passing the moveable bolt into any one of the holes (*b*¹, *b*¹,) further up or down in the spur. W, is a seat for the driver, and X, a seat for the person gathering the reaped grain from the platform.

"When the machinery just described is applied to the cutting of wheat or other grain, it is brought to the edge of the field (with either two or four horses yoked to it), and with the platform placed in front and the horses alongside of the crop to be cut down. As the horses advance the wheel-gearing is put in motion, which causes the reel slowly to revolve, and so prevent the straws or stalks from being pressed forward when they come in contact with the cutting-blade, which has at the same time a rapid reciprocating motion imparted to it by the action of the crank K, and connecting rod L; the straws or stalks are thus speedily cut through, and fall backwards on the platform. The fingers H, H, H, greatly facilitate this part of the operation, as they hold the straws or stalks from yielding along with the lateral action of the cutting-blade; and it is for the more effectually accomplishing this object that they are formed of a shape like to a spear-head, which causes the straws or stalks to slide into the spaces between them when in that position; and as the inclined edges at the roots of the fingers (that is, immediately over the cutting-blade,) form an acute angle with the edge of the knife, the cutting [29] through of the straws or stalks is sure to be effected by the reciprocating movement of the knife-blade. Two separate views of parts of the fingers and cutting-blade are given in Figures 4, and 5; the blade in Figure 4, is straight in the cutting edge, while that in Figure 5, is zig-zag, or of an indented form. In every case, however, it has been found to be of great advantage to have the cutting edge toothed somewhat similar to a sickle, and to have those teeth divided into sections corresponding to the number of fingers, each section having one half of the teeth inclined in one direction, and the other half having the teeth inclined in the opposite direction. As the straws or stalks of the crop which is in the course of being reaped are cut through by the action of the cutting-blade, as just described, the continued rotation of the reel causes them to fall over upon the surface of the platform E, from which as they accumulate they are drawn off with a common hand-rake by the attendant who sits upon the seat X.

"The quantities so drawn off are each about the size of a common sheaf, and delivered on to the ground immediately behind the frame A, A, of the machine, thus leaving a clear space for the return of the machine in case the binding of the sheaves may not have kept pace with the progress of the reaping or cutting machine. Y¹, is a wheel-board, which turns the standing grain in before the cutting-blade upon the near side of the machine; and Y², is a 'separator,' which performs a similar part upon the off side of the machine; Y³, is a brace, which gives stiffness to the support

for the reel, and serves to keep the reaped grain from being dragged over the back of the platform. Z, is a canvass back to the platform.

"When the machine is being transported from one place to another, the intermediate gearing for communicating motion from the shaft of the wheel F, to the cutting-blade and reel, is disconnected by the lower bearing of the inter-[30]-mediate shaft being moved aside, for which purpose the bearing c, is fixed in one end of a lever d, shewn separately in Figure 6. The lever is attached at the centre to the frame by a pin e, upon which it is free to move as a fulcrum; the other end of the lever d, is fixed to the frame by a bolt passed through the hole f, so that by undoing that bolt the wheels may be readily thrown into or out of gear.

"And having now described the nature of the said invention, and in what manner the same is to be performed, I declare that what I claim is, the construction of reaping or grain cutting and gathering machines according to the improvements before described; that is to say, the constructing and placing of holding-fingers, cutting-blades, and gathering-reels respectively, as before described, and the embodiment of those parts as so constructed and placed, all or any of them, in machines for reaping purposes, whether such machines are constructed in other respects as before described, or however else the same may in other respects be constructed."

On the 23rd August, 1851, the said R. Brooman by a deed of that date assigned the letters patent to the plaintiff.

The defendant on the 13th March, 1852, registered a design for a reaping machine knife.

The defendant, after the date of the assignment and before the commencement of this action, made and sold knives, cutting-blades, or pieces of steel similar to those of the plaintiff; and the jury found as a fact that the said knives, cutting-blades, or pieces of steel were made and sold by the defendant, and were capable of being used in the plaintiff's reaping machine.

The publications mentioned in the defendant's notice of objections are to be deemed part of this case. Among these publications were the following:—(a)

[31] "Journals of the Franklin Institute of the State of Pennsylvania, 2nd Series, vol. 15, p. 44. Published 1835.

"'Title American Patents for June, with Remarks.'

"For a reaping machine. Cyrus Hall McCormick, Rockbridge County, Virginia, June 21."

The main operating part of this machine is old; and, indeed, there are other points in it liable to the same objection; but when the major proposition is proved the minor one may be left untouched. The following is a part of the claim:—

"My claim is to the arrangement of the several parts so as to constitute the above described machine; and I particularly claim the cutting by means of a vibrating-blade, operated by a crank, having the edge either smooth or with teeth, either with stationary wires or pieces above and below and projecting before it for the purpose of staying or supporting the grain whilst cutting; or the using a double crank and another blade or vibrating bar, as before described, having projections before the blade or cutter, or on the upper side, both working in contrary directions, thereby lessening the friction and liability to wear by dividing the motion necessary to one between the two."

"3rd Series, vol. 10, p. 247. Published 1845.

"'Title American Patents, issued in January 1845.'

"For improvements in the machines for reaping grain. Cyrus McCormick, Rockbridge County, Jan. 31. This is for improvements on that kind of machines in which the grain is cut by the serrated edge of a straight and vibrating cutter operated by a crank, the grain being sustained by fingers. The blade is serrated like a sickle, except that the angle of the teeth is reversed for every alternate tooth, and the supporters of the blade are secured by screws to the front part of the platform, and bent down and then up to receive a free escape to straw which may enter the machine. [32] The

(a) The decision of the Court renders it unnecessary to refer to the others.

fingers for supporting the grain are spear-formed, and the angle of the edge begins to run in forward of the edge of the cutting-blade, so as to form an angular shear to insure the support of the grain in the act of cutting."

The Court is to be at liberty to draw inferences from the facts herein stated in the same way as the jury might have done.

The questions for the opinion of the Court are:—Whether the publication of the parts of books mentioned in the notice of objection, prior to the date of the letters patent granted to R. Brooman, entitles the defendant to have a verdict entered for him on the second and sixth pleas.

Whether the making and selling by the defendant of the knives, or the pieces of steel, was an infringement of the patent right granted to R. Brooman and assigned to the plaintiff, so as to entitle the plaintiff to a verdict on the first plea.

Montague Smith (Hindmarch with him), for the plaintiff. First, the defendant has infringed the plaintiff's patent. The invention consists of the construction and embodiment of holding-fingers, cutting-blades and gathering-reels; and the defendant has made and sold cutting-blades identical with those used by the plaintiff. [Pollock, C. B. Suppose a cutting-blade in the machine broke, could not a person make another without infringing the plaintiff's patent?] If the cutting-blade was capable of repair, he might repair it; but if it was so broken that a new one was required, he must purchase it of the plaintiff. The cutting-blade is an essential part of the machine, and that has been made by the defendant without the plaintiff's licence. [Bramwell, B. The patentee does not claim the teething but the blade, so that, if the argument for the plaintiff is right, no man can make a knife without infringing this patent.] The two [33] parts of the claim are distinct, the one relates to the constructing and placing of the three materials; the other to the embodiment of them in the machine. [Channell, B. The patentee claims the cutting-blade as placed in a reaping machine,—then is the making of a cutting-blade any infringement of the patent until it is placed in such a machine? Martin, B. *Smith v. The London and North Western Railway Company* (2 E. & B. 69) shews that where an invention consists of several parts, the limitation or pirating of any part of the invention is an infringement of the patent.] There the patent was for improvements in wheels, and the specification described the invention as consisting of a mode of forming a wheel of one solid piece of wrought iron, by means of welding pieces of wrought iron together so as to form the rim, spoke and nave into one compact mass. The defendants used a wheel made by welding pieces of wrought iron together so as to form a single compact piece of wrought iron; the mode of forming the nave was the same as that described in the specification, but the mode of forming the rim was different; and the Court of Queen's Bench held that, as the mode of forming the nave was a material, new and useful part of the invention, the use of it by the defendants was an infringement of the patent. [Channell, B. In that case the portion pirated was distinctly claimed. Pollock, C. B. Suppose these blades were fixed in a piece of wood, and two men went along cutting corn with them, would that be an infringement of the plaintiff's patent?] Any use of the same blade in a reaping instrument would be an infringement.

Secondly, the invention is new. In the American patents referred to in the Journals of the Franklin Institute of Pennsylvania, though the materials are similar, the mode of cutting is different. Where there is a claim to several sub-[34]-stances of the same nature as capable of producing a certain effect, if some of them will not answer a patent may be obtained by a person who discovers the one adapted to the purpose: *Hill v. The London Gas Light Company* (5 H. & N. 312). So here, the prior use of a similar material in a different mode, for the purpose of effecting the same object, will not vitiate this patent.

Webster appeared for the defendant, but was not called upon to argue.

POLLOCK, C. B. I am of opinion that our judgment ought to be for the defendant. I agree with an observation of my brother Martin, in the course of the argument, that the plaintiff's invention is substantially an embodiment of the machine for cutting grain mentioned in the 10th volume of the 3rd Series of the Journals of the Franklin Institute of the State of Pennsylvania, published in the year 1845. It seems to me that the description of that machine is sufficient to render the subject-matter of the plaintiff's patent not a new invention; but at least it shews that the plaintiff ought

not to have claimed each of the three materials, viz., the holding-fingers, the cutting-blades, and the gathering-reels. Mr. Smith's argument is, that the plaintiff claims the three materials respectively, and therefore if a person uses any one of them for any purpose whatever he infringes the plaintiff's patent. It is clear that the publication of the American patent in the year 1845 displaces that view of the subject. If the plaintiff claims each of the three materials, and there was another patent, prior to his, for a machine, which has supporting fingers and cutting-blades, and which was so described as to preclude him from claiming anything but the combination of the three materials in the way [35] specified, the defendant having only manufactured a portion of the plaintiff's machine, viz., the cutting-blade; it seems to me that he is not liable to an action for infringing the plaintiff's patent for a reaping machine. It may be that if a person made a reaping machine with a cutting-blade like the plaintiff's, that would be an infringement of his patent; but a blade is not in my judgment a machine, and the making it will do no harm to the plaintiff until it is adapted to a reaping machine. Upon these grounds I agree with my brother Martin, that what the plaintiff claims is no novelty, since a portion of it was anticipated in the year 1845, and that the plaintiff should have restricted his claim to a combination of the three materials forming the machine, and not have claimed each of them.

MARTIN, B. If our judgment depended on the question whether the making by the defendant of the cutting-blades was an infringement of this patent, I should not be prepared at present to concur. If a person invented a machine, consisting of two parts, which formed the subject of a valid patent, and a manufacturer made one of those parts and put that into another machine of the same description, I am disposed to think that would be an infringement of the patent. However, it is not necessary to express an opinion on that point, because it is clear that this patent is void for want of novelty. The patent is for "Improvements in Agricultural Machines," communicated to the patentee by a foreigner residing abroad. The specification, after describing the mode in which the grain is cut, goes on to say:—"The fingers H, H, H, greatly facilitate this part of the operation, as they hold the straws or stalks from yielding along with the lateral action of the cutting-blade; and it is for the more effectually accomplishing this object that they are formed of a shape like a spear-head, which causes the straws or stalks [36] to slide into the spaces between them when in that position." In the specification of the American patent, granted to the plaintiff in the year 1845, it is said:—"The fingers for supporting the grain are spear-formed, and the angle of the edge begins to run in forward of the edge of the cutting-blade, so as to form an angular shear to ensure the support of the grain in the act of cutting." So that the one specification describes the holding-fingers as spear-headed, the other as spear-formed, and they both say that the fingers come to a point for the purpose of steadily supporting the grain. The plaintiff's specification proceeds thus:—"And as the inclined edges at the roots of the fingers (that is immediately over the cutting-blade) form an acute angle with the edge of the knife, the cutting through of the straws or stalks is sure to be effected by the reciprocating movement of the knife-blade." The specification then goes on to say:—"Two separate views of parts of the fingers and cutting-blade are given in Figures 4 and 5; the blade in Figure 4 is straight in the cutting-edge, while that in Figure 5 is zig-zag, or of an indented form. In every case, however, it has been found to be of great advantage to have the cutting edge toothed somewhat similar to a sickle, and to have these teeth divided into sections corresponding to the number of fingers, each section having one-half of the teeth inclined in one direction, and the other half having the teeth inclined in the opposite direction." So that the cutting-blade is nothing more than a knife with teeth upon one part running to the right and left. The meaning of the specification is plain. The patentee claims the construction of the reaping machine; the construction and placing of the holding fingers, cutting-blades and gathering-reels; and the embodiment of those parts so constructed and placed in reaping machines. Now, in the year 1835, an American patent was granted to the plaintiff for a reap-[37]-ing machine, upon which there is in the Journals of the Franklin Institute the following remarks:—"The main operating part of this machine is old; and, indeed, there are other points in it liable to the same objection, but when the major proposition is proved the minor one may be left untouched." A part of the claim is then stated as follows:—"My claim is to the arrangement of the several parts so as to constitute the above described machine; and I particularly claim the cutting by means of a vibrating-blade operated by a crank

having the edge either smooth or with teeth, either with stationary wires or pieces above and below and projecting before it for the purpose of staying or supporting the grain whilst cutting." No doubt the contrivance for the support of the grain whilst cutting was defective, because wire was not strong enough for that purpose. In the year 1845, the plaintiff obtained another American patent "For improvements in the machine for reaping grain," and this patent is thus described in the work to which I have referred:—"This is for improvements in that kind of machines in which the grain is cut by the serrated edge of a straight and vibrating cutter operated by a crank, the grain being sustained by fingers. The blade is serrated like a sickle, except that the angle of the teeth is reversed for every alternate tooth, and the supporters of the blade are secured by screws to the front part of the platform, and bent down and thrown up to receive a free escape to straw which may enter the machine." It then proceeds to say that the fingers for supporting the grain are spear-formed. So that the machine is identical with that for which the present patent was obtained, with this exception, that instead of the teeth being placed all on one side, each alternate tooth is put different ways. No doubt by this means the implement is much stronger, but it [38] is substantially the same machine operating in the same way by cutting backwards and forwards. Then, suppose the plaintiff's patent was good, would the selling of a machine, made according to the American patent of 1845, be an infringement of it? I think it would. For these reasons it seems to me that this patent is void for want of novelty.

BRAMWELL, B. The first question we have to determine is whether the defendant is entitled to a verdict on the plea of not guilty. Had it not been for the doubt entertained by my brother Martin, I should have thought this an extremely plain case. The plaintiff's patent is for "Improvements in Agricultural Machines," and therefore anything not an improvement in an agricultural machine would not be within the patent. The patentee having described the nature of the invention, and in what manner the same is to be performed, proceeds thus:—"I declare that what I claim is the construction of reaping or grain-cutting and gathering machines, according to the improvements before described:" that is, I claim the construction of improved reaping machines. He then proceeds thus: "That is to say,"—and what follows is not a different description of claims, but an explanation of his claim,—“the constructing and placing of holding-fingers, cutting-blades and gathering-reels respectively, and the embodiment of those parts so constructed and placed, all or any of them, in machines for reaping purposes.” That seems to me perfectly plain. The patentee says, "My patent is for improvements in agricultural machines, and what I claim is the construction of such machines, that is to say, the construction of the thing before described;" and, in order that there may be no doubt, he goes on to say, "Whether such machines are constructed in other respects as before described, or however else the [39] same may in other respects be constructed." That is in effect saying, "I claim not only the machine but every part of it." But if this patent is good for the new serrated blade, it is good for the old indented blade, and then a man could not make a knife without infringing the patent. I am satisfied that there is no difference between making a thing with one intent and another. If a man may do a thing, he may do it with whatever intent. If the blade is used in some machine not the same as that described in the patent, the patent is not infringed.

Then as to the objection that the invention is not new, I confess I have some difficulty, because it depends on whether the claim is to each separate part or to the combination. If the whole is claimed, I cannot say that the invention is new. However, I am satisfied that the defendant is entitled to a verdict upon the plea of "not guilty."

CHANNELL, B. I am also of opinion that the defendant is entitled to judgment upon the plea of not guilty, which disputes an infringement of the plaintiff's patent. His claim is for "the construction of reaping or grain-cutting and gathering machines according to the improvements before described." Then follows that by which the patentee interprets the preceding language:—"That is to say, the constructing and placing of holding-fingers, cutting-blades and gathering-reels respectively, as before described, and the embodiment of those parts as so constructed and placed, all or any of them, in machines for reaping purposes." One point raised is whether this invention is founded on the combination of the holding-fingers, cutting-blades and gathering-reels, or whether the patentee does not claim each of them separately. It appears to

me unnecessary to decide whether the plaintiff claims the combination or each of [40] those three things, because, assuming a claim to the cutting-blades, I do not understand that the patentee claims the invention of cutting-blades simpliciter, but only when placed in a machine of this description. That being the construction which I put on the specification, it seems to me that there has been no infringement of his patent. As to whether the making a cutting-blade and placing it in a machine of this description would have been an infringement of this patent, it is not necessary to give an opinion. But as the judgment of my brother Martin somewhat differs from that of the Lord Chief Baron, I have thought it right to state my view upon this point.

Upon the other point, I am of opinion that the patent is void on the ground of want of novelty, whether the claim is to the three materials separately or to their combination only. The first mention of the cutting-blade in the specification is where it is stated "that a set of fingers somewhat of a spear-head shape are affixed to the front edge of the platform, and placed at regular intervals apart from each other; immediately underneath these fingers is placed the cutting-blade, which is formed of a thin plate of steel, toothed upon its front edge, and fitted into a grove or into bearings attached to the front of the platform." Then in another part of the specification it is said that "the fingers greatly facilitate this part of the operation, as they hold the straws or stalks from yielding along with the lateral action of the cutting-blade, and it is for the more effectually accomplishing this object that they are formed of a shape like a spear-head," &c. The patentee then refers to two views of parts of the fingers and cutting-blade, in one of which the blade is straight in the cutting edge, in the other, of an indented form. He then proceeds to say that in every case it has been found to be of great advantage to [41] have the cutting edge toothed somewhat similar to a sickle. But I do not, however, understand that he claims the toothing of the cutting edge as the essence of this part of the invention. Then comes the question whether the American patent, granted in January, 1845, is not substantially the same. That is, "for improvements on that kind of machine in which the grain is cut by the serrated edge of a straight and vibrating cutter operated by a crank, the grain being sustained by fingers." In the plaintiff's patent the grain is also sustained by fingers, and in both patents the object is the same, viz., to hold the straws and stalks while the cutting is going on, and prevent them from being pressed forward when they come in contact with the cutting-blade. Then, in the American machine, "the blade is serrated like a sickle" (the like expression being used in the plaintiff's patent) "except that the angle of the teeth is reversed for every alternate tooth." Then, in the American machine, "the fingers for supporting the grain are spear-formed" (in the plaintiff's they are "spear-headed"); "and the angle of the edge begins to run in forward of the edge of the cutting-blade, so as to form an angular shear, to ensure the support of the grain in the act of cutting." In the plaintiff's machine the inclined edges at roots of the fingers form an acute angle with the edge of the knife. A specification must be interpreted with reference to the language which the patentee has used, and the language of these two specifications is substantially the same. I therefore think that on both points the defendant is entitled to judgment.

Judgment for defendant.

[42] WHITE v. BEETON. June 5, 1861.—Declaration on an agreement between the defendant of the one part, and the plaintiff and W. of the second part, whereby in consideration of 8778l. 14s. to be paid on or before the 1st July 1860, in the following proportions, that is to say, to the plaintiff for cash advanced to the Hull Loan and Discount Society, 689l. 14s.; also 480l. for sixty shares held by him, and 40l. for five shares belonging to him and originally held by T.; to W. 160l. for twenty shares held by him; to G. 120l. for fifteen shares held by him, the parties of the second part agreed that the entire property of the Society, and all money standing in the books to the credit of the Society, and all interest, profits, and emoluments arising therefrom should from the date of the agreement be vested and exclusively held by the defendant, and that all promissory notes, bonds, or other securities, should be given up to him on signing the agreement, and all necessary assistance for recovering any money owing on the said notes or other securities should be given by the plaintiff. The declaration alleged that

although all conditions precedent were fulfilled, necessary to entitle the plaintiff to a performance by the defendant of the agreement, yet he had not paid the sums of money by the agreement to be paid to the plaintiff.—Plea. That the Society was a common partnership, and the defendant entered into the contract in the declaration mentioned on the faith and in consideration of all the shares in the Society being vested in him; that neither the plaintiffs nor W. had any power or authority, nor were they ever ready, willing or able to vest in the defendant the shares of T. and G., and that T. and G. repudiated the contract; that the substantial part of the contract was that the defendant should become the owner of all the shares in the Society, so that he might carry on the business exclusively on his own account; that all the shares in the Society never vested in the defendant, whereby the consideration for his entering into the contract failed. Held, that the plea was bad, inasmuch as, the defendant having accepted performance of the rest of the contract and enjoyed a benefit under it, the vesting in him of all the shares in the Society was not a condition precedent to the plaintiff's right to recover.

[S. C. 30 L. J. Ex. 373; 7 Jur. (N. S.) 735; 9 W. R. 751; 4 L. T. 474. Referred to, *Carter v. Scargill*, 1875, L. R. 10 Q. B. 568; *General Billposting Company v. Atkinson*, [1909] A. C. 121.]

Declaration. That an agreement was made between the defendant and the plaintiff in the words following, that is to say: "An agreement made the 30th day of June, A.D. 1856, between James Beeton, of &c., of the one part (meaning the above named defendant), and William White (meaning the above named plaintiff), and Wilson Whitley, both of &c., of the second part: Whereby in consideration of the sum of 8778l. 14s. of lawful English money, to be paid on or before the 1st day of July, 1860, in the following proportions, that is to say, to Mr. William White (meaning the plaintiff) for cash advanced by him to the Hull Loan and Discount Society the sum of 698l. 14s.; also the sum of 480l., being the value of and in full payment for sixty shares of 8l. per share, held by him in his own name; also the sum of 40l., being the value of five shares of 8l. each now belonging to him and originally [43] held by Mr. Charles Todd, all in the said Hull Loan and Discount Society; and to Mr. William Whitley the sum of 160l., being the value and in full payment for 20 shares of 8l. each held by him in the said Society, and to Mr. John Goodburne the sum of 120l., being the value of and in full payment for 15 shares of 8l. each held by him in the said Society, with interest at 5 per cent. per annum in the meantime, to be paid half yearly, &c.: In consideration whereof the parties named herein as of the second part to this agreement, do hereby covenant and agree, on account of the sums of money before named, that the entire property of and in the said Hull Loan and Discount Society, and all the sums of money now standing in the books to the credit of the said Society, and all the interest, profits and emoluments arising therefrom and now due, or to become due, shall from this day be vested in and exclusively belong to and be held by and to the uses of the said James Beeton, his heirs and assigns, and all promissory notes, bonds or other securities shall be given up to him on the signing of this agreement, and all necessary assistance in the recovering, at law or in equity, of any sums of money owing on the said notes or other securities shall be given by the said William White as heretofore. And for the securing the payment of the sum of 8778l. 14s. as aforesaid and the interest that may become due thereon, the said James Beeton hereby agrees to deposit with the said William White the title deeds and conveyance of certain lots of land belonging to the said James Beeton, to remain with him until the said sum of 8778l. 14s. and interest thereon shall be fully paid. And the said William White hereby agrees that on payment to him and them of the sums of money as above by the said James Beeton, he will deliver up to the said James Beeton, or his assigns, all the said title deeds and conveyances of the said lots of lands without injury [44] done to them; and he will not in the meantime use them for any purpose but for their care and safe keeping, according to the true intent and meaning of this agreement. Witness our hands, the day and year first before written—James Beeton, William White, Wilson Whitley." And although before suit all conditions precedent were fulfilled, and all things had happened, and all times had elapsed necessary to entitle the plaintiff to a performance by the defendant of the said

agreement, yet the defendant hath not paid the said principal sums of money by the said agreement to be paid to the plaintiff, or any part thereof, or any interest thereon.

Plea. That the said Society was a common partnership and was not constituted under any act of parliament: that the defendant entered into the contract in the declaration mentioned on the faith and in consideration of all the shares in the said Society being vested in him: that neither the plaintiff nor the said Wilson Whitley had any power or authority, nor were they, or either of them, ever ready or willing or able, to vest in the defendant the said five shares of the said Charles Todd, nor did the same ever vest in the defendant; and the said Charles Todd has wholly repudiated the said contract: that neither the plaintiff nor the said Wilson Whitley had any power or authority, nor were they or either of them ever ready or willing or able, to vest in the defendant the said shares of the said John Goodburne, nor did the said last mentioned shares ever vest in the defendant; and the said John Goodburne has wholly repudiated the said contract: that, with the exception of certain shares held by the defendant, the said shares in the said agreement mentioned were all the shares in the said Society, and that the substantial part of the contract in the declaration mentioned was that the defendant should become the owner of all the shares in the said Society, so that the [45] defendant might become the sole partner in the said Society, and so that he might carry on the business of the said Society exclusively on his own account: that by reason of the premises, in this plea mentioned, all the shares in the said Society never vested in the defendant, and neither the plaintiff nor the said Wilson Whitley, nor either of them, ever was ready, willing or able to vest in the defendant all the shares in the said Society, whereby the consideration for the defendant entering into the said contract failed.

Demurrer and joinder therein.

Mellish appeared in support of the demurrer; but the Court called on

Quain, to support the plea. The defendant entered into the agreement upon the faith and in consideration that all the shares in the Society should be vested in him, but as two of the shareholders have refused to vest in him their shares, a substantial part of the consideration has failed. [Martin, B. Suppose a person says to another, "I have a debt due to me of 1000l., and A. B. has a debt due to him of 500l., in consideration of your paying me a sum of money I will assign to you my debt immediately, and I undertake to assign to you the debt of A. B. at the end of one year;" if he assigns his own debt, and the assignee accepts the assignment, and has the benefit of it, is it any answer to an action for the consideration that he has not procured an assignment of the debt of A. B.?] The doctrine on this subject is founded on the case of *Boone v. Eyre* (1 H. Black. 273, n.), where Lord Mansfield said:—"The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the [46] defendant has a remedy on his covenant, and shall not plead it as a condition precedent. The authorities are discussed in 1 Wms. Saund. 319 b., note, where rules are laid down for ascertaining when covenants are dependent or independent. Here the defendant's bargain was that he should become the sole proprietor of all the shares in the Society, and, as the bringing a cross action would not effect that object, the breach could not be compensated by damages. In *Ritchie v. Atkinson* (10 East, 295), where it was held that the delivery of a complete cargo was not a condition precedent to the right to recover a freight, the sum to be recovered was apportionable. *Glaholm v. Hays* (2 Man. & G. 257), *Croockewit v. Fletcher* (1 H. & N. 893) and *Ellen v. Topp* (6 Exch. 424) establish this rule, that, although part of the consideration has been enjoyed, yet, if a substantial part has not been performed, the contract cannot be enforced. In *Chanter v. Leese* (4 M. & W. 295. In error, 5 M. & W. 698), the consideration for the defendant's contract was the exclusive use of six patents, but, one of them being void for want of novelty, it was held that the contract could not be enforced, because he had not the whole benefit of that for which he contracted. So here, the bargain was for an entire thing, viz., all the shares in the Society. [Bramwell, B. In *Ellen v. Topp* there was a continuing duty to be performed: the case may be different where there is only a single act. The defendant might have refused to accept the other shares until he got an undertaking from the two shareholders that they would transfer to him their shares; and he should have returned the promissory notes and other securities, and said, "I will repudiate the contract unless all the shares are transferred

to me within a reasonable time;" but instead of doing so he takes a benefit under it. Channell, B. By not repudiating the contract [47] does not the defendant affirm it? If the defendant appropriated any portion of the property after he became aware that the plaintiff could not perform his undertaking, that should have been replied. [Bramwell, B. Suppose promissory notes to the amount of 2000l. were handed over to the defendant, and he carried on the business for a long time, trying to negotiate with the two shareholders for the transfer of their shares, is he to pay nothing for the shares he has got?] If the defendant had carried on the business, he would be liable to account to the other partners in a Court of equity. The authorities shew that the question, whether covenants are dependent or independent of each other, is to be determined by the intention of the parties as it appears on the instrument. *Stavers v. Curling* (3 Bing. N. C. 355) and *Macintosh v. The Midland Counties Railway Company* (14 M. & W. 548) point out the distinction between covenants the breach of which may be compensated by damages, and covenants which go to the whole consideration.

Mellish, *contra*. There has been no such failure of consideration as to preclude the plaintiff from recovering in this action. The declaration contains a general averment of the occurrence of all things necessary to entitle the plaintiff to a performance by the defendant of his agreement. The plea alleges that the plaintiff has not performed that portion of his contract which relates to the vesting in the defendant the shares of two shareholders. Therefore it must be assumed that everything has been done by the plaintiff except that which the plea alleges is not done. In this respect the case differs from *Chanter v. Leese* (4 M. & W. 295. In error, 5 M. & W. 698), because there the declaration contained no averment of performance of any condition precedent. This [48] case is also unlike *Ellen v. Topp* (6 Exch. 424), where there was to be a continual performance of the whole agreement on both sides; so that when one party ceased to perform his part the other was at liberty to do so. The cases are reviewed, and the rule laid down in *Boone v. Eyre* (1 H. Black. 273, n.) is thus explained in 1 Wms. Saund., 320 d., note:—"Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration." *Campbell v. Jones* (6 T. R. 570) was decided on that principle. *Ritchie v. Atkinson* (10 East, 295) is an express authority that the transfer of all the shares is not a condition precedent to the plaintiff's right to payment for his shares. The plaintiff cannot, at law or in equity, recover back that which the defendant has received; and the defendant ought not to have taken any benefit under the agreement without first ascertaining that the plaintiff was in a position to transfer to him all the shares. The defendant, by accepting a part performance of the contract, has precluded himself from insisting upon the performance of the remainder as a condition precedent to the plaintiff's right to recover.

POLLOCK, C. B. I am of the opinion that the plaintiff is entitled to judgment. The agreement is set out in *hæc verba*, and it appears to be made between the defendant [49] of the one part, and the plaintiff and W. Whitley of the second part. The agreement then stipulates, in substance, that all the shareholders in a loan society shall give up their shares to the defendant at certain prices. He is to pay to the plaintiff a certain sum, to pay to Whitley another sum, and to pay to other persons, who do not appear to have signed the agreement, other sums. I can see nothing to prevent the fact that he had agreed with the other shareholders, and then came to the plaintiff and Whitley and said, "I have bargained with the other parties, if you will sign this agreement you need not trouble yourselves about them;" whereupon the plaintiff and Whitley agree to give up their shares upon payment to each of them of a certain sum. After a lapse of more than four years the plaintiff wants to be paid, and then the defendant says, "I have not got the other shareholders to agree, and cannot get the whole of the shares in the Society; therefore I am not in the position in which I ought to be, because I entered into the agreement upon the faith that I was to have the whole." It may be his misfortune or his fault that he has failed to carry out the arrangement, but that cannot affect the plaintiff's rights. It appears to me, therefore, that this case does not fall within the rule relied upon by Mr. Quain, where

the parties have agreed that the performance of certain things shall be a condition precedent. It is clear that the defendant derived considerable benefit from the agreement, for all the property belonging to the Society was vested in him.

BRAMWELL, B. I am of the same opinion. I think Lord Kenyon's remark in *Campbell v. Jones* (6 T. R. 570) is perfectly correct, viz., that "whether these kinds of covenants be or be not independent of each other must certainly depend on [50] the good sense of the case," except where the parties, by express agreement, have determined that something shall be a condition precedent. In the common case of building a house, the person who employs the builder says, "the money shall be paid when the house is built;" and if it is not built, the money is not payable because the contract has not been performed. But where there is no express stipulation making the performance of some act a condition precedent, Lord Kenyon's observation applies.

The question then is, what is the good sense of the case which we have now to decide. I cannot help thinking that the performance of an act may be at one time a condition precedent and not at another. For instance, if I bargain for the purchase of ten horses for a certain sum of money, and the seller delivers only nine, I may say to him, "I will not accept them; my bargain was for ten." But if instead of so doing I take the nine horses and use them, that which was at one time a condition precedent, by my own conduct has become no condition precedent. Therefore the delivery of ten horses was a condition precedent at one time and not at another. In the case of *Ritchie v. Atkinson* (10 East, 295), the defendant might have said to the plaintiff, "You have not performed your condition precedent to sail on a particular day, and we will not load;" but, having loaded, they could not say "the freight shall not be paid because it was a condition precedent that you should sail on a particular day." So, in this case, the defendant might have said to the plaintiff and Whitley, "I will not take from you any assignment of your shares until I am sure that you have the authority of the two other shareholders to vest in me their shares, so that I shall get the full benefit of the contract." However, he did not do so, but took all the property, credits and securities of the Society—for we [51] must assume that the allegations in the declaration, not controverted by the plea, are the true facts.

Then, is it a condition precedent to the performance of his contract that the shares of the two refractory shareholders should be vested in him? We must look at the good sense of the matter, and I think that in cases of this kind there may be a part performance where there is no condition precedent. Suppose, for instance, the guardians of a Union workhouse contracted with a baker to supply 100 loaves every day for three months, and he supplied them with one exception, when he delivered 99 only, it would be preposterous to say that he is not entitled to be paid the contract price. Again, suppose the baker delivered the 100 loaves on one day only, is he entitled to be paid the contract price? It seems to me that would be equally unjust, and that the guardians, who had the 100 loaves for one day only, might reasonably complain that a new contract should be forced upon them; and as to retaining the loaves they might say, "We cannot help it, for they are consumed." Therefore, it seems to me that there may be cases of partial performance in which the party would not be entitled to the contract price, and there may be other cases of partial performance in which he would be entitled to the contract price. Then where is the line to be drawn? If there is a substantial performance of the contract the price must be paid, and the remedy is by a cross action. If one loaf only was missing out of 3000 which ought to have been delivered, there would be a substantial performance of the contract, but upon what deficiency there would cease to be a substantial performance is another question. Applying that reasoning, has there been in this case such a substantial performance of the contract that the plaintiff is entitled to the price and the defendant is driven to his cross action? I am not sure that, upon demurrer [52] and with the materials before us, that question can be correctly determined, but I think the answer is, that the defendant has undertaken to make a good plea and has failed, and that it appears by the declaration that enough has been done by the plaintiff to entitle him to the contract price. I put it on this ground—the promissory notes, bonds and other securities of the Society are to be handed over to the defendant immediately on signing the agreement, and, if he wanted guarantees that the shares of the two refractory shareholders should vest in him, he ought not to have signed an agreement whereby he was bound at once to take the assets with the securities of the Society. Inasmuch as one act which the plaintiff had to do was to be done at one time, and another act, namely the getting the assent

of the two shareholders to vest their shares in the defendant, was to be done at a future time, there is good reason for supposing that the performance of the latter act is not a condition precedent. It may be that the defendant would have been at liberty, after the lapse of a reasonable time for procuring the assent of the two shareholders, to have returned to the plaintiff the property and securities received from him, and to have reinstated him so far as practicable; and then to have said, "You have not performed your contract, and you were bound to do so within a reasonable time; although I was obliged to take the property and securities at the time the agreement was signed, I now return them to you, and rescind the contract, as you have failed to perform the whole of your undertaking."

In whatever way the case is regarded, it seems to me that the plea is defective. It ought at least to have stated that a reasonable time had elapsed before the commencement of this suit, for the plaintiff to get the consent of the two shareholders, and that he had failed; that in a reason-[53]-able time afterwards the defendant returned what he had received and rescinded the agreement. If a good plea could be made (and I doubt whether it could at law, because the plaintiff was to do one act at one time and another act at another time), it could only be done in the way I have stated. Further, that the substantial part of the contract could not be performed without the consent of the two shareholders to the vesting of their shares in the defendant, must be by reason of the property, securities and shares delivered to the defendant being of no sensible value, as compared with the vesting in him of those shares, but the plea fails to state that.

Upon the whole, therefore, I come to this conclusion: First, that inasmuch as the plaintiff was to deliver the securities to the defendant at one time, and at another time to get the consent of the two shareholders to the vesting of their shares in the defendant, the performance of the latter act is not a condition precedent to the plaintiff's right to recover in this action; but the non-performance of that act is the subject of a cross-action. Secondly, assuming that the performance of that act was a condition precedent, it was only so in the sense I have already described, where the party must insist on his right to the performance of that part of the contract before he accepts, or, having accepted, retains the benefit of the other part. Thirdly, if the performance of the act is to be treated as a condition precedent on account of the comparative worthlessness of that part of the contract which the plaintiff has performed, the defendant should have made that apparent on his plea. Therefore, upon all the three grounds on which it was suggested that the vesting of these shares in the defendant was a condition precedent, Mr. Quain has failed, that is to say, he has failed to shew that the performance of the act was in any sense a condition precedent; or, assuming it [54] was, he has failed to shew that the defendant availed himself of his right to its performance, and, within a reasonable time, returned what he had received; and he has also failed to shew any condition precedent, by alleging the comparative worthlessness of that part of the contract which the plaintiff did perform. For these reasons I think that the plaintiff is entitled to judgment. My brother Martin, who has left the Court, requested me to state that he is of the same opinion.

CHANNELL, B. I am also of opinion that the plaintiff is entitled to judgment. The agreement is set out in terms in the declaration, and the plaintiff seeks to recover his proportion of the money payable under that agreement. No objection has been made to the declaration, and the question is whether it is answered by the plea. The defendant relies upon this; that the plaintiff has not done any act by which he has vested in the defendant the shares of two of the shareholders in the Society, and that they have repudiated the contract. Then, does that afford any answer to the declaration? Upon these pleadings it must be assumed that all the stipulations of the contract required to be performed before the time arrived for payment of the money to the plaintiff, have been performed with the exceptions of the two particulars I have mentioned. The question then is, whether the defendant is liable to pay to the plaintiff these sums of money, which are the stipulated proportions which he was to receive, or whether the defendant can say that there has been an entire failure of the contract so as to preclude the plaintiff from recovering them. I am of opinion that he cannot, and that the vesting in the defendant the shares of the two shareholders who repudiated the contract was not a condition precedent to the plaintiff's right to recover. I [55] agree that in a certain sense it might have been—the defendant might, if he had thought fit, have stood aloof from any acquiescence in a part performance of

the contract by the plaintiff. I agree that the performance of certain stipulations might not give the plaintiff a right to recover this money when the rest have not been performed. But in this case there has been, not a mere partial performance by the plaintiff, but a partial performance which has been accepted by the defendant, and of which he has had the benefit; for on these pleadings we must assume that all the promissory notes, bonds and other securities were delivered up to the defendant on signing the agreement, and that all necessary assistance has been rendered to him for the recovery, at law or in equity, of any monies owing on the notes or other securities. It seems to me that the defendant should either have repudiated the contract before this action was brought, and have returned all that he obtained by it, or he should have averred in his plea that a reasonable time had not elapsed so as to enable him to see whether the plaintiff would perform the rest of the contract. For want of that averment, I think that the plea is bad.

It seems to me that the case falls within the principle of the decisions in *Boone v. Eyre* (1 H. Black. 273, n.), *Ritchie v. Atkinson* (10 East, 295) and *Campbell v. Jones* (6 T. R. 570); and is distinguishable from the cases of *Chanter v. Leese* (4 M. & W. 295. In error, 5 M. & W. 698) and *Ellen v. Topp* (6 Exch. 424), on the ground that it cannot be said that the plaintiff was to continue to do something, which was to be the consideration for the performance by the defendant of his part of the contract.

Judgment for the plaintiff.

[56] HAILES v. MARKS. June 10, 1861.—To an action for false imprisonment, the defendant pleaded a justification, alleging several facts which constituted reasonable and probable cause for the defendant suspecting that the plaintiff had stolen his goods. At the trial the defendant failed to prove all the allegations in the plea, and the learned Judge amended it by altering one and striking out others. Held, that the amendment was properly made, the facts stated in the plea as amended affording sufficient reasonable and probable cause for the suspicion.—In an action for false imprisonment, the question of reasonable and probable cause is one of law for the Judge to decide, and not for the jury.

[S. C. 30 L. J. Ex. 389; 7 Jur. (N. S.) 851; 9 W. R. 808; 4 L. T. 805.]

The declaration stated that the defendant assaulted the plaintiff, and gave him into the custody of a policeman, and caused him to be imprisoned in a prison, police station and police court for a long time, whereby the plaintiff was injured in his character and otherwise.

Pleas. First: Not guilty.

Second. That before the said time when, &c., goods of the defendant (to wit) engravings and prints to the number of many hundreds, and of the value of 1000l. or thereabouts, had been and were feloniously stolen, taken and carried away; and that the defendant at the said time, when &c., had good and probable cause to suspect, and vehemently suspected the plaintiff to have been guilty of the said felony upon the following grounds (to wit) the said goods were stolen from the defendant's stock in his business of a printseller, at divers times between Christmas 1860, and the 6th day of February, 1861, when the same was discovered; and that the plaintiff had been during all that time making frames for the defendant, in the defendant's said trade, and the plaintiff frequently went to the defendant's place of business where the said goods were stolen, and on many of these occasions sent the defendant's boy out for things, or upstairs on some errand or excuse, on which occasions he was down in the room where the said goods were kept, and whence they were stolen, and had the opportunity of stealing the same; and, although during that time he was in pecuniary difficulties, and paying off a County Court judgment at the rate of 6s. a month, he was dealing largely in prints of the same sort as those which had been stolen from [57] the defendant, and had frequently left large bundles of such prints at a public-house; and, according to the statement of one Brall, had sold to him during that time 300l. worth of prints: wherefore the defendant did what was complained of, in causing the plaintiff to be arrested and dealt with according to law for the said offence.

The plaintiff joined issue on the pleas.

At the trial, before Channell, B., at the London Sittings in last Easter Term, the

following facts appeared :—The defendant was a printseller, in the Minories, London, and the plaintiff, who was a frame maker, had made frames for many years. The course of dealing was for the defendant to give the plaintiff prints in discharge of his account for frames. At Christmas, 1860, the defendant took stock, when the numbers of each print were carefully ascertained. In February, 1861, the defendant missed a large quantity of prints of the value of 1000*l*. They were of various kinds, some being coloured and others plain. The defendant kept a case on the counter, called the counter-case, within which were a number of prints sufficient to supply the ordinary demands of his customers. When the case was empty it was the practice to take down other prints from a shelf in the shop and again fill the case. On one occasion a greater quantity of prints were required than the counter-case could supply, and the plaintiff went to the shelf when he found that there were not sufficient there to fill the case. On inquiry he ascertained that the plaintiff had been in the habit of coming to the shop early in the morning, and sometimes with a cart, when the only person in the shop was a boy, whom he used to send upstairs or on some errand. The defendant, with a detective officer, went to the shop of one Brall, a printseller in Whitechapel, and there found a large quantity of prints of the value of 300*l*. or 400*l*., some of which were coloured and corresponded with those he had [58] lost ; others were uncoloured and corresponded with those he had given the plaintiff for his frames. According to the evidence of the defendant, Brall said he had bought prints of the plaintiff to the amount of 300*l*. since December ; but the detective officer, who was a witness for the defendant, stated that all Brall said was that he had laid out 300*l*. in prints, but did not mention the nature of the transactions, or the time over which they extended. The defendant then gave the plaintiff into custody on a charge of stealing his prints, and the plaintiff was taken before a police magistrate, when, after several remands, he was discharged. There was no evidence that the plaintiff was in pecuniary difficulties, or that a County Court judgment had been obtained against him ; neither was it proved that he had left prints at a public-house, as alleged in the second plea.

The defendant's counsel applied for leave to amend that plea by striking out the allegations not proved. The learned Judge reserved the point, and told the jury to consider the second plea as if the allegations not proved were struck out, and to say whether they were satisfied that the defendant had reasonable and probable cause for believing that the plaintiff had committed a felony. The jury found that a robbery had taken place on the defendant's premises to a considerable amount, and that the plaintiff had opportunities for carrying away prints ; but that the defendant was not justified in giving him into custody, and they found a verdict for the plaintiff with 30*l*. damages, leave being reserved to the defendant to move to enter the verdict for him.

B. C. Robinson, in last Easter Term, obtained a rule nisi accordingly, on the ground that the question of reasonable and probable cause was for the Judge instead of the jury, and that the facts found by the jury afforded reasonable and probable cause for giving the plaintiff into custody, although [59] some of the facts alleged in the plea were not proved ; and that the learned Judge ought to have amended the plea : or why there should not be a new trial on the ground that the verdict was against the weight of evidence.

Joyce and Butler Rigby now shewed cause. The first question is, whether the plea could be amended at the trial ; the second, whether it ought to have been amended. It is submitted that the plea could not be amended, for two reasons : first, the plaintiff was deprived of his right to demur to the plea ; and secondly, there is this distinction between an action of trespass for false imprisonment and an action for a malicious prosecution, that in the latter it is a question for the Judge to decide whether there was reasonable and probable cause for the prosecution, and the plaintiff must prove malice and want of reasonable and probable cause ; but in the action for false imprisonment the defendant must prove that he had reasonable and probable cause for suspecting the plaintiff, which is a question for the jury ; and it is also a question for them whether the defendant acted under a bona fide belief that the plaintiff had committed felony. Now, the facts which induced the defendant to suspect that the plaintiff had committed felony are those alleged in the second plea ; but some of those allegations were not proved ; yet because the remainder afford reasonable and probable cause for suspicion, is the Court to say that they alone operated on the mind of the defendant ?

[Bramwell, B. Suppose one of the facts alleged in the plea was that the defendant saw the plaintiff running down a certain street, but it turned out that it was not the plaintiff, would the plea be disproved because it contained that allegation? Or suppose, instead of its being alleged in the plea, the defendant was asked, "Did you not say that you saw the plaintiff running down [60] a certain street, and did you not act upon that belief?" and the defendant answered, "I did," is the plaintiff to recover, although other facts are proved which justified the imprisonment?] Where a party relies on a variety of circumstances as having operated on his mind, and it turns out that some of them are untrue, it is impossible to say on which he acted. [Martin, B., referred to the 36th section of the Common Law Procedure Act, 1860.] The defendant cannot justify the imprisonment unless he had reasonable ground for suspecting the plaintiff, and acted under a bona fide belief that he had committed felony: *Abridg. Trespas (D.)* 3. The law is thus laid down by Tindal, C. J., in *Broad v. Ham* (5 Bing. N. C. 722, 725):—"In order to justify a defendant there must be a reasonable cause,—such as would operate on the mind of a discreet man: there must also be a probable cause,—such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him." *Harris v. Dignum* (1 F. & F. 688), *Hogg v. Ward* (3 H. & N. 417), and *Davis v. Russell* (5 Bing. 354) are authorities to the same effect. Assuming that there was power to amend the plea, for the same reasons it ought not to have been exercised. They also argued that the facts proved did not afford reasonable and probable cause.

B. C. Robinson appeared in support of the rule, but was not called upon to argue.

CHANNELL, B. We are all of opinion that the rule ought to be absolute to enter the verdict for the defendant. I deliver my judgment first, in order to state the facts. (His Lordship then stated the facts as above set forth.) [61] It appeared to me at the trial, that some of the allegations in the second plea were not proved. There was no evidence that the defendant was paying off a County Court judgment, nor that he was dealing largely in prints of the same sort as those which had been stolen from the defendant, and had frequently left large bundles of such prints at a public-house; and the jury negatived the fact that he was in pecuniary difficulties. The concluding allegation in the plea as to the statement of Brall was not correct, for the jury found that the detective officer gave the true version of the conversation. The plea was amended by striking out the former allegations and amending the latter; and the first question is, whether it was capable of being amended at all, this being an action in which it is necessary for the defendant either to shew actual guilt or reasonable and probable cause for suspecting it, such reasonable and probable cause being composed of the several circumstances stated in the plea. It has been argued on the one hand, that this is a plea in excuse, compounded of several circumstances, every one of which must be proved. On the other hand, it is said that in this, as in other cases, it is sufficient to prove so much of the plea as affords an answer to the action. Looking at the act of parliament, I am of opinion that the amendment was properly made. It seems to me that the allegations not proved may be struck out of the plea. Then, with regard to the concluding allegation, the jury have found that it was not true in the sense as pleaded, but in a modified sense, and I think it was proper to amend that allegation accordingly. The right to amend by altering is substantially the same as the right to strike out; and if the Judge has power to amend by striking out, he must have power to substitute. The question then comes to this, whether there is shewn on the face of the plea, as amended, sufficient reasonable [62] and probable cause for the defendant giving the plaintiff into custody. I entertain a strong opinion that, taking the facts which the plea as amended discloses, there was reasonable and probable cause. At the trial I was of opinion that the question of reasonable and probable cause was one of law for me to decide, but to avoid the necessity for a new trial I left that question to the jury. Upon these grounds I think the rule ought to be absolute.

POLLOCK, C. B. I am also of opinion that the rule ought to be absolute. I think that a verdict for the defendant is more consistent than a nonsuit, because the jury have exercised their judgment on the facts, and have found that there was reasonable and probable cause. The principal point which we are now deciding is, that a plea of this description may be amended,—that the plea so amended furnishes an answer to the action is a matter quite subordinate, as it affects this particular case only. If a plea contains a statement at variance with the facts proved, and which ought to have been

pleaded, of course the Judge will amend, because he merely corrects an obvious error of the pleader; and that applies, not only to defective statements in the plea, but also to striking out allegations not proved. Moreover, I am of opinion that it is not necessary to prove all that is alleged in a plea of this kind, but that it is sufficient if such allegations in the plea are proved which in the opinion of the Judge furnish reasonable and probable cause. With respect to adding to a plea, I am far from laying down any general doctrine. What is permitted to be added must depend upon the subject matter of each case. I also think it is the province of the Judge, not of the jury, to decide what is reasonable and probable cause. If it were not so, the administration of justice would be uncertain, for the experience of most [63] Judges must have afforded them opportunities of observing that evidence which in a criminal Court would be sufficient for a conviction, when the party complains of a wrong, may have a different effect with a jury when the same person seeks to vindicate a right. Looking at all the circumstances of the case, I think there was abundant evidence of reasonable and probable cause. The case of *Davis v. Russell* (5 Bing. 354) was cited to shew that the jury may take into consideration, not only the facts proved, but whether the defendant acted *bonâ fide*, believing, upon those facts, that he had a right to take the plaintiff into custody. But if the jury find certain facts to be true, and the necessary consequence is that any person acquainted with those facts would believe that the plaintiff had committed felony, I do not think it necessary to ask the jury whether the defendant was *bonâ fide* acting under that belief. If a man found his own property in the possession of another, it would be absurd to ask the jury whether he *bonâ fide* believed it to be his property, and acted on that belief when he gave the other into custody. For these reasons I am of opinion that the plea was properly amended, and that the facts proved afforded reasonable and probable cause.

BRAMWELL, B. I am also of opinion that the verdict ought to be entered for the defendant. Since the case of *Panton v. Williams* (2 Q. B. 169), I have always understood that the question of reasonable and probable cause is one of law. I remember an action for false imprisonment, in which Jervis, C. J., said, that the only question for the jury was whether the facts were proved; and the jury having found in the affirmative he directed a verdict for the defendant, stating that in his opinion there was reasonable and pro-[64]-bable cause. Here the plea stated certain facts, but at the trial the defendant failed to prove some of them, and then it became a question for the Judge to determine whether the matters proved constituted reasonable and probable cause. If the Judge was of that opinion, the other allegations in the plea were immaterial and need not be proved. Then comes the question whether the plea could be amended by striking out some allegations not proved and qualifying another allegation. I agree with my Lord and my brother Channell that it may, and I can see no reason to the contrary. It is admitted that the statute gives the power to amend, but it is ingeniously argued that if a person alleges that he acted on a certain collection of facts, and fails to prove some of them, it is impossible to say on which he acted. But I think that is a fallacy. It is not the question upon what he acted, but whether he had reasonable and probable cause for acting; and, if he had, he is justified, although he had, or said he had, some further cause. That there was reasonable and probable cause, I cannot entertain a doubt. A felony was committed upon the defendant, and the plaintiff was a person who had an opportunity of stealing the property, and some of the stolen property was found in his possession. For these reasons I think that there was reasonable and probable cause, that my brother Channell was right in making the amendment, and that the rule ought to be absolute.

Rule absolute.

[65] SARAH SHINGLER v. HOLT. June 6, 1861.—On an interpleader at the instance of a sheriff, an issue was tried, whether certain goods seized were the property of the claimant as against the execution creditor, when it appeared that the claimant was a married woman living apart from her husband in adultery with G. the execution debtor, and the goods were seized in a house in which they were living together. The Judge told the jury that the question was whether, looking at the subject as if the claimant had been a single woman, as between her and G. the goods belonged to G. The jury having found a verdict for the claimant:

Held, that the verdict was right notwithstanding that the claimant was a married woman.

[S. C. 30 L. J. Ex. 322; 7 Jur. (N. S.) 866; 9 W. R. 871; 4 L. T. 76: at Nisi Prius, 2 F. & F. 487. Followed, *Duncan v. Cashin*, 1875, L. R. 10 C. P. 559.]

Interpleader. The plaintiff affirms, and the defendant denies, that certain goods and chattels seized by the sheriff of Surrey under a writ of *fi. fa.* against the goods of Thomas Grover, were at the time of the delivery of the writ to the sheriff, the goods and chattels of the plaintiff [as against the execution creditor (a)] &c.

At the trial before Channell, B., at the Middlesex Sittings in Easter Term, it appeared that the now defendant, Holt, having obtained judgment against Thomas Grover in an action for the amount of a bill of costs, a *fi. fa.* was issued under which the goods in question were seized in a house in which the now plaintiff, Sarah Shingler, was residing with T. Grover; and the goods having been claimed by the plaintiff, by an order dated the 7th of March, 1861, the above issue was directed. It was proved that the plaintiff had many years previously been married to one George Boddy, a footman, who continued to live in service apart from his wife, only visiting her occasionally, and contributing very little to her support. The plaintiff maintained herself and her children by letting lodgings. She had some furniture which she had purchased with money given her by relations. In 1857 she committed adultery with T. Grover, and a petition for divorce having been presented by her husband against her and T. Grover as co-respondent, on the ground of adultery, a decree nisi for a dissolution of the marriage was pronounced on the 6th of December, 1860, and the final decree on the 20th of [66] March, 1861. The defendant attempted to shew that the goods really belonged to T. Grover.

Upon this evidence it was submitted by the counsel for the defendant, first, that the execution creditor was at liberty to set up the right of the plaintiff's husband; and, secondly, that, though the plaintiff was not living with her husband, the furniture, including all which she had acquired, down to the date of the final decree belonged to him.

The learned Judge told the jury that the question was, whether the goods belonged to the plaintiff, as against the execution creditor, and asked them whether, looking at the question as if she had been a single woman, as between her and Grover, the goods were the goods of Grover. If the goods were Grover's, they were rightly seized in execution; but, if the plaintiff's account was correct, she was entitled to the verdict. The jury found for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him.

Montagu Chambers, in Easter Term, obtained a rule accordingly, on the grounds: first, that the goods were not the separate goods of the plaintiff; secondly, that the goods were the goods of one George Boddy; thirdly, that at the time of the seizure and claim made, the plaintiff was the wife of George Boddy, and was not Sarah Shingler.

Denman and Lord now shewed cause. The execution creditor had no right to set up the title of the plaintiff's husband. [Bramwell, B. The question is whether, as against the claimant, the goods were subject to the execution.] In *Gadsden v. Barrow* (9 Exch. 514), the issue did not contain the words "as against the execution creditor." In that case the evidence went to shew that the claimant never had any property in the goods. Here the plaintiff had a legal possession which she was entitled to retain as against a wrong doer. Bare possession is sufficient to entitle a claimant [67] to a verdict on an interpleader issue: *Edwards v. English* (7 E. & B. 564), *Green v. Stevens* (2 H. & N. 146). In *Chase v. Goble* (c) a stranger was entitled to the goods, and the claimant had no right to interfere with the seizure. [Pollock, C. B. I rather doubt the correctness of that decision. If the assignees of a bankrupt do not set up their title under a particular act of bankruptcy, no other person can do so. I observe, however that the form of the issue was whether the goods "were the property of Chase and Hill," the claimants.] Under the form of issue in the present case it is not competent to the execution creditor to set up, as against a person who is in possession of the goods, the title of a person under whom he does not claim. In *Belcher v. Patten*

(a) The issue was amended by the addition of these words at the trial.

(c) 2 Man. & G. 930. *Green v. Rogers*, 2 C. & K. 148, was also referred to.

(6 C. B. 608) that principle was applied as against a claimant. For the purpose of this issue it may be taken that the goods were the separate property of the wife, as they would have been if acquired after a separation by mutual agreement: *Haddon v. Fladgate* (1 Sw. & Trist. 48). [Bramwell, B. If the goods were the separate property of the wife, and the sheriff had returned nulla bona, no action would have lain against him. If, in the like case, he sold the goods, the wife might have sued him in the name of her husband: *Chambers v. Donaldson* (9 East, 471).] The interpleader issue is merely to inform the conscience of the Court; and in *Bird v. Crabb* (g) this Court decided that a married woman might be party to such an issue. [Bramwell, B. The question to be tried was, not whether Mary Shingler was a married woman, but whether the allegation that the goods were hers and not Grover's was a mere [68] "sham." As to some of the goods which were purchased after the decree nisi, they argued that the dissolution of the marriage operated from the day when the decree nisi was pronounced, referring to 20 & 21 Vict. c. 85, s. 31, and 23 & 24 Vict. c. 144, s. 7. *Winstone v. Winstone and Dyne* (2 Sw. & Trist. 246), and *Boddy v. Boddy and Grover* (30 L. J. N. S. Prob. & Mat. 95).

Montagu Chambers and Griffiths, in support of the rule. It may be laid down as a rule that if in an interpleader issue the claimant's case shews that his title is defective, he cannot recover. Now, according to the well established law of husband and wife, the plaintiff's statement shewed her title to be defective. [Pollock, C. B. I should have thought that the Court ought to deal with the facts of the case in precisely the same way, whether the defect in the title is shown by the claimant or the execution creditor.] If the plaintiff's evidence shews her title to be defective, the suggested difficulty, that the defendant cannot set up the *jus tertii*, does not arise. In *Gadsden v. Barrow* (9 Exch. 514, 516), Parke, B., said "When it turns out that the plaintiff has no right to the goods because they are not his property, the Judge cannot order the proceeds to be delivered to him;" and again, "The only question on the interpleader rule was, whether they were the property of the trustees; if not, they had no right to interfere." In *Edwards v. English* (7 E. & B. 564, 566), Lord Campbell, C. J., said, "The ratio decidendi (in *Chase v. Goble* (2 Man. & G. 930)) was that the proof shewed that the deed under which the plaintiff claimed passed nothing." A plaintiff in an interpleader issue must shew that he is entitled to the possession of the goods as against all the world. An equitable title is not sufficient. [Pollock, C. B. Sup-[69]-pose a *cestui que trust* was in possession of goods, might not a Judge at Chambers allow him to claim them in his own name?] It would seem that a *cestui que trust* can only claim in a Court of equity: *Isaac v. Spilsbury* (10 Bing. 3). In the present case the plaintiff had, at law, no property whatever in the goods; her right to recover is therefore disproved: *Agar v. Blethyn* (2 C. M. & R. 699), *Messenger v. Clarke* (5 Exch. 388), *Carne v. Brice* (7 M. & W. 183), *Tugman v. Hopkins* (4 Man. & G. 389). [Channell, B. In *Agar v. Blethyn* (2 C. M. & R. 699) and *Tugman v. Hopkins* (4 Man. & G. 389) the husband interfered.] Non-interference will not prevent the husband from coming forward at a future time. It is essential to remember that the object of an interpleader is to determine the legal rights of the parties. The 1 & 2 Wm. 4, c. 58, was passed to prevent a multiplicity of actions—not of suits in equity. At the time of the passing of that Act no equitable pleas were allowed, and although the law has since been changed in that respect it does not affect the construction to be put on the Act. Suppose the husband had brought an action against the sheriff or execution creditor for seizing the goods, they would have had no answer. The preamble of the 6th section shews that it is intended to protect sheriffs against "the hazard and risk of actions," that is to say, against legal claims. The plaintiff could not have sued the sheriff except in a Court of equity. [Pollock, C. B. Is not that contrary to *Chambers v. Donaldson* (9 East, 471)?] In *Gadsden v. Barrow* (9 Exch. 514), the goods were not liable to be seized in execution. [Pollock, C. B. I was no party to that decision. Channell, B. That decision took place in 1854, since which the form of the issue has been changed.] They also argued that until the decree for a divorce is made absolute the status of the woman is not altered.

[70] POLLOCK, C. B. We are all of opinion that the rule must be discharged.

(g) Not reported in this work. The jury found that the goods taken in execution were the separate property of the plaintiff, a married woman, and the Court refused to disturb the verdict. See 30 L. J. Exch. 318.

If the question to be determined was, whether a married woman could be legally possessed of property as against her husband, there would have been no necessity to send the case before a jury. The question submitted to the jury was, whether the goods belonged to Grover, and were liable to be taken under the execution against him, or whether they were the goods of the claimant, acquired by her under circumstances which gave her a title to them as against Grover. The jury found that she had a *bonâ fide* title as against him, and the verdict was entered for the plaintiff. Why should we set it aside? It may be a question how the Judge is to dispose of the interpleader summons when the issue comes before him, but I do not see why we should set aside the verdict, or enter it for the defendant. Suppose, after the plaintiff had made her claim and established it, the defendant had discovered for the first time that the claimant was a married woman, ought we to grant a new trial? I should say not. The object was, not to try the capacity of the plaintiff as a married woman, but whether these particular goods were subject to the execution. The defendant cannot now set up the plaintiff's want of capacity as a defence. When he found out that she was a married woman, he should have come to the Court to compel the husband to be the plaintiff. He did not choose to do so, but went to trial on an issue on which the verdict was properly found against him.

BRAMWELL, B. I agree that the rule must be discharged. The question is, not what we ought to have done if the defendant had objected that Mary Shingler, as a married woman, ought not to be permitted to claim in her own name. Had he done so, possibly we might have compelled the husband to make himself a party. The issue was [71] framed in the ordinary way, to try whether the goods were the goods "of the plaintiff as against the execution creditor," and a verdict was found for the plaintiff. The defendant now asks that a verdict may be entered for him, on the ground that something, which the parties did not go down to try, shews that the plaintiff's title was defective. But these issues are the creatures of the Court, and we have a right to deal with them as if they stated very fully the question which the parties went down to try. Looked at in this way, it seems to me that the issue does not raise the point which the defendant seeks to make. The expression, "not entitled as against the execution creditor," assumes that the plaintiff may be so entitled.

The objection is that the plaintiff cannot be the owner of any property. In reality the question was this: "Is the plaintiff, as far as a married woman can be, the owner of the goods?" Mr. Griffiths urged that the object of the 6th section was for the relief of the sheriff against actions. But it was not the object of the statute to put any one in a different or worse position from that in which he would have been before it passed. Before the passing of the Act if, in a case like the present, the sheriff had returned *nulla bonâ*, no action could have been maintained against him. If he had sold the goods *Chambers v. Donaldson* (9 East, 471) shews that the plaintiff might have recovered against him in the name of her husband. I entertain some doubt whether the 6th section of the 1 & 2 Wm. 4, c. 58, applies to equitable claims, though the Lord Chief Baron and my brother Martin are inclined to think it does. But, assuming that Mr. Griffiths' contention on this point is well founded, it is not the question which the parties went down to try. As to *Gadsden v. Barrow* (9 Exch. 514) it may be that a claimant cannot set up the *jus tertii* where the issue is not to try such right, [72] but simply that of the claimant, and on that ground the case may have been rightly decided. Here I say nothing as to whether in point of law the property in these goods was in the plaintiff, and I do not pretend to express any opinion as to the effect of the decree *nisi*. But without saying that the plaintiff had any property in the goods, and though possibly in order to enable her to get the money out of Court, it may be necessary for her to obtain the sanction of her husband, in my judgment the verdict ought to be entered according to the strict legal construction of the terms of the issue which the parties went down to try.

CHANNELL, B. I agree that the rule must be discharged. Many points were made in the argument as to which I shall express no opinion. It is not necessary to decide what is the effect of the decree *nisi*, or whether the 6th section of the 1 & 2 Wm. 4, c. 68, applies to claims by parties having merely equitable interests. A question of fact was submitted to the jury, the finding on which is not impeached. The issue, as amended at the trial, was in effect, "Had the plaintiff a property in the goods, as against the execution creditor?" that is, "so far as a married woman can have property." The argument for the defendant was that the plaintiff being a married

woman, notwithstanding the decree nisi, was incapable of having any property or being a claimant in an interpleader. I have a strong impression that, on a proper application, the execution creditor might have had relief. But the defendant did not think fit to take any proceeding for that purpose, but accepted the issue in the above form, and, whatever right he may have had, the only question now is whether plaintiff proved the affirmative of the issue in fact.

Rule discharged.

[73] *ROLLASON v. LEON AND OTHERS.* June 3, 1861.—Declaration on the following agreement in writing, made in January 1861: “L. agrees to let, and R. agrees to take the wood-mill, situate &c., with the house and land adjoining, for the period of three years from Lady Day then next, at the rent of 120l. per annum. A lease for the same to be executed and signed as soon as possible, subject to the permission of H., landlord of the mill. L. also agrees to let, and R. agrees to take, the said mill, house, land, &c., from this date up to Lady Day then next, on the same terms and at the same rate of rent, R. to have the sole use of the mill, house, and land, &c., and all machinery and utensils therein contained.” Held, that the agreement operated as an actual demise from its date up to Lady Day, and as an agreement for a lease from that time for a term of three years, and consequently was not void, under the 8 & 9 Vict. c. 106, s. 4, for not being under seal.

[S. C. 31 L. J. Ex. 96; 7 Jur. (N. S.) 608.]

Declaration. That before, and at the time of the making of the agreement hereinafter mentioned, the plaintiff was a fire brick manufacturer and was desirous of carrying on his said business and manufactory of fire bricks on the premises hereinafter mentioned; and the plaintiff had applied to the defendants to let him the said premises for the purpose of carrying on his said business and manufactory thereon; all which the defendants well knew. And thereupon it was agreed between the plaintiff and the defendants in the words and figures following, (that is to say):—The said Leon Brothers (thereby meaning the defendants) agree to let, and the said John Rollason (thereby meaning the plaintiff) agrees to take, their wood-mill, situate at Failsworth, with the house and land adjoining, and appertaining thereunto, and all the machinery and utensils therein contained, for the period of three years from Lady Day then next, at the rent of 120l. per annum payable quarterly to the said Leon Brothers, on the usual quarter days. A lease for the same to be executed and signed as soon as possible, subject to the permission of Mr. John Hopwood, landlord of the said mill. The said John Rollason to pay all taxes, gas, rent and insurance against fire on the said mill, house, machinery and utensils. The said Leon Brothers also agree to let, and the said John Rollason also agrees to take, the said mill, house, land, machinery and utensils from the date up to Lady Day then next, on [74] the same terms and at the same rate of rent as mentioned above, the said John Rollason to have the sole use of the said mill, house and lands adjoining and appertaining thereto, and all the machinery and utensils therein contained. And the said John Rollason agrees not to do anything to the said mill, house, lands, machinery, and utensils, in the way of alterations and removal of fixtures, without the consent of the said Leon Brothers first obtained; nor to sublet any part of the said premises; nor to remove any thing therefrom without the consent of the said Leon Brothers first obtained. The said John Rollason further agrees to give up the said mill, house and land adjoining and appertaining thereunto, and all the machinery and utensils therein contained at the end of the above mentioned period of three years, or at Lady Day next, if the lease cannot for any unforeseen reason be entered into, in the same condition as it now is according to the inventory now to be signed by him, ordinary wear and tear only excepted; the said John Rollason being responsible for all breakages, accidents, or damages done to the said mill, house and land adjoining and appertaining thereunto, and to all the machinery and utensils therein contained. And the said John Rollason agrees to keep all the hedges and fences round the land, or any part of the same, in good repair. The said John Rollason agrees to allow to remain and not to remove any of the stock of goods now lying in the said mill, the property of the said Leon Brothers, and to be responsible for the preservation of the same up to Lady Day next,

the said Leon Brothers not being liable for or called upon to pay any rent or charges on the same; the said Leon Brothers, or any one, on their behalf to have the right of entering the said mill and house and land adjoining and appertaining thereunto, for such purpose as they may require, at any time they may choose up to Lady Day next. In witness [75] whereof the said Leon Brothers and the said John Rollason have hereunto set their hands the day of January, 1861. And although the said John Heywood granted the permission in the said agreement mentioned, and the plaintiff was always ready and willing to perform the said agreement in all things on his part, and although all conditions were fulfilled, &c., yet the defendants did not nor would let the said wood-mill, with the house and land adjoining, &c., according to the said agreement, or suffer or permit the plaintiff to have or retain possession thereof either for the said term of three years, or up to Lady Day then next, as in the said agreement mentioned, but altogether refused and still refuse so to do, &c.

Demurrer and joinder therein.

Aspland, in support of the demurrer. The agreement set out in the declaration operates as a lease for more than three years, and not being under seal is void by the 8 & 9 Vict. c. 106, s. 4. It professes to demise the premises from its date up to Lady Day then next, and there is a further demise for a period of three years from Lady Day. *Stratton v. Pettit* (16 C. B. 420) is an authority in point. There, by articles of agreement, the plaintiff agreed to let, and the defendant agreed to take, certain premises then in the possession of the defendant, for the term of five years; and the plaintiff also agreed to sell, and the defendant agreed to purchase, the fee simple of the premises, to be conveyed to the defendant, his heirs, &c., absolutely, at the end of the said five years; provided the defendant, his heirs, &c., should have in the meantime quietly occupied and not have been evicted from the premises; yielding and rendering by the defendant unto the plaintiff, as well for the rent or use of the said premises for five years as for the said purchase [76] thereof, 70l., in and by seventy shares of 1l. each in the Birkbeck Life Assurance Company; and it was further agreed, that should the defendant be legally ejected from the premises within or during the term of five years, the plaintiff should pay or refund to the defendant, either in cash or in the said shares, at and after the rate of 7l. 10s. per annum for the portion of the term unexpired at the time of such eviction: it was held that the intention of the parties, to be collected from the language of the instrument, was that it should take effect as a lease, and consequently that it was void, not being by deed. [Bramwell, B. I should not regret if that decision was reviewed by a court of error. Why may not persons enter into an agreement for a lease for more than three years?] Where an agreement for a lease contains words of present demise, it takes effect as a lease. In *Doe d. Phillips v. Benjamin* (9 A. & E. 644) where, the tenant being in possession under a demise for three years, the landlord agreed to let him the premises for fourteen years, the agreement contained a stipulation that a lease was to be drawn up on the usual terms, and the tenant agreed to take it upon those terms; but it was nevertheless held that the agreement operated as a present lease. Littledale, J., there said, "The words 'agree to let' have long been held the same as words of actual letting." Again, in *Chapman v. Bluck* (4 Bing. N. C. 187), the plaintiff, by letter, offered to take a farm of the defendant, from Michaelmas, 1833, at 110l. a-year, payable quarterly, upon a lease for twenty-one years; a valuation to be made of the crops, a lease to be prepared at the plaintiff's expense, and the whole to be subject to a certificate of plaintiff's solvency to be given by M. The defendant having received the certificate, by letter accepted the plaintiff as tenant on the terms proposed. The valuation was deferred from time to time; but the [77] plaintiff, on paying 100l. towards the amount was let into possession: it was held that the letters of the plaintiff and defendant (at all events, as explained by the above circumstances, and some admissions made by the plaintiff after a distress) constituted an actual demise on which the defendant was authorized to distrain for rent arrear, and not a mere agreement for a lease.

Kemplay appeared to support the declaration, but was not called upon to argue. He referred to *Pollock v. Stacy* (9 Q. B. 1033).

BRAMWELL, B.(b) I am of opinion that the plaintiff is entitled to judgment. With unfeigned respect for the learned Judges of the Court of Common Pleas, I have

(b) Pollock, C. B., and Martin, B., were not present.

always thought and still think that the case of *Stratton v. Pettit* (16 C. B. 420) was not rightly decided. We are not, however, called upon to overrule it because the present case is distinguishable. It seems to me that in *Stratton v. Pettit* (16 C. B. 420) the Court made this mistake—whereas, before the statute 8 & 9 Vict. c. 106 passed, it involved no inconvenience that certain words should be interpreted as an actual demise; yet when that statute passed and made the same reasoning inapplicable, and rendered it impossible that parties using words of agreement should have intended to create a lease, the Court held that the same reasoning applied, and that words of mere agreement were words of lease. But I do not think that case governs this, because this agreement cannot in any sense be said to be a lease; indeed, if it is not an agreement, I do not well see how parties can make an agreement for a lease. The words are, “The defendants agree to let, and the plaintiff agrees to take”; and “A lease is to be executed and signed as soon as possible.” That [78] shews that the plaintiff was not at present to hold the premises as lessee, but only when a lease was executed. I should have thought that so if the agreement had stopped there; but, after other stipulations, it goes on—“The defendants also agree ‘to let and the plaintiff also agrees to take’ the ‘premises’ from this date up to Lady Day then next, on the same terms and at the same rate of rent.” It is not unreasonable to suppose that the intention of the parties was that there should be a parol demise of the premises up to Lady Day and an agreement for a lease for three years from Lady Day. But if the parties have attempted to create two terms in succession, one of which is invalid, the other may be good. If the agreement to let for three years had stood alone, inasmuch as it was subject to the permission of the landlord, I should have treated it as an agreement only, and not a lease. But here there is an absolute demise up to Lady Day, so that Mr. Aspland’s point does not arise. But, assuming that it does, there is a good letting up to Lady Day; and if it be retorted that the document if invalid in part is invalid in the whole, that reasoning only applies when it is treated as an agreement; but Mr. Aspland’s argument is, that it is not an agreement but a lease for more than three years. For these reasons, I think that the plaintiff is entitled to judgment.

CHANNELL, B. It appears to me that this case is distinguishable from *Stratton v. Pettit* (16 C. B. 420). Whether this instrument be considered as an agreement or a lease, the rights of the parties extend over two periods, viz., from January, 1861, to Lady Day, and from Lady Day for a further period of three years. Between January and Lady Day there is an actual demise; then follows a further provision as regards the rights of the parties for three years after [79] Lady Day. Whether that amounts to an actual demise or whether it must be understood as a mere agreement for a lease may admit of more doubt; but in either view the plaintiff is entitled to judgment. The provision that from Lady Day a lease is to be executed subject to the permission of the landlord, would lead to the inference that that part of the contract was an agreement for a lease, and not an actual demise. Supposing on the other hand it is to be construed as a lease, the contract embodies two distinct terms, the last of which would require an instrument under seal, but the first would not; and therefore as to that the agreement is valid; and consequently upon the whole the plaintiff is entitled to judgment.

Judgment for the plaintiff.

COLLARD v. THE SOUTH EASTERN RAILWAY COMPANY. May 24, 1861.—The plaintiff, a hop-grower in Kent, sent to London by the defendants’ railway some pockets of hops consigned to a purchaser. The defendants kept the hops for some days on their premises in an open van whereby a small portion was stained by wet, and the purchaser rejected the whole as he was entitled to do by the custom of the market. The plaintiff dried the stained hops and they were rendered as good as ever for actual use, but the staining had depreciated the market value of the bulk. The plaintiff sent the hops to a factor for sale, but at that time the market price of hops had considerably fallen from what it was at the time the hops ought to have been delivered. The defendants had no notice that the hops were sent to London for sale.—Held: First, that the plaintiff was entitled to recover, as damages, the amount of the depreciation in the market value of the hops, and was not confined to the value of the portion actually damaged.

Secondly, that he was entitled to recover, as damages, the difference between the market price on the day when the hops were sold and the day when they ought to have been delivered.

[S. C. 30 L. J. Ex. 393; 7 Jur. (N. S.) 950; 9 W. R. 697; 4 L. T. 410. Discussed, *The Parana*, 1877, 2 C. D. 122.]

The declaration stated, that the defendants were common carriers of goods for hire upon and along certain railways, to wit, from Pluckley Station, in the county of Kent, to the Bricklayer's Arms Station, in the county of Surrey; and theretofore the plaintiff delivered to the defendants as such carriers, and the defendants as such carriers received from the plaintiff, certain goods, to wit, eight pockets of hops [80] of the plaintiff, to be safely and securely carried and conveyed for the plaintiff by the defendants, as such carriers, from Pluckley Station aforesaid, to the Bricklayer's Arms Station aforesaid, and there, at the Bricklayer's Arms Station aforesaid, to be safely and securely delivered by the defendants for the plaintiff for reward to the defendants in that behalf. Yet the plaintiff says that the defendants, not regarding their duty in that behalf, did not nor would safely or securely carry or convey the said goods from Pluckley Station aforesaid to the Bricklayer's Arms Station aforesaid, nor there, at the Bricklayer's Arms Station aforesaid, safely or securely deliver the same goods for the plaintiff; nor did nor would the defendants, whilst they so had the care and custody of the said goods for the purpose aforesaid, take due or proper care of the same, but the defendants during that time took so little and such bad care of the same, and behaved and conducted themselves in so negligent, careless and improper a manner, that by reason of such want of due and proper care, and of such negligent, careless, and improper conduct of the defendants in that behalf the said goods then became and were greatly wetted, damaged and injured and deteriorated in value; and the defendants delivered the same goods at the said Bricklayer's Arms Station for the plaintiff in such wetted, damaged and deteriorated state and condition, and thereby the same have become and are of no use or value to the plaintiff.

Plea. Payment of 7l. 14s. 3d. into Court, and that the said sum is enough to satisfy the plaintiff's claim. Issue thereon.

At the trial, before Erle, J., at the last Kent Assizes, the following facts appeared:—The plaintiff, a hop-grower in Kent, had sold to Messrs. Crosier, of the Borough Market, London, eight pockets of hops, to be delivered at the Bricklayer's Arms Station, London, at 18l. per cwt., according [81] to sample. The hops were sent to the Pluckley Station on the defendants' railway on the 20th of October, consigned to Messrs. Crosier, whose carman applied for them at the Bricklayer's Arms Station on the 23rd of October, but was told that they could not be found. He applied again on the following day, and received the same answer. On the 29th of October he called again, and found them in an open van. On examination it appeared that the hops in some of the bags were partially stained, apparently from lying in a wet truck. On the same day the hops were removed to Messrs. Crosier's, who refused to receive them on account of their damaged condition; and by the custom of the hop-market they had a right to reject them. The plaintiff caused them to be dried, and when saleable, which was not until the 19th of November, sent them to a factor, who valued them at 8l. per cwt. Between the 29th of October and the 19th of November the market price fell from 18l. to 9l. per cwt.; and the damage to the hops caused a further diminution in value of 3l. or 4l.; but for actual use by a brewer the hops, when dried, were as good as ever. Evidence was adduced on the part of the defendant to prove that the quantity of hops actually damaged by the wet did not exceed eight pounds a pocket in six pockets, and that taking the value of the hops at 18l. per cwt., the damage was covered by the amount paid into Court.

The learned Judge told the jury that the plaintiff was entitled to damages for the deterioration in the value of the hops by reason of the wet, and also in respect of the difference in value which occurred between the time when they ought to have been delivered and when they were rendered saleable by drying. The jury found a verdict for the plaintiff with 18l. damages, beyond the amount paid into Court, in respect of the depreciation in the quality of the hops, and 65l. damages in respect of the depreciation in [82] their value by reason of the fluctuation of the market. A verdict was entered for both those sums, and leave was reserved to the defendants to move to reduce the damages by the sum of 65l.

Lush, in the following term (April 18), moved for a rule nisi accordingly. He also moved, with respect to the 18l. damages, for a new trial on the ground of misdirection. He submitted that inasmuch as the hops, when dried, were as good as ever for actual use, and the defendants had no notice that they were for sale, the plaintiff was only entitled to recover the value of the small portion actually damaged, and which was covered by the amount paid into Court.

POLLOCK, C. B. With respect to the 18l. damages, we think that the defendant is not entitled to a rule. The distinction between something bought for use and bought for sale is not a legal distinction. It is one of those matters which a jury may take into their consideration, and might possibly come to the conclusion that a person who has bought an article for use, which is damaged, has not sustained the same amount of injury as a person who has bought the article for sale, and is obliged to sell it at a lower price. With respect to the 65l., the Court will consider whether there ought to be a rule.

A rule nisi having been subsequently granted to reduce the damages by 65l.,

Bovill and G. Francis now shewed cause. The plaintiff is entitled to retain the amount of damages assessed by the jury. The loss to him through the negligence of the defendants is the difference in the value of the hops when delivered to them and when rendered fit for market. If the hops had been altogether lost, the measure of damage would be their value at the time they were delivered to [83] the defendants. There being, however, only a partial loss, the question is, to what extent are the hops depreciated in value? That can only be determined by ascertaining their value when delivered to the defendants and their value when rendered fit for sale, and the extent of the depreciation is the true measure of damage. This case is distinguishable from *Hadley v. Baxendale* (9 Exch. 341), and falls within the rule there laid down, the damage being the necessary consequence of the defendants' breach of duty.

Lush and Garth in support of the rule. The plaintiff has already obtained damages in respect of the depreciation in the quality of the hops, and that is all he is entitled to. He cannot recover in respect of the fluctuation of the market, for defendants did not know whether the hops were sent to London for the plaintiff's use or for sale. If for the plaintiff's use, there is no foundation for this claim to damage, for the hops would be just as much use to him as they would if there had been no fluctuation in the market. A carrier cannot know whether the owner of goods will or will not be affected by the fluctuations of a market. Such fluctuations depend on many circumstances, which could neither have been foreseen nor contemplated by the parties. In *Smeed v. Foord* (1 E. & E. 602), the defendant contracted to deliver to the plaintiff, a farmer, a steam thrashing machine within three weeks from the 24th of July, but did not do so until the 11th of September. The plaintiff, as the defendant well knew, was in the habit of thrashing out his wheat in the field, and sending it off at once to the market. In consequence of the non-delivery of the machine it became necessary to carry the wheat home and to stack it. The wheat was damaged by exposure to weather so that it was [84] necessary to dry it in a kiln, and the quality was much deteriorated, and before it could be sold the market price had fallen: the defendant knew that the machine was wanted for immediate use at the time appointed for the delivery: it was held that the plaintiff was entitled to recover damages in respect of the deterioration of the quality of the wheat, the expense of carrying, stacking and kiln-drying it; but not in respect of the fall in the market price. Lord Campbell there said:—"As respects those items for which the plaintiff claims damages as resulting from the falling of the rain, I am of opinion that he is entitled to recover. But, as respects the fall of the market price of wheat, in respect of which he claims damages, my opinion is quite different, because it could not have been foreseen by the parties that the markets would fall; it was not in the contemplation of the parties at the time they made the contract, and was not the natural consequence of the breach of contract." [Martin, B. Suppose some perfectly new chairs are sent by a carrier to an upholsterer, and in the course of the journey they are unpacked and used, so as to be somewhat damaged, but are equally useful for sitting upon, why is the upholsterer not to recover for the damage? I agree with the decision in the case of *Smeed v. Foord* (1 E. & E. 602), because the plaintiff might have procured another thrashing machine, or have employed a man to thrash his wheat. Pollock, C. B. There are many reasons for supporting that decision.] Damage is not recoverable unless it arises naturally from the breach of contract, or may be reasonably supposed to

have been in the contemplation of both the parties. Here the damage arising from the depreciation of the market was not the natural consequence of the defendants' breach of duty, and as they had no notice that the hops were sent to London for sale, such damage [85] could not have been in their contemplation at the time they made the contract. [Martin, B. It was reasonable to suppose that the hops were sent to London for sale. It is impossible to decide cases of this kind by analogy. Each must be dealt with by itself, and the rules of common sense applied to it. Pollock, C. B. One distinction between the case of *Smeed v. Foord* and the present is that there the damage disallowed was consequential—the plaintiff was merely prevented from using the machine; here the subject-matter of the contract is damaged. It does not follow that damage arising from a fall in the market which directly affects the subject-matter of the contract may not be recovered. Channell, B. In that case the direct damage was allowed.] The damage allowed was as consequential as that disallowed. It is conceded that if a horse sent by a carrier is damaged so as to be of less value for sale, the owner would be entitled to recover the damage although the horse might be of the same use to the owner; but if the horse was sent for the purpose of being used on a particular occasion, and in consequence of its not being used on that occasion, its value to the owner was depreciated, the carrier would not be responsible because he had no notice of the purpose for which the horse was sent. So here, although the defendants are liable for the actual deterioration in the value of the hops, they are not liable for the damage arising from the particular purpose for which the hops were sent to London, and of which they had no notice. [Channell, B., referred to *Gee, Appellant, The Lancashire and Yorkshire Railway Company, Respondents.*]

MARTIN, B.(a) We are all of opinion that the rule ought to be discharged. The Lord Chief Baron, before he left the Court, requested me to state that he was of that opi- [86]-nion. It seems to me that the case is clear. We must assume that the hops were to be delivered in London on a certain day, and that by reason of the defendants' breach of duty they could not be delivered until another day. It was proved that if they had been brought to market on the proper day they would have fetched a certain price, but, not being brought until a later day, the market price in the meantime fell, and the value of the hops was diminished by the amount of 65l. If that be not a direct, immediate and necessary consequence of the defendants' breach of duty, it is difficult to understand what would be. It is said that the defendants had no notice of the purpose for which the hops were sent to London, but I think that they must have known that they were sent for one of two purposes, either for consumption by the person to whom they were sent, or, as was more likely to be the case, to be sold for profit. It seems to me that *Hadley v. Baxendale* (9 Exch. 341) has no bearing on this case; and I think that *Smeed v. Foord* was correctly decided. In my judgment the plaintiff is entitled to recover for this damage, because it is a direct and immediate loss consequent on the defendants' breach of duty. If this case should be taken to the Court of error, I hope that Court will be able to put the rule on an intelligible footing; but at present we must do the best we can with each particular case and decide it upon principles of reason and good sense.

CHANNELL, B. I am of the same opinion. I agree with the doctrine laid down by this Court in *Hadley v. Baxendale*, and I also agree with the decision of the Court of Queen's Bench in *Smeed v. Foord*, which seems to me perfectly distinguishable from this case. There the Court held that the plaintiff was entitled to recover for all the heads of damage [87] which were the direct result of the non-delivery of the thrashing machine, but an attempt was made to recover for damage not the necessary consequence of the non-delivery of the machine, nor reasonably in the contemplation of the parties. Here the hops were delivered in a damaged condition, and it seems to me that there is no difference between their being delivered in that condition and being kept upon the defendants' premises until dried, because, in the interval, they were unsaleable. It must be ascertained what they were worth at the time they became available to the plaintiff as marketable goods, contrasted with what they would have been worth if the defendants had performed their contract. I do not know what other test can be applied for ascertaining the damage. For these reasons, I think that the rule ought to be discharged.

Rule discharged.

(a) Pollock, C. B., had left the Court.

IN RE ANDREW. June 10, 1861.—Where an order has been made that an attorney deliver to a client his papers, it is no answer to an attachment for disobedience of the order, that the agent of the attorney, having possession of the papers, claims a lien on them in respect of agency charges.

[S. C. 30 L. J. Ex. 403.]

Mundell had obtained a rule, calling on Frederick Andrew, an attorney of this Court, to shew cause why an attachment should not issue against him for disobedience of a rule and order of the Court, by which he was ordered to deliver up papers to a client. On cause being shewn, the Court referred the matter to the Master, who made the following report:—

In this case, Mr. Frederick Andrew, of Manchester, was formerly the attorney of Mr. John Dailey, a merchant, also of Manchester, and was engaged in conducting several actions and other matters for him. During the whole of the time that Mr. Andrew acted as Mr. Dailey's attorney, Mr. Deane was the London agent of Andrew.

[88] Early in 1860 orders were obtained by Dailey to tax Andrew's bills of costs, a change of attorneys having previously taken place, and on the 16th of March an order was made to deliver up papers, subject to Mr. Andrew's lien, to be ascertained by the Master.

An action had been commenced in the Borough Court of Manchester, by Andrew against Dailey, to recover the amount of his bills, and this action was referred to the Registrar of the Court, including all matters in difference between the parties.

On the 14th of June, 1860, an award was made, finding a lien, and 42l. 9s. 8d. due to Andrew on his action in the Borough Court, and 10l. 8s. 4d. due on his general account. Costs were given to Andrew, and upon payment all papers were directed to be delivered up. The award was made a rule of Court, and costs were taxed at 95l. 1s. 2d. on the 7th of August, 1860.

On the 10th of August, 1860, notice was given by Deane to Dailey not to pay the amount under the award to Andrew, as he had a lien on the papers for his agency charges against Andrew.

An action was brought by Andrew on the award, to recover the amount due under it; and on the 4th of November, 1860, an order to stay was made on payment of debt and costs.

On the 20th of November, 1860, 161l. 1s. 10d. was paid by Dailey to Andrew for debt and costs.

On the 12th of December, 1860, an order was made upon Andrew forthwith to deliver to Dailey all his papers (his lien having been satisfied), and for payment of the costs of the application. This order was served upon Andrew on the 15th of December; and on the 17th of December Andrew delivered up a bundle of papers, being all the papers at that time in his actual possession, the remainder of Dailey's papers being in the hands of Deane.

[89] On the 25th of January, 1861, the last mentioned order was made a rule of Court, and costs taxed at 10l. 4s., which costs have been paid. An attachment for non-performance of the order and rule of Court was moved on the 30th of April, 1861, and on the 23rd of May the matters of the rule were referred to the Master, with power to dispose of all costs, and to take evidence *vivâ voce*.

Mr. Deane still claims a lien upon the papers in question, in respect of his alleged unsatisfied general claim against Mr. F. Andrew for agency charges. His lien on these papers, in point of law, only extends to the amount of the charges in the particular business to which they belong. But Mr. Dailey has no remedy against him, because there is no privity between the client and the London agent of his attorney. Mr. Andrew, some time since, offered to settle his general account with Deane for an amount which has been declined by him; but he has not taken what seems to me the only right step for him to have taken, namely, by summoning Deane to give up the papers belonging to Dailey, upon payment of his particular charges in respect of the matters to which they relate. Mr. Deane has commenced an action against Andrew to recover 366l. 18s. 6d., the alleged balance of his agency charges against Andrew, to which Andrew has pleaded payment, set-off, never indebted, and no

signed bill delivered. The action was set down for trial in February last, but the record was withdrawn. The action is still pending.

On the 22nd of December, 1860, Mr. Andrew obtained an order to tax Deane's bill against him, but it has been since rescinded on Mr. Deane's application.

Mr. Andrew has not made due efforts, in my judgment, to recover the papers belonging to his late client, Mr. Dailey, now in the hands of his London agent, Mr. Deane, and I am humbly to report to the Court that an attachment should [90] issue against Mr. Frederick Andrew for his non-performance of the order and rule for the delivery up of Mr. Dailey's papers, and that he should pay all costs of and occasioned by the application against him.

Lush and Morgan Lloyd now shewed cause. There has been no contempt for which the Court will grant an attachment. A London agent has, as against the country attorney who employs him, a general lien on all papers in his hands; but as against the client he has no lien, if the country attorney has been paid: Arch. Prac. vol. 1, p. 140, 10th ed. The same practice prevails at law and in equity. There, if the client has paid the bill of his country attorney before notice of anything remaining due to the London agent, he may apply to the Court for an order that the latter deliver up the papers to him: *Waller v. Holmes* (1 John. & H. 239). *Moody v. Spencer* (2 D. & R. 6) is an analogous case at law. There the London agent had received money due to the client, upon which the country attorney had no claim; and it was held that the client might recover it in an action against the agent. In this case, the country attorney could not get the papers out of the hands of the London agent, because the latter claimed a lien in respect of the general balance due to him. [Martin, B. The country attorney has no lien on the papers, and what answer can it be that there is an account between him and his London agent?] The attorney is not guilty of a contempt of Court, for he has done all in his power to obtain possession of the papers, but the law prevents him. [Pollock, C. B. The question is, who is to take the trouble of getting the papers out of the hands of the London agent? It ought to be the person who placed them there. Martin, B. The general rule is that a lien is not transferable; but there is an exception in the case of an [91] attorney who may transfer his personal lien to his agent. In Arch. Prac. vol. 1, p. 140, 10th ed. it is said:—"The possession of the agent is the possession of the attorney, and if the latter has been paid, the client may sue him for the papers, though the agent detains them on the ground of his lien or otherwise:" citing *Hullock on Costs*, vol. 2, p. 530, 2nd ed.; per Bayley, J., in *Moody v. Spencer* (2 D. & R. 6).] The agent has a lien, as against the client, to the amount of the money due from him to the attorney, and from the attorney to the agent: *Bray v. Hine* (6 Price, 203). But, if the client has paid the attorney, he is entitled to have the papers from the agent: *White v. Royal Exchange Assurance* (1 Bing. 20). [Martin, B. The client ought to have his papers delivered up to him when he pays the attorney's demand.]

Mundell appeared to support the rule, but was not called upon to argue.

Per Curiam.(d) The rule must be absolute with costs: the attachment to lie in the office until a Judge at Chambers orders it to issue.

Rule accordingly.

[92] VICKERS v. OVEREND. May 27, 1861.—Declaration on a deed whereby the defendant covenanted with the plaintiff to use his best endeavours and all due diligence to forward the works comprised in a certain contract, so that the same should be completed in as short a time as practicable. Breach: that the defendant did not nor would use his best endeavours or due or any diligence to forward the works comprised in the said contract, so that the same might be completed in as short a time as practicable, but wholly neglected so to do, and the said works by the default of the defendant remain and are incomplete and unperformed. Plea: that the defendant did use his best endeavours and all due diligence to forward the works comprised in the said contract, so that the same might be completed in as short a time as practicable; but that by causes wholly beyond his controul, and without any default on his part, he was and has been hindered

(d) Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.

and prevented from forwarding the said works. On demurrer: Held, that the plea, though informal, was good as a traverse of the breach.

[S. C. 30 L. J. Ex. 388.]

Declaration. That by a certain deed, made between John Watson of the first part, Arthur Lindley and William Cutts of the second part, the defendant and Hutton Vignoles of the third part, and the plaintiff of the fourth part: After reciting that the said J. Watson, by and through the defendant, had contracted with a Company called "The New Mechanical Dock Company for the repairs of ships at Bahia," to construct for the said Company a patent slip and other works and machinery as therein mentioned: And further reciting that, although the said contract was taken in the name of the said J. Watson, the said A. Lindley, W. Cutts, the defendant, the said Hutton Vignoles, or some or one of them, claimed to be respectively interested therein; subject nevertheless to the claims of the plaintiff in respect of a sum for outlay, pursuant to the terms of a certain indenture in the said deed now in recital mentioned: And further reciting that it had been ascertained and finally settled that the sums paid by the plaintiff, and all other his claims, amounted to 10,012*l.*, which sum included the purchase of the timber, plant and materials, and other property provided and paid for by the plaintiff; the said W. Watson did, by the said deed, with the consent and express direction of the parties thereto of the second and third parts, assign unto the plaintiff 890 shares of 11*l.* 5*s.* each, numbered 1 to 890, inclusive, and 30 shares of 11*l.* 5*s.* [93] each, numbered 921 to 950, inclusive in the said Company, and the right and benefit of having the calls upon the said shares, then or thereafter to be made, paid up from time to time out of the monies payable by the said Company in respect of the said contract. And the defendant thereby covenanted with the plaintiff to do and execute all such acts, things and assurances as should be necessary for effectually vesting the said 890 shares and 30 shares respectively in the plaintiff, and for causing all calls then due, or thereafter to become due, on the said shares to be paid up out of the said sums payable, or from time to time to become payable, by the said Company in respect of the said contract: and that the defendant would, within a reasonable time after the date of the said deed, or next after the periods at which the calls next thereafter mentioned should become due, do and perform all such acts as should be necessary for obtaining and delivering to the plaintiff, in a transmissible shape, evidence of the calls then due, or thereafter to become due, having been paid out of the sums payable, or from time to time to become payable, in respect of the said contract; and that the defendant would not do or suffer anything by which the said contract should be prejudiced or wholly or partially forfeited; and that he would use his best endeavours, and all due diligence, to forward the works comprised in the said contract, so that the same works should be completed in as short a time as practicable. And although all things have, before suit, happened and been performed to entitle the plaintiff to the performance by the defendant of his covenant: Yet the defendant did not nor would use his best endeavours, or due or any diligence to forward the works comprised in the said contract, so that the same might be completed in as short a time as practicable, but has wholly neglected so to do, and the said works, by the default of the defendant, [94] remain and are incomplete and unperformed; whereby the said shares have become and are of no value to the plaintiff, and he hath thereby wholly lost the said sums so paid by him as aforesaid, and the interest thereof.

Plea. That the defendant did use his best endeavours, and all due diligence, to forward the works comprised in the said contract so that the the same might be completed in as short a time as practicable, but that, by causes wholly beyond his controul, and without any default on his part, he was and has been hindered and prevented from forwarding the said works.

Demurrer and joinder therein.

Lush, in support of the demurrer. The question depends upon the true meaning of the contract. It is submitted that the defendant's covenant amounts to this:—"I being the party to do the works, will take care, by using my best endeavours, and all due diligence, that the works are completed in as short a time as such works can be completed." The plea, therefore, affords no answer to the breach, because the covenant is an absolute covenant that the defendant shall, by means of using his best endeavours and all due diligence, take care that the works are completed in as short a time as possible. [Pollock, C. B. The question is, whether the plea is to be treated as a plea

in confession and avoidance, or an inartificial denial of the breach. The defendant covenants with the plaintiff to do his best, and says, "I have done my best." The plea means this: "I should have done all that I covenanted to do, but I was prevented by something beyond my controul." [Pollock, C. B. Sickness may have been the cause.] Whatever was the cause, the defendant is responsible for the breach of his express covenant. The former part of the plea is qualified by the latter; but the whole, so qualified, affords [95] no answer to the breach. [Channell, B. Under the old system of pleading the plea might have been specially demurred to; but now the latter part may be rejected as surplusage. Martin, B. The defendant covenants that he will use his best endeavours to complete the works as soon as practicable; and, if he used his best endeavours, but the works were destroyed by an inundation, I apprehend he would be excused.] It comes to the question, what is the meaning of the covenant? Does it mean, "I will do no more than use my best endeavours?" Or does it mean, "I will undertake that the work shall be done?" [Bramwell, B. It may be that the defendant was bound to complete the works in a reasonable time, and, plus that, he was to use his best endeavours to complete them as soon as possible; but the plaintiff does not complain that the defendant has not completed the works, although a reasonable time for that purpose has elapsed, but that he has not done his best to complete them; and he says he has, and that it was not through any default on his part that they were not completed.]

Hawkins appeared in support of the plea, but was not called upon to argue.

Per Curiam.(a) There must be judgment for the defendant.

Judgment for the defendant.

[96] RICE AND ANOTHER v. BAXENDALE. May 27, 1861.—Where goods are delivered to a carrier, to be carried from A. to B., and are lost, the owner is entitled to recover the value of the goods at B.; and (per Bramwell, B.,) that value is the price for which they can be got to, not at, B.

[S. C. 30 L. J. Ex. 371. Applied, *Ströms Bruks Aktie Bolag v. Hutchison*, [1905] A. C. 524.]

This was a plaint tried before the deputy Judge of the Sheriffs' Court of London, when a verdict was entered for the defendant, subject to the opinion of this Court upon the following case:—

The plaintiffs are licensed hawkers, and the defendant is a member of the firm carrying on trade as common carriers under the name of Pickford and Company. The following is a copy of the particulars of the plaintiffs' claim delivered in the cause:—

"The following goods were delivered to the defendant as a common carrier by Messrs. Swainson and Bennett, of Leeds, on the 27th of November, 1860, to carry for the plaintiffs, but the defendant has not delivered the same to the plaintiffs, although he undertook and agreed to do so.

"54,072 Black Union Cloth, 45 @ 3/6	£7 17 6
54,077 Blue Pilot Do., 16 @ 3/6	2 16 0

Value of the goods at Maidstone 1/6 per yard more, and the difference is hereby claimed if the plaintiffs have no right to the items hereinafter mentioned.

The plaintiffs have sustained damages by the detention and non-delivery of the said goods:—

For loss of the Sale thereof	4 0 0
Travelling Expenses	3 0 0
Loss of time of plaintiffs and horse and cart from 30th of Nov. to 22nd of Dec. 1860, @ 10/ per day	11 0 0

£28 13 6"

To this claim the defendant paid into Court 10l. 13s. 6d., the amount of the two first items, being the price of the goods as invoiced by the manufacturers to the plaintiffs.

(a) Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.

In November, 1860, the plaintiffs remitted the sum of [97] 10l. 13s. 6d. to Messrs. Swainson, Bennett and Co., cloth manufacturers, of Leeds, and ordered the cloth set out in the particulars to be sent on to them to Maidstone. In that town the plaintiffs were waiting the receipt of the goods, to trade in the town and in the neighbourhood.

On the 27th of November, Messrs. Swainson and Co. delivered to the defendant, at Leeds, the goods in a parcel addressed to the plaintiffs at Maidstone, and nothing else passed at Leeds. In due course of conveyance the goods ought to have been delivered at Maidstone on the 29th of November. They were never delivered to the plaintiffs. In anticipation of the delivery the plaintiffs had sold a great part of the goods to customers at Maidstone.

The plaintiffs made inquiries from time to time at Maidstone of the servants of the South Eastern Railway Company, and were informed that they had received information of the arrival of the goods in London, but that the parcel had not been sent on to Maidstone. They informed the plaintiffs that the parcel was expected there daily. It however never arrived.

The plaintiffs ordered a fresh supply of goods from the same manufactory, but Messrs. Swainson and Co. declined to forward the goods without a fresh remittance for the amount thereof.

The plaintiffs were detained at Maidstone until the 22nd of December, expecting every day to receive the goods and to be in a position to complete their contract with the customers, and to proceed with their journeys as hawkers. They proved that articles similar to those delivered to the defendant by the plaintiffs could not be purchased by them at Maidstone under 1s. 6d. a yard more than was charged by the manufacturers. They also proved that they must necessarily have been detained in Maidstone four or five days before they could get a fresh supply of [98] goods, if the fresh order to Messrs. Swainson and Co. had been executed by them in due course of delivery, or if they had ordered a similar parcel from any other manufacturer. The plaintiffs were however compelled, by this refusal of Messrs. Swainson and Co., to supply a fresh parcel without the money, which the plaintiffs could not at the time pay, to sell a horse at Maidstone to pay their expenses there, and to enable them to get away. They also could not, by reason of their poverty, purchase the goods either at Leeds or Maidstone. They lost 4l., the profits on the sale of the goods, and expended 3l. in travelling and other expenses in making inquiries about the parcel; and remained twenty-two days in Maidstone, expecting to receive the parcel, and incurred expences for themselves and horse at the rate of 10s. per day. Upon this evidence the Judge found

1. That the money paid into Court was equal to the value of the goods when delivered to the defendant, and that the defendant had no notice of what use the plaintiffs intended to make of the goods at Maidstone or elsewhere.

2. That the plaintiffs could not have procured goods of a like quality or description at Maidstone, at the time the goods ought to have been delivered by the defendant, at a price less than 4l. 14s. 6d. beyond the sum paid into Court.

3. That the plaintiffs, if they had cash, might have procured another parcel from the manufacturers at the same price; and the damages to the plaintiffs beyond the invoice price of the goods, in respect of the delay, would amount to 3l., and no more.

4. That the plaintiffs had in fact suffered to the extent of the damages they claimed, but it arose from the want of means.

[99] The particulars were to be taken to be amended, so as to enable the plaintiffs to recover any sum they are by law entitled to over and above the sum paid into Court.

The Judge ruled that the verdict ought to be entered for the defendant, on the ground that the damages sought to be recovered, beyond the sum paid into Court, were not losses either arising naturally from the breach of duty relied upon, or such as the parties, at the time the goods were delivered to the defendant, contemplated. Whereupon, at the suggestion of the Judge, the parties agreed to the verdict being so entered, subject to an appeal to this Court.

Therefore, if the Court should be of opinion that the plaintiffs are not entitled to recover anything beyond the sum paid into Court, then the verdict for the defendant is to stand.

But if the Court should think that the plaintiffs are entitled to recover anything

beyond that sum, then the verdict is to be entered for the plaintiffs for such sum as the Court, upon the above facts, shall determine the plaintiffs are entitled to.

If the ruling of the Judge, as to the measure of damages in this cause, is to be taken as a determination of fact, so as to conclude the Court, such ruling is not to prejudice the plaintiffs, as the Judge intended merely to intimate an opinion, and it was understood that neither side should be affected by it.

Honeyman, for the plaintiffs. The plaintiffs are entitled to recover more than the amount paid into Court. [Martin, B. The only question is, whether they are entitled to recover the value of the goods at Maidstone: it is clear that they are not entitled to recover the other items of damage.] The plaintiffs are entitled to recover, as damages, the amount which they must have paid to procure goods of [100] a like quality and description at Maidstone, and the Judge has assessed that amount at 4l. 14s. 6d. beyond the sum paid into Court. They are also entitled to recover the expenses of waiting at Maidstone for the goods, which they were told were expected daily, and for the expenses of travelling to make inquiries about the goods. In the case of *Black v. Baxendale* (1 Exch. 410), the plaintiff sent certain goods by the defendants, who were carriers, to be delivered at Bradford on a Thursday, in order to be ready for the market on Saturday, but did not give notice that they were sent for that purpose. On that day his clerk proceeded there, and owing to the non-delivery of the goods till the Monday following he removed them to another place for sale; and in an action for the non-delivery of the goods within a reasonable time, it was held that the expenses so incurred might be given by the jury as damages. [Bramwell, B. What is the loss? It is the value of the goods at Maidstone. Martin, B. The loss is the sum at which the goods could be replaced at Maidstone, and the proper mode of replacing them is to purchase them, not of a tradesman, but of the manufacturer.] In that case the plaintiffs would have no compensation for the damage sustained by the delay in the delivery of the goods. At all events the measure of damage is not confined to the value of the goods at Leeds, but the plaintiffs are entitled to recover their value at Maidstone at the time when they ought to have been delivered.

C. Pollock, for the defendant. The plaintiffs have sustained no legal damage beyond the value of the goods. They might at any time have sent to Leeds and obtained the same goods at the same price, and therefore they are not entitled to the compensation claimed for delay. [Pollock, C. B. The case expressly finds that the damage to the plain-[101]-tiffs beyond the invoice price of the goods in respect of delay would amount to 3l.] The delay was not the necessary consequence of the defendant's negligence. This is not like the case of a breach of contract to deliver in London a cargo of rice consigned from Bombay. [Bramwell, B. The goods must be worth more at Maidstone than at Leeds, because there is the costs of carriage. Suppose the goods had been insured, and burnt in a warehouse at Maidstone, would not the plaintiffs be entitled to the value of them at Maidstone?] That is on the hypothesis that the goods arrived at Maidstone, but here they have not. Suppose the goods were wanted for a certain purpose on a particular day, and the plaintiffs could not procure others for that occasion without paying an increased price, they could not recover that as damages. [Martin, B. The plaintiffs must be entitled to something more than the cost price of the goods. Bramwell, B. Under the 3 & 4 Wm. 4, c. 42, s. 25, the jury may give interest as damages in trover; and the plaintiffs might say, "We have already paid for the goods, and have lost the interest of our money."] The plaintiffs can only recover such damages as naturally result from the breach of contract: *Hamlin v. The Great Northern Railway Company* (1 H. & N. 408). In *Fletcher v. Tayleur* (17 C. B. 21) the Court observed that it would be convenient if, in the case of the non-delivery of a chattel, a rule was laid down as to the measure of damage, analogous to that in the case of non-payment of money. [Bramwell, B. The Judge, who has taken a correct view of the case, has found that the amount paid into Court was equal to the value of the goods when delivered to the defendant; and, if that is to be taken as the finding of their value at Maidstone, our judgment ought to be against the plaintiffs. But if the [102] case were again sent down, no doubt the Judge would find that the goods were worth more at Maidstone than at Leeds, and therefore we may conveniently give judgment now.]

Honeyman was not called upon to reply.

POLLOCK, C. B. It is clear that the goods are worth more at Maidstone than at

Leeds. The only principle that we lay down is that when goods are delivered to a carrier to be carried from A. to B., and are lost, the owner is entitled to the value of the goods at B. In this case there are materials upon which we can come to a reasonable conclusion that the plaintiffs are entitled to more than the amount paid into Court; therefore let the verdict be entered for them for 3l.

BRAMWELL, B. I agree, with this qualification, that the value of the goods is the price for which they can be got to the place of consignment, not at that place.

CHANNELL, B., concurred.^(a)

Judgment for the appellants for 3l.

[103] FORSTER AND WIFE v. ROWLAND. June 2, 1861.—The defendant having proposed to take a lease of certain premises for the term of seven years, a draft lease was prepared, to which the defendant made some objections. He ultimately took it away to be settled by his solicitors. Defendant's solicitors returned the draft to the plaintiffs' solicitors, with the following letter:—"We have seen our client and have altered the draft lease in accordance with his instructions. We trust there will be no impediment to prevent an early completion, and shall be glad to receive the draft as soon as you can, that we may engross the counterpart." The plaintiffs' solicitors replied, returning the draft and engrossment of lease and counterpart, stating that, according to the practice where there is no stipulation on the subject, the lessor's solicitor invariably prepares both lease and counterpart. Held, that there was no evidence of any contract binding the defendant to take the lease. And no memorandum of any contract sufficient for that purpose within the 4th section of the Statute of Frauds.

[S. C. 30 L. J. Ex. 396; 7 Jur. (N. S.) 998.]

Declaration. That, by an agreement between the plaintiff W. R. Forster, on behalf of himself and Margaret his wife, and the defendant, it was agreed that the plaintiffs should grant to the defendant, and that the defendant should accept a lease of certain premises at Comberbach, belonging to the plaintiff W. R. Forster in right of his wife, for the term of seven years, from the 2nd of February, 1860, &c., at the yearly rent of 100l. &c.; that the lease should contain certain reservations, covenants, &c.: that although the plaintiffs were always ready and willing and offered to grant such lease, and all conditions were fulfilled, and all things have happened, and all times elapsed necessary to entitle the plaintiffs to have the agreement performed by the defendant, yet the defendant refused to perform the agreement and accept the lease, &c.

Plea: Non-assumpsit. On which issue was joined.

At the trial, before Keating, J., at the Liverpool Spring Assizes, it was proved that the defendant having proposed to take a lease of a house and premises at Comberbach of the plaintiffs for the term of seven years, a draft lease was prepared, which the defendant read through with the plaintiffs' solicitors. The defendant made some objections to it, and ultimately took it away to be settled by his solicitors. After some correspondence as to the terms between the solicitors of the several parties, Messrs. Keightley [104] and Banning, the defendant's solicitors, wrote to Messrs. Goulden and Swinburne, the plaintiffs' solicitors, returning the draft with the following letter:—

"Liverpool, 18th May, 1860.

"Rowland and Forster.

"Dear Sirs,—We have just seen our client and have altered this draft lease in accordance with his instructions. We trust there will now be no impediment to prevent an early completion, and we shall be glad to receive the draft as soon as you can (sic), that we may engross the counterpart.—Yours truly,

"KEIGHTLEY AND BANNING."

(a) Martin, B., had left the Court.

To this Messrs. Goulden and Swinburne replied as follows:—

“Manchester, 22nd May, 1860.

“*Forster and Rowland.*

“Dear Sirs,—We send you by book-post this draft and engrossment of the lease and counterpart, the latter as being in accordance with the understanding in this matter and also apart from this with the practice here, &c. To satisfy you we requested Mr. Marriott, the Secretary of our Law Society, to state the rule, assuming the absence of any agreement. We enclose you a copy of his letter. When you have compared the engrossments with the draft be good enough to return it with the engrossment of the lease, the execution of which we can obtain in a post’s time and shall then be prepared to exchange with you.—Yours truly,

“GOULDEN AND SWINBURNE.”

Mr. Marriott’s letter stated that, “In the absence of an agreement, the lessor’s solicitor invariably prepares both [105] lease and counterpart, and the lessee invariably pays for both.(a)

Messrs. Keightley and Banning replied:—

“Liverpool, 23rd May, 1861.

“Dear Sirs,—Our client denies that there was any agreement or understanding as to the costs of the lease and counterpart. The printed rules of our Law Society say that ‘The whole expence, whether there be a lease or lease and counterpart and whether one or more attorneys be employed, must be divided between the landlord and the tenant,’” &c.

After some further correspondence the plaintiffs’ solicitor called on the defendant to execute the lease, alleging that it had been finally settled and approved of irrespective of the question of the payment of costs. The defendant’s solicitors replied that they had no authority to settle the terms of any lease except on payment by each party of the terms of the lease and counterpart in equal proportions, and on that ground the defendant eventually declined to accept the lease.

On these facts the defendant’s counsel objected that there was no evidence of any agreement to accept the lease. The plaintiffs’ counsel urged that the approval of the draft lease by the defendant’s solicitors constituted an agreement within the 4th section of the Statute of Frauds. The learned Judge directed a nonsuit, reserving leave to the plaintiffs to move to enter a verdict for a sum agreed upon.

Manisty, in Easter Term, obtained a rule to enter the verdict for the plaintiffs, on the ground that there was evidence to go to the jury that Messrs. Keightley and Banning had authority to bind the defendant to take the lease.

[106] Brett and Henderson now appeared to shew cause; but the Court called on Manisty and A. Fonblanque to support the rule. First, the defendant intimated to the plaintiffs’ solicitors that Keightley and Banning, his solicitors, should settle the terms of the lease. The letter of the 18th of May inclosed the draft lease as agreed to; and the terms were assented to on behalf of the plaintiffs by the letter from their solicitors of the 22nd of May. [Channell, B. Can it be said that the letter of the 18th of May is anything but an offer on the terms that the defendant’s solicitors should engross the counterpart?] The question as to the engrossment of the counterpart was no part of the agreement, which was complete without it. It was not one which was left to be disposed of by the defendant’s solicitors, who were only to settle the terms of the lease.

MARTIN, B. I think that there was no complete agreement in the present case. Up to the time when the matter was placed in the hands of the defendant’s attorneys there was no agreement in writing; there was simply a negotiation as to granting a lease on terms to be settled. If the defendant’s attorneys had returned the draft without conditions, there might have been some ground for contending that their letter was evidence of an agreement. But nothing of the sort occurred. The defen-

(a) In the subsequent correspondence, Dart on Vendors and Purchasers, 3rd ed., p. 465, was referred to on this point.

dant's attornies in the letter of the 18th of May forwarded to the plaintiffs' attornies the draft lease altered in accordance with the instructions of their client. He had assented to accept the lease on certain terms, one of which was that the plaintiffs' attornies should engross the lease and that the defendant's attornies should engross the counterpart. A dispute arose as to this condition, and the letter of the [107] 25th of May shews that there was no final agreement, but the matter was inchoate and unsettled. Therefore it is plain that independently of the Statute of Frauds there was no final agreement.

But, further, I think that there was no agreement signed so as to satisfy the 4th section of the Statute of Frauds. I agree with the Court of Common Pleas in *Bailey v. Sweeting* (9 C. B. 843), that all that the statute requires is written evidence of the contract, and that there may be a note or memorandum of the contract, sufficient to satisfy the statute, which when written was not intended to operate as a contract. But the memorandum must be "signed by the party or by his agent lawfully authorized." Here there is not a particle of evidence to shew that the defendant authorized Messrs. Keightley and Banning to sign a contract to bind him. Therefore the rule must be discharged.

BRAMWELL, B. I am of the same opinion. The only way in which it can be suggested that there was an agreement is by saying that the defendant, at some previous interview with the plaintiffs, verbally agreed to take a lease. But for the Statute of Frauds, that would have been a good agreement to take a lease on all usual terms. Upon that supposition, however, Messrs. Keightley and Banning were not agents either to make another agreement for the defendant or to make a memorandum of such agreement. But suppose there was no agreement until all the terms were adjusted; another difficulty arises,—Messrs. Keightley and Banning say, "We have seen our client and altered the draft lease in accordance with his instructions." Treating that as a proposal, it is on the terms that Keightley and Banning should "engross the counterpart." That proposal was not accepted in its entirety. The plaintiffs' attornies say, "You shall not engross the counterpart; we will." There is a third [108] way in which the letter of the 18th of May may be viewed, viz., that the suggestion that the defendant's attornies are to engross the counterpart may be treated, not as a proposal, but as a statement of a consequence of the contract being accepted. The plaintiffs' counsel contended that the letter was the statement of an agreement between the plaintiffs and the defendant, and that they differed as to the consequences of it. *Bailey v. Sweeting* (9 C. B. N. S. 843), is distinguishable from the present case. Here the letter does not refer to an agreement already made; it is not a statement of the contract and an erroneous conclusion from it. It was written while the agreement was still in fieri. I think therefore that the letter is insufficient to bind the defendant, whether it is treated as a memorandum of an original agreement for a term at a certain rent and under the usual conditions, in which case Keightley and Banning had no authority to make a memorandum of such agreement; or whether Keightley and Banning had authority to negotiate and settle all the terms upon which the lease was to be granted, in which case the parties never came to a final agreement; or, on the third view of the case, because it assumes, incorrectly, that Keightley and Banning state that as a conclusion which is in fact a condition.

CHANNELL, B. I am of opinion that the nonsuit was right. There was no evidence that Keightley and Banning had authority to sign the letter of the 18th of May as an agreement. In fact it is a mere proposal clogged with the condition that the writers shall have the privilege of engrossing the lease. That proposal was never accepted. It was said that *Bailey v. Sweeting* (9 C. B. N. S. 843), is an authority that the condition may be rejected. But that case merely decided that where one of the parties to a contract has stated in writing the particulars of it, that statement may be evi- [109] dence against him sufficient to satisfy the statute though in the same writing he repudiates his liability. But this case is distinguishable. In *Bailey v. Sweeting*, (a) the document was not in the nature of a proposal. Here the parties were still negotiating when the letter of the 18th of May was written, and therefore the principle which governed *Bailey v. Sweeting* has no application.

Rule discharged.

(a) 9 C. B. N. S. 843. See Blackburn on the Contract of Sale, p. 66; *Goodman v. Griffiths*, 1 H. & N. 574.

IN THE MATTER OF THE PETITION OF JOHN BARKER AND SUSAN his Wife. On appeal from an assessment of the Commissioners of Inland Revenue under the Succession Duty Act. June 8, 1861.—L., tenant for life and subject to such life estate, having a general power of appointment by deed or will, by will executed after the Succession Duty Act came into operation, exercised the power in favour of B. B. was a stranger in blood to L., but was the niece of her husband, the donor of the power, who had created it and died before the Act came into operation. Held, that B. was only liable to a duty of three per cent., as on a succession derived from the donor of the power.

[S. C. 30 L. J. Ex. 404; 7 Jur. (N. S.) 1061; 5 L. T. 206. Not applied, *Attorney-General v. Gardner*, 1863, 1 H. & C. 639. Commented on, *Attorney-General v. Upton*, 1866, 4 H. & C. 343; L. R. 1 Ex. 228. Applied, *Attorney-General v. Mitchell*, 1881, 6 Q. B. D. 548.]

Edward Lloyd by his will made the 3rd of June, 1845, devised all the residue of his estate (which comprised the real property which was the subject of the assessment) to trustees upon trust, during the life of Elizabeth Lloyd his wife, to receive the annual proceeds and pay the same to the said Elizabeth for her sole and separate use independent of any person with whom she might thereafter intermarry. And he declared that his said trustees should after the death of his said wife stand seised of the said residue upon such trusts, intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as his said wife should, notwithstanding any future coverture, and whether covert or sole, by any deed or deeds, instrument or instruments in writing, with or [110] without power of revocation and new appointment, or by her last will and testament, or any codicil or codicils thereto, to be by her respectively legally executed, direct or appoint, give, devise or bequeath the same; and in default thereof upon certain other trusts in the will mentioned.

The testator died in 1850 before the passing of the Succession Duty Act, 1853, and his wife survived him.

On the 13th of August, 1858, the testator's wife, Elizabeth Lloyd, by her will, after reciting the said power, did, as to a certain messuage, lands, &c. (the subject of the assessment), by virtue and in exercise of the power and of any other power enabling her in that behalf, direct and appoint, give, devise and bequeath the same immediately after her decease to go, remain and be to the use of other trustees and their heirs upon trust, during the life of the petitioner Susan Barker, to pay the annual income to her sole and separate use, &c. And from and after the decease of the petitioner in trust for her children as she should by will appoint, &c.

Elizabeth Lloyd died on the 17th of May, 1859. The petitioner Susan Barker is a descendant of a sister of the said Edward Lloyd, but is a stranger in blood to the said Elizabeth Lloyd.

Although, in the assessment made by the Commissioners of Inland Revenue in respect of the succession, the value of the said real property is rightly ascertained as being 10,693l. 7s. 11d., yet the duty payable was assessed by the said Commissioners at 1069l. 6s. 9d., being at the rate of 10 per cent. on that sum as a succession derived by the petitioner from Elizabeth Lloyd as the predecessor, whereas the duty on the said sum ought to have been assessed at the rate of 3 per cent. on the said sum.

Prayer. That the assessment be amended and reformed, and that the costs of the appeal be awarded to the petitioner.

[111] The Attorney General (with whom were the Solicitor General, Mellor, and Beavan), for the Crown. Elizabeth Lloyd was tenant for life of an estate and subject to her own life estate had a general power of appointment by deed or will. By will executed in 1858, after the Succession Duty Act (16 & 17 Vict. c. 51) came into operation, she exercised the power in favour of the petitioner Susan Barker. Susan Barker was a stranger in blood to Elizabeth Lloyd, but was the niece of her husband, the donor of the power, who had died before the Act came into operation. If the estate which Susan Barker thus took is to be treated as derived from the wife, who exercised the power in her favour, she is liable to pay 10 per cent.; if from the husband, who created the power, she is liable to pay 3 per cent. only. By the 2nd section

"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of the Act," is to be deemed to have conferred "on the person entitled by reason of any such disposition a succession," &c. And "the term 'predecessor' shall denote the settlor, disposer, testator, &c., or other person from whom the interest of the successor is or shall be derived." It has been contended successfully, on behalf of the Crown, that where an interest is created by virtue of a general power the estate is created by the exercise of the power, and the appointment ought to be treated as if it were written in the instrument creating the power. If that be so, the husband of Elizabeth Lloyd was the predecessor in the present case. [Martin, B., referred to the judgments of Lord Campbell and Lord Kingsdown in *The Attorney General v. Lord Braybrooke* (9 H. L. Cas. 150).] It is true that, if this view be correct, it is not for the advantage of the Crown in this particular [112] case, but the object of the Crown is to have a uniform rule established. It might be contended that a general power of appointment, capable of being exercised by the donee in his own favour, is equivalent to an estate and interest equal to that which the power enables the donee to create. The 4th section of the Act was intended to meet cases of this kind. One mode of construing that section is to read the participle "taking effect" as referring to the antecedent substantive "disposition of property;" and, therefore, the section as applying only where the settlement or other disposition of property by which the power is created, comes into operation after the passing of the Act. According to another mode of construing that section, the words "taking effect" may be referred to "appointment," and if that view is correct, as the appointment did not take effect during the lifetime of Elizabeth Lloyd, she took a succession. But if this is not the true interpretation, Elizabeth Lloyd did not take a succession in respect of the general power she possessed. In *Lovelace's case* (4 De Gex & Jones, 340), it was held by the Lords Justices (reversing the decision of Vice Chancellor Wood), that appointees under a general power are entitled by reason of the disposition which created the power, and are therefore within the 2nd section. The Vice Chancellor thought that, by the 4th section, general powers and the dealings under them were taken out of the operation of the 2nd section. But the 4th section may be construed thus:—"When any person shall have a general power of appointment under any disposition of property" (such power) "taking effect upon the death of any person dying" after the commencement of the Act, in the event of his making any appointment, the power shall be regarded as property, and the donee chargeable in respect of the estate he derived under it. A power of appointment "takes [113] effect" when it arises or comes into existence as a subsisting power. And by the 4th section the donee of the power is to be the successor if he exercises it in his own favour. That section in fact leaves power of appointment to the operation of the 2nd section, subject to the rule, that, where a power of appointment is exercised in favour of an individual, that individual is the successor, and the person who creates the power is the predecessor. The 4th section only takes out of the 2nd those powers which come into operation after the commencement of the Act, and are so used as if they were property. There is a manifest inaccuracy in the language of the 4th section. After the words "he shall in the event of his making any appointment," the words "for his own benefit" would seem to have been omitted. The object was to provide for the case of the donee of a general power making an appointment for his own benefit. [Bramwell, B. In substance Susan Barker derived her interest from Elizabeth Lloyd. The cases seem to shew that, for the purpose of ascertaining whether any and what duty is payable, we must look to the substance of the transaction and not merely to the machinery by which it is carried into effect. Now, if Elizabeth Lloyd had appointed to herself in fee and then devised to Susan Barker, it is clear that duty at the rate of 10 per cent. would have been payable. It seems to me that the second part of section 4 throws a light on the former part. The circumstance that the legislature has said that where a person takes property by the exercise of a limited power of appointment he "shall be deemed to take the same as a succession derived from the person creating the power," seems to me to give rise to an inference that, where the power of appointment is general, the appointee does not take under the creator of the power.] It must be treated as settled by the [114] decision of the House of Lords, that what is done under a power of appointment must be referred to the deed by which the power is created.

Mellish appeared for the petitioner.

POLLOCK, C. B. It may be, that when we are considering whether the subject shall pay duty or not, and according to what scale it should be paid, he has a right to shew that by the substance of the transaction the lower rate of duty only is payable; and he may also have a right to avail himself of a technicality, and to say that the technical effect of the exercise of a power of appointment is the same as if the person creating the power had himself appointed the estate. Therefore, for the purpose of establishing a right to duty, the Crown must shew itself entitled both in substance and technicality. The subject has a right to say, "whatever may be the apparent substance of the transaction, technically I derive my interest, not from the person exercising the power of appointment, but from the person who created the power." We ought not to hold that the subject must pay the larger rate of duty because the transaction is capable of being viewed in different lights. The legal effect of the transaction is, that the person taking the benefit under the power takes it, not from the person exercising the power, but from the person creating it. Lord Kingsdown, in his judgment in the House of Lords, says,—“As regards the form of the conveyance by the execution of the power, the general rule of law is,—a limitation so created by the execution of the power must be read as if that was introduced into the deed creating the power.” That being the [115] general rule of law, we cannot apply another rule, or take some other view of it, so as to make the subject pay duty when, according to the form and technicality of the law, he is not liable to pay it. Where duty is claimed by the Crown, the Crown must have a right to claim it according to the form and technicality of the law, and also according to the substance of the transaction; and, unless both concur, the subject is not liable.

MARTIN, B. With respect to the 4th section, it seems clear that the person who is to pay the duty is the person who gets the succession. Then, according to the first part of the 4th section, the person exercising the power of appointment is to be deemed to have a succession, derived from the donor of the power. I think this applies to the case where a person having a general power of appointment exercises it in his own favour, and that the individual so exercising such power of appointment would thereby be deemed to have a succession. The section should be read—“Where any person under any disposition of property shall have a general power of appointment, taking effect on the death of the person dying after the time appointed for the commencement of this Act, over property, he”—that is, the person exercising the power—“shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property and interest thereby appointed,” as a succession derived from the donor of the power. But it is on taking a succession, that duty is to be paid by the 2nd section. The first part of the 4th section seems applicable to a person exercising the power; the second part having relation to the person in whose favour a power is executed. I therefore agree that 3 per cent. was the proper duty.

[116] BRAMWELL, B. I speak with diffidence, because my Lord and my two learned Brothers differ from me in opinion; but I should like to state why I do not agree with them. I need scarcely say I am not thinking of differing from anything said by the House of Lords in the case referred to. In fact, as I read the judgments, they are no authority for our holding that in this case the Crown is entitled to 3 per cent. only. The effect of the decision of the House of Lords appears to be, that we must look at the substance of the transaction. Lord Campbell says—“Did not the appellant take the Audley End Estates, in popular language and substantially, under a disposition made by himself?” And Lord Kingsdown said: “To deal with the case, as it is always more satisfactory to do, on the substance and real effect of the transaction, does the son take any estate?” And again, “I think we ought to look at the substance of the case.” Now, if in this case the devise had been to Mrs. Lloyd in fee, and she had devised the estate to Mrs. Barker, the latter must have paid 10 per cent. It is equally clear that if Mrs. Lloyd had exercised the power of appointment in her own favour, and given to herself an estate in fee, and then devised the estate to Mrs. Barker, the latter must have paid 10 per cent. Mrs. Lloyd has done what is in substance the same thing.

Then as to the words of the Act. By the 2nd section the term “successor” shall denote the person entitled, “and the term ‘predecessor’ shall denote the settlor, disponent, testator, obligor, ancestor or other person through whom the interest of the

successor shall be derived." It has been contended, and the Court is about to affirm, that Mrs. Lloyd, is not the person from whom the interest of Mrs. Barker was derived, in other words not the settlor, that is to say, she having the absolute property and power of disposing of it as she pleased, is not the settlor, nor did Mrs. Barker derive any interest [117] from her. That may be so; but any person, not being a lawyer or conversant with legal phraseology would say that it could not be so. The person whose bounty Mrs. Barker is enjoying was Mrs. Lloyd; and though I concede that we must deal with Acts of Parliament as lawyers, still, when I find plain language of this sort, I can not see how it can be said that Mrs. Lloyd is not the settlor from whom the interest of Mrs. Barker is derived, and therefore I think that the Crown is entitled to 10 per cent.

CHANNELL, B. The question is, whether the Crown is entitled to duty at the rate of 3 per cent. or 10 per cent. That depends on the construction to be placed on the 4th section of the Succession Duty Act, which is not carefully worded. It is difficult to put upon it a construction wholly free from doubt. I, however, am reasonably satisfied that the construction which the Attorney General has submitted is the right one. I think that, to uphold the construction put upon it by Vice Chancellor Wood would lead in many cases to great inconvenience. I have the satisfaction, in coming to that conclusion, of knowing that I decide in conformity with the view of the Lords Justices, and, as far as I understand it, the view of the House of Lords.

Assessment amended.

[118] CUMBERLAND *v.* COPELAND. June 7, 1861.—An assignment of copyright, made before the 5 & 6 Vict. c. 45 passed, must be in writing attested by two witnesses.

[S. C. 7 Jur. (N. S.) 686; 9 W. R. 752: reversed 1 H. & C. 194.]

The declaration stated that, before and at the time of the committing of the grievances by the defendant hereinafter mentioned, and after the passing of a certain act of parliament made and passed, &c. (3 & 4 Wm. 4, c. 15), the plaintiff was the proprietor of certain dramatic pieces, that is to say, "The Pilot," "The Happiest Day of My Life" and "The Youthful Queen," and had, as such proprietor, the sole liberty of representing, or causing to be represented, the said dramatic pieces at any place or places of dramatic entertainment whatsoever, in any part of the British dominions, and from thence hitherto hath been, and still is, the proprietor thereof, and possessed of the sole right and liberty aforesaid: Yet, while the plaintiff was the proprietor thereof as aforesaid, and had the sole liberty of representing and causing to be represented the said pieces as aforesaid, and after the passing of the said act of parliament, the defendant, contrary to the intent of the said Act, and without the consent in writing of the plaintiff first had and obtained, did cause each and every of the said dramatic pieces to be represented at divers places of dramatic entertainment situate in Great Britain, to wit, at the Royal Amphitheatre, &c., and at divers time, within twelve months before the commencement of this suit, to wit, "The Pilot" thirteen times, "The Happiest Day of My Life" five times, "The Youthful Queen" fifteen times, contrary to the form of the statute, &c., and contrary to the right of the plaintiff as such proprietor as aforesaid. By reason whereof, and by force of the statute, &c., the defendant has become and is liable to pay to the plaintiff, [119] so being such proprietor as aforesaid, and having such sole liberty as aforesaid, an amount not less than 40s. in respect of each and every such representation of each of the said dramatic pieces, or the full amount of the benefit or advantage arising from each and every of such representations, or the injury or loss sustained by the plaintiff therefrom whichever shall be the greater damages. And the plaintiff says that the sum of 40s. is the greatest damages recoverable by him, according to the form of the said statute, in respect of each representation of each and every of the said pieces by the defendant as above mentioned, whereof the defendant had notice: Whereby, and by force of the statute, &c., an action hath accrued to the plaintiff to demand and have from the defendant thirty-three several sums of 40s.: Yet the defendant hath not paid the same, or any part thereof.

Pleas. First: that the plaintiff was not the proprietor of, nor had he, as such proprietor, the sole liberty of representing the said pieces as alleged. Secondly: that the defendant did not cause the said pieces, or any of them, to be represented as alleged. Issues thereon.

At the trial, before Martin, B., at the Middlesex Sittings in last Easter Term, it appeared that the action was brought under the 3 & 4 Wm. 4, c. 15, to recover 40s. for each representation by the defendant at two theatres in Liverpool of the three dramatic pieces mentioned in the declaration. The defendant's counsel admitted the plaintiff's right to recover in respect of "The Pilot," and the plaintiff abandoned all cause of action in respect of "The Youthful Queen." With respect to "The Happiest Day of My Life," it was proved that, on the 15th of May, 1833, the plaintiff verbally agreed to purchase of J. B. Buckstone, who was the author and proprietor of that dramatic piece, the copyright of it, and seven other dramatic pieces, for [120] 37l. 18s. which was then paid. On the 30th of May, 1835, the following deed was executed by J. B. Buckstone:—

"Know ye all to whose presence this may come, that I, John Baldwin Buckstone, of Walcot Place, South Lambeth, in the county of Surrey, Esq., for and in consideration of the sum of 37l. 18s., paid to me on the 15th day of May, 1833, by Mr. John Cumberland, of Cumberland Terrace, Camden New Town, in the county of Middlesex, Publisher: Do hereby assign all and every my right, title and interest whatsoever in the copyright of and in my eight dramatic pieces, entitled 'Luke the Labourer,' 'The Happiest Day of My Life,' 'No. 23 John Street, Adelphi,' 'Billy Taylor,' 'Popping the Question,' 'The Ice Witch; or, the Frozen Hand,' 'Damon and Pythias,' and 'Open House; or, the Twin Sisters:' to have and to hold the aforesaid eight copyrights to the said John Cumberland, his executors, administrators and assigns, from and after the day of the date hereinbefore mentioned, as his and their absolute property. As witness my hand this 30th day of May, 1835.—(Signed) John B. Buckstone. (L.S.) Witness J. Lythgoe. Received on the 15th day of May, 1833, from Mr. John Cumberland, the sum of 37l. 18s., being the consideration money paid by him to me for the above named eight copyrights.—(Signed) John B. Buckstone."

Five representations of "The Happiest Day of My Life," by the defendant, without the leave or licence of the plaintiff, were admitted.

It was submitted, on behalf of the defendant, that the plaintiff had not a sufficient property in the dramatic piece entitled "The Happiest Day of My Life" to enable him to maintain this action, inasmuch as the deed of assignment was not attested by two witnesses, as required by 8 Anne, c. 19.

[121] The learned Judge being of that opinion, a verdict was entered for the plaintiff for 26l. in respect of "The Pilot," and leave was reserved to the plaintiff to move to increase the verdict by 10l., in respect of "The Happiest Day of My Life," if the Court should be of opinion that the assignment from J. B. Buckstone conveyed the title to the plaintiff.

Lush, in the present term, obtained a rule nisi accordingly, against which

Murray shewed cause. The assignment is invalid, not having been attested by two witnesses. The 8 Anne, c. 19, s. 1, imposed a penalty on any person who should print, reprint or import any book without the consent of the proprietor in writing, "signed in the presence of two or more credible witnesses." Until the year 1833, the author of a dramatic piece could not prevent any person from representing it at a theatre, his right being limited to a publication by printing. To remedy that mischief, the 3 & 4 Wm. 4, c. 15, passed. The 1st section of that statute, after reciting the 54 Geo. 3, c. 156, s. 4, which extended the term of copyright granted by the 8 Anne, c. 19, enacts that the author of any tragedy, comedy, play, &c., not printed or published by him or his assignee, "shall have as his own property the sole liberty of representing it at any place of dramatic entertainment," &c., "and shall be deemed and taken to be the proprietor thereof," &c.; "and that the author of any such production, printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this Act, or from the time of such publication respectively, until the end of twenty-eight years, &c., and also if the author [122] shall be living at the end of that period, during the residue of his life, have as his own property the sole liberty of representing it at a place of dramatic entertainment," &c. The 2nd section imposes a penalty on any person who shall

represent such production without the consent in writing of the author or proprietor thereof. The object of the legislature was to extend to dramatic authors the same right, with respect to the representation of their plays, as other authors enjoyed with respect to their books, and consequently, unless the plaintiff was an assignee of the copyright at the time that statute passed, he is not the "proprietor" within the meaning of it. The assignee of the copyright, and not the author who has assigned it, has the sole right of representation: *Cumberland v. Planché* (3 Nev. & M. 536; 1 A. & E. 580). It is clear that, under the 8 Anne, c. 19, an assignment must be in writing: *Power v. Walker* (3 M. & Sel. 7), *Clementi v. Walker* (2 B. & C. 861), and it must also be attested by two witnesses: *Davidson v. Bohn* (6 C. B. 456). It is true that in *Jefferys v. Boosey* (4 H. L. Cas. 815) some of the Judges were of opinion that, since the 54 Geo. 3, c. 156, an attestation by two witnesses was no longer necessary to the validity of the assignment; but Lord St. Leonards, Parke, B., and Alderson, B., considered that the 8 Anne, c. 19, and 54 Geo. 3, c. 156, might well stand together, and therefore the latter Act did not by intendment repeal the former. There it was not, however, necessary to decide the point. It is said that, assuming the copyright in the play did not pass under this assignment, still the sole right of representation passed, but that proposition cannot be maintained. The 8 Anne, c. 19, gave the author of a dramatic piece no right to prevent its representation, and therefore it is plain that, by the 3 & 4 Wm. 4, c. 15, the legislature intended to annex to [123] the copyright the additional right of sole representation. The two rights being at that time indivisible, it would be contrary to principle to hold that the right of representation passed, though the copyright would not pass without an assignment attested by two witnesses. Moreover, if the right of representation could have passed without such an assignment, it does not pass here, for there is no mention of it. The 5 & 6 Vict. c. 45, s. 22, shews that formerly the two rights were indivisible, for it provides that the assignment of the copyright shall not convey to the assignee the right of representing the dramatic piece, unless there is an entry in the register book of the assignment, expressing the intention of the parties that such right should pass by such assignment. Here, inasmuch as the assignment did not convey the copyright, it could not pass the sole right of representation.

Lush and C. Pollock, in support of the rule. This point has never been decided. It was discussed in *Jefferys v. Boosey* (4 H. L. Cas. 815), and the majority of the Judges were of opinion that an attestation by two witnesses was no longer necessary. It is important to consider how the doctrine originated that an assignment of copyright must be in writing, attested by two witnesses. Neither the 8 Anne, c. 19, nor the 54 Geo. 3, c. 156, in terms require it. The 8 Anne, c. 19, s. 1, enacts "that if any person within the times granted and limited by this Act shall print, reprint or import any such book, &c., without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses, or knowing the same to be so printed or reprinted, without the consent of the proprietors, shall sell, publish, &c., such book, such offender shall forfeit such book," &c. The only effect of [124] that enactment is to impose a penalty on any person who shall print or sell a book without the consent of the proprietor thereof in writing, attested by two witnesses; it makes no mention whatever of the manner in which the copyright must be assigned. But in *Power v. Walker* (3 M. & Sel. 7) Lord Ellenborough said "that the statute having required that the consent of the proprietor, in order to authorize the printing or reprinting of any book by any other person, shall be in writing, the conclusion from it seemed almost irresistible that the assignment must also be in writing; for if the licence, which is the lessor thing, must be in writing, a fortiori the assignment, which is the greater thing, must be also." And Dampier, J., "expressed himself to the same effect, and said that the assignment could only be under the statute, and therefore the plaintiff must shew that he was such an assignee as the statute required." That is the sole foundation for the doctrine that an assignment of copyright must be attested by two witnesses. Then the 54 Geo. 3, c. 156, s. 4, after reciting the 8 Anne, c. 19, enacts that "the author of any book or books, composed and not printed or published, or which shall hereafter be composed and be printed and published, and his assign or assigns, shall have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, to commence from the day of first publishing the same, and also if the author shall be living at the end of that period for the residue of his natural life," &c. It then

imposes a penalty on any person who shall, within the times granted by the Act, print, reprint, import or sell any such book without the consent of the author or other proprietor of the copyright "first had and obtained in writing." That enactment did not extend to existing copyrights, for it mentions only books "hereafter printed." [Bramwell, B. [125] The 8th and 9th sections contain provisions with respect to books "already published."] Then, in what manner could the author of a book, published after the 54 Geo. 3, c. 156, exonerate from penalties a person who printed or sold it? By consent in writing; not under the statute of Anne, a writing attested by two witnesses, for the provisions of that Act did not extend to books published after the 54 Geo. 3, c. 156, passed, but by a consent in writing under the latter Act. Therefore, assuming that, under the 8 Anne, c. 19, a licence and assignment must be in writing and attested by two witnesses, under the 54 Geo. 3, c. 156, no attestation is necessary; for the reason of requiring an assignment to be attested was that the 8 Anne, c. 19, required the licence to be attested; but since a licence in writing without attestation is sufficient under the 54 Geo. 3, c. 156, an assignment in writing without attestation is also sufficient. [Martin, B. It is established law that an assignment of copyright under the 8 Anne, c. 19, must be in writing, attested by two witnesses.] An assignment is treated only as an enlarged consent, and if attestation is not necessary in the one case, it is not in the other. *Davidson v. Bohn* (6 C. B. 456) is no authority on the construction of the 54 Geo. 3, c. 156, for that statute was not mentioned in the argument or judgment. If *Power v. Walker* (3 M. & Sel. 7) had occurred after the 54 Geo. 3, c. 154, and the Court had reasoned in the same way, they must have held that, as a consent required no attestation, an assignment required none. The 3 & 4 Wm. 4, c. 16, does not recite the 8 Anne, c. 19, but only the 54 Geo. 3, c. 156. The first section gives the author or his assignee the sole liberty of representing a dramatic piece; the second section imposes a penalty on any person who shall represent the same "without the consent of the author or proprietor." [126] In *Jefferys v. Boosey* (4 H. L. Cas. 815), Crompton, J., Erle, J., Coleridge, J., and Jervis, C. J., expressly held that, since the 54 Geo. 3, c. 156, an assignment of copyright need not be attested by two witnesses; and Lord Brougham adopted the same view. Then, what is the effect of the repeal of the 8 Anne, c. 19, by the 5 & 6 Vict. c. 45? Inasmuch as the statute which prescribed a particular mode of assignment has been repealed, it must be considered as if it had never existed: *Ex parte Grisewood* (1 De Gex & J. 544, 557). [Martin, B. There is an exception as to "any right or contract then subsisting."] The 28th section preserves subsisting rights not expressly affected by the Act. Here it is sought to destroy, not to preserve, a right.

POLLOCK, C. B. I am of opinion that the rule ought to be absolute. The plaintiff claims 10l., being 40s. for each of five representations of a play which had been assigned to him by the author, the assignment having been attested by one witness only. It appears to me that, as the law now stands, an assignment attested by one witness only, is valid, notwithstanding any former statute or decision to the contrary. In my judgment there is no statute or construction of a statute, nor any legal authority, opposed to that plain and simple view of the subject. A statute relating to copyright was passed in the reign of Queen Anne; two others were passed in the reign of George the Third; another was passed in the reign of William the Fourth, and the last was in the reign of her present Majesty. The 5 & 6 Vict. c. 45, absolutely repealed the 8 Anne, c. 19, the 41 Geo. 3, c. 107, and the 54 Geo. 3, c. 156; reserving, however, by the 28th section, rights subsisting at the time the 5 & 6 Vict. c. 45 passed. Therefore copyright which then existed did [127] not obtain its validity from the statutes of Anne or George the Third, but from the statutes at that time in force. Now, the right here claimed is a right under the 3 & 4 Wm. 4, c. 15, which created a new species of property. It is not a mere right; it is as much a property as the authorship of a book. The statute says that the author of any dramatic piece, or his assignee, "shall have as his own property the sole liberty of representing" it. Then who is the assignee? It is said that, by the 8 Anne, c. 19, a licence was required to be attested by two witnesses, and therefore an assignment ought to be attested in the same manner; but the answer is that the statute of Anne is repealed, and a statute repealed is as completely obliterated from the records of parliament as if it had never existed. The 43 Eliz. c. 6, s. 2, enabled a Judge to certify to deprive a plaintiff of costs where he recovered less than 40s.; and under the 22 & 23 Car. 2, c. 9, a plaintiff who recovered less than 40s. got no more costs than damages unless the Judge

certified. The 3 & 4 Vict. c. 24, which came into operation on the 3rd July, 1840, repealed both those enactments; and where a plaintiff, on the 27th June, 1840, recovered a verdict for 1s., but the Judge did not certify until the 9th of November (a) following, it was held that the certificate was null and void, and the legislature interfered by passing the 4 & 5 Vict. c. 28. Therefore I apprehend it is clear that we must look to the statutes now in force, and see whether this assignment is good under the law as it now exists. I am of opinion that it is. It seems to me that the case is not governed by the authorities relied on, and that neither *Power v. Walker* (3 M. & Sel. 7) nor *Davidson v. Bohn* (6 C. B. 456) are binding on us. If the construction put upon a statute is manifestly erroneous, we are bound to give it the [128] true construction, though I admit that, where the matter is doubtful, the Court would from what may be called the courtesy due to another Court of co-ordinate jurisdiction, pay attention to its decisions. I consider that a case, where the question of law is decided upon the refusal of a rule, is far less satisfactory than where the matter has been fully discussed and decided after hearing the arguments on both sides. In *Power v. Walker* (3 M. & Sel. 7) and *Davidson v. Bohn* (6 C. B. 456), instead of hearing the point argued, the Court decided it by refusing a rule. It seems to me, however, that *Power v. Walker* does not decide this case, but only that the assignment must be in writing; nothing is there said about attestation. It is true that, in *Davidson v. Bohn*, *Power v. Walker* was treated as if it had decided that an attestation by two witnesses was necessary, but it did not decide that point; and it is possible, that if the assignment had been in writing, the Court might have come to a different conclusion. It is supposed that, the 8 Anne, c. 19, being repealed, we are bound to transfer the construction put upon that Act to the 3 & 4 Wm. 4, c. 15, and hold that an attestation by two witnesses is necessary; but the administration of justice requires us to look at that Act and decide for ourselves, not to adopt a wrong decision upon a repealed statute, and where, if that decision had not taken place, I imagine no member of the Court would say that, under the statute law which now prevails, an assignment attested by one witness was not a valid assignment. For these reasons, I think that the rule ought to be absolute.

MARTIN, B. I regret that I cannot concur in the view of the Lord Chief Baron.

The facts are these:—On the 30th of May, 1835, Mr. Buckstone, the author and proprietor of a dramatic piece, [129] called “The Happiest Day of My Life,” purported to assign the copyright of that work to the plaintiff; and, in my judgment, unless on that day the proprietorship was assigned in a manner which the law then required, it now remains in Mr. Buckstone; and the 5 & 6 Vict. c. 25 protects Mr. Buckstone’s right, not the plaintiff’s. Therefore we must see what was the right of the plaintiff on the 30th May, 1835, after the execution of the deed of assignment; and for that purpose we must ascertain the true construction of the 8 Anne, c. 19, for whatever may have been the common law right on this subject, these rights are now governed by the statute law: *Millar v. Taylor* (4 Burr. 2303).

The 8 Anne, c. 19, begins by enacting that, from a certain day the author of any book already printed, who has not transferred to any other the copy of such book, or the person who has acquired the copy (which according to the true construction of this Act means the copyright) shall have the sole right and liberty of printing such book for the term of twenty-one years. Then, after enacting that the author of any book not printed shall have the same right for fourteen years, it imposes a penalty on any person who shall print or publish such book without the consent of the proprietor thereof (which clearly means the author), “first had and obtained in writing signed in the presence of two or more credible witnesses.” This Act is plain; it points out the person who shall be the proprietor of the work, and it speaks of others who shall print and publish without the consent of the proprietor. This statute was the subject of legal consideration in the case of *Davidson v. Bohn*, where it is clearly laid down that for the purpose of transferring the right of copyright, there must be an instrument in writing attested by two witnesses. It is the same [130] by judicial construction as if the statute had contained an enactment that the person by whom the property is acquired from the author must have it by writing under his hand attested by two witnesses.

Then comes 54 Geo. 3, c. 156, intituled “An Act to Amend the several Acts for

(a) *Morgan v. Thorne*, 7 M. & W. 401.

the encouragement of learning, by securing the copies and copyright of printed books to the authors of such books or their assigns." The 4th section recites: "And whereas by the said recited Acts of the eighth year of Queen Anne and the forty-first year of his present Majesty's reign, it is enacted that the author of any book or books, and the assignee or assigns of such author respectively, should have the sole liberty of printing and reprinting such book or books for the term of fourteen years, to commence from the day of first publishing the same, and no longer;" and it was provided that after the expiration of the said term of fourteen years the right of printing or disposing of copies should return to the authors thereof, if they were then living, for another term of fourteen years. It then further recites:—"And whereas it will afford further encouragement to literature if the duration of such copyright were extended in manner hereinafter mentioned:" (that recital points out that the author and the assignee of the author shall have an extended right). Then the statute enacts, that the author of any book and his assignee shall have the sole liberty of printing and reprinting such book for the full term of twenty-eight years, &c.; and that if any bookseller or printer, or other person whatsoever, shall print, reprint or publish the same without the consent of the author or other proprietor of the copyright first had and obtained in writing, he shall be liable to an action. It seems to me that the persons spoken of in this enactment as assignees are the legal assignees within [131] the meaning of the statute of Anne, and that the object of the enactment was to give such persons an extended right. Therefore, in order to ascertain who is an assignee entitled to the benefit of the 54 Geo. 3, c. 156, we must see who is an assignee under the 8 Anne, c. 19.

Then comes the statute upon which this question arises, the 3 & 4 Wm. 4, c. 15, which came into operation on the 10th of June, 1833. The first section recites, that by an Act passed in the 54 Geo. 3, it was provided and enacted that the author of any book and his assignee or assigns should have the sole liberty of printing such book for the term of twenty-eight years, and that it is expedient to extend the provisions of that Act; it then enacts that the author of any dramatic piece, or his assignee, shall have as his own property the sole liberty of representing it at any place of dramatic entertainment. The second section imposes a penalty on any person who shall represent any such production "without the consent in writing of the author or other proprietor first had and obtained." The prior part of this Act is taken verbatim from the 54 Geo. 3, c. 156, and the "assignee" means the lawful assignee according to the then state of the law. The 3 & 4 Wm. 4, c. 15, gives to the person who is an assignee within the 54 Geo. 3, c. 156, the additional advantage of the sole right of representation, which, for the reasons I have stated, is confined to the right which the plaintiff acquired before the 5 & 6 Vict. c. 45; and I conceive it my duty to hold that, inasmuch as Mr. Buckstone did not execute a transfer of his copyright by a writing attested by two witnesses, the property did not pass, and he is still the legal owner of it. I concur with the observations of Lord St. Leonards in *Jefferys v. Boosey* (4 H. L. Cas. 815). They seem to me to express the true law on this subject, [132] and being in accordance with my views, I adopt them as part of my judgment.

Then the only remaining question is, whether the 5 & 6 Vict. c. 45, has made any difference. It seems to me that it has not. It is intitled "An Act to amend the law of copyright." The first section recites that "It is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world." It then enacts, that from the passing of that Act, the 8 Anne, c. 19, 41 Geo. 3, c. 107, and 54 Geo. 3, c. 156, shall "be and the same are hereby repealed, except so far as the continuance of either of them may be necessary for carrying on or giving effect to any proceedings at law or in equity pending at the time of passing this Act, or for enforcing any cause of action or suit, or any right or contract then subsisting." If I am correct in my view, the right of representing this dramatic piece is in Mr. Buckstone, not in the plaintiff, by reason of the defect in the assignment; and if the 5 & 6 Vict. c. 45, has any bearing on the case, the plaintiff has no right under it. I regret it is so, for the transaction was perfectly honest, Mr. Buckstone intending to transfer his whole interest in the property to the plaintiff. No doubt, it is a hardship that the plaintiff has not got that which Mr. Buckstone intended to give him; but it is our duty to administer the law, not to make it. The plaintiff having, in my opinion, failed to establish that Mr. Buckstone transferred to him the copyright in this play, I think the rule must be discharged.

BRAMWELL, B. I am of the same opinion ; and my judgment is founded so much upon the reasons given by my brother Martin, that I doubt whether I ought to occupy time in mentioning my own, but as I understand the case [133] will be carried to a Court of error, it is right that I should shortly state them. If I had for the first time to construe the statute of Anne, I should not put upon it the construction which the Court did in *Power v. Walker* (3 M. & Sel. 7). It seems to me that the whole difficulty is attributable to the mistake which I cannot help thinking the Court made in that case. They construed the statute as requiring an assignment of copyright to be in writing, not as a consequence of the necessity of a licence in writing signed by two witnesses, in order to justify what would otherwise be a piracy ; but, as an inference or conclusion from such a licence being required, they considered that an assignment of copyright must also be in writing. That decision was corroborated in *Davidson v. Bohn* (6 C. B. 456), and recognized in the House of Lords, and it is now too late to question it. Therefore we must take it for granted that the statute of Anne was rightly construed when it was held that an assignment of copyright must be in writing attested by two witnesses.

That being so, the next question is, did the 54 Geo. 3, c. 156, make any difference ? I agree with my brother Martin that it did not. It seems to me that the effect of the decisions in *Power v. Walker* and *Davidson v. Bohn* is, that the statute of Anne must be read as if it contained an express enactment that an assignment of copyright shall be in writing attested by two witnesses, and that is not affected by the 54 Geo. 3, c. 156. It is true that if the 54 Geo. 3, c. 156, had been the only statute upon the subject, the Court of King's Bench would not have decided *Power v. Walker* as they did ; but having put that construction upon the statute of Anne, though the reason for requiring such a construction failed after the 54 Geo. 3, c. 156, was passed, it does not therefore follow that the 54 Geo. 3, c. 156, altered that which had been held to be the effect of the [134] statute of Anne. That opinion cannot be said to be confirmed by *Davidson v. Bohn*, because in that case the attention of the Court was not called to the 54 Geo. 3, c. 156 ; but it is an opinion expressed by Lord St. Leonards and Alderson, B., in *Jeffreys v. Boosey* (4 H. L. Cas. 815, 915, 995), and one in which I concur. Then, if so, the plaintiff has no copyright under the 8 Anne, c. 19, and 54 Geo. 3, c. 156.

But then it is said that these statutes are repealed. I confess I do not understand that argument. Suppose these statutes are repealed, would that give the plaintiff a title ? Certainly not. It would only be a repeal of those statutes which enabled a title to be acquired in a particular way. If they are repealed, the plaintiff not only stands without any title but without any capacity to acquire one, for nothing has been done under the 3 & 4 Wm. 4, c. 15. However, the 5 & 6 Vict. c. 45, does not repeal the 8 Anne, c. 19, and 54 Geo. 3, c. 156, as respects subsisting rights and contracts.

The result is that the plaintiff has no title to this copyright ; and the only remaining question is whether, having no title to the copyright, he has a right to claim the sole representation of this play. It seems to me the matter is not susceptible of argument. The 3 & 4 Wm. 4, c. 15, gives the sole liberty of representing a dramatic piece to the author or his assignee, but the plaintiff is neither the author nor assignee of this play. He has therefore no title to the copyright, and without it he cannot complain of the representation of this play. For these reasons I think that the rule ought to be discharged.

CHANNELL, B. I regret that any difference of opinion should exist ; but, upon the best consideration which I have been able to give this matter, I think that the rule should be discharged. The rule is to increase the damages, and [135] whether or no it should be made absolute depends on whether an assignment made before the 5 & 6 Vict. c. 45, and attested by one witness only, transfers the copyright. If there were any ground for saying that the 8 Anne, c. 19, and 54 Geo. 3, c. 156, have been altogether repealed, the case would be relieved of much difficulty ; but I am unable to adopt that view. It seems to me that the right of the plaintiff to increased damages does not depend solely on the 3 & 4 Wm. 4, c. 15, for the preamble of that Act recites the 54 Geo. 4, c. 156, and that it is expedient to extend the provisions of that Act. It seems to me preposterous to say that an enactment, the provisions of which are to be extended, is repealed. Then I go back to the 54 Geo. 3, c. 156, and ascertain whether that Act has repealed the provisions of the statute of Anne. I find that the 54 Geo. 3, c. 156, is an Act to amend the statutes relating to copyright and to extend the duration of the period for which copyright is to exist. Instead of a copyright for

fourteen years and, after the expiration of that period if the author be then living, for another term of fourteen years, the 54 Geo. 3, c. 156, gives to an author a copyright for twenty-eight years, and, if the author be living at the end of that period, for the residue of his life. Therefore I cannot understand that the 54 Geo. 3, c. 156, has repealed the statute of Anne; and I must regard that Act as still in force for some purposes. Then, if I cannot admit the argument that the 8 Anne, c. 19, and 54 Geo. 3, c. 156, have been repealed, the question is what construction has been put upon them by judicial decisions. I am not prepared to say that, if I had to construe those statutes for the first time, I should concur with the decisions in *Power v. Walker* and *Davidson v. Bohn*; but we cannot overrule them. If I am right in my view that the statute of Anne is in force for some purposes, I must construe it according [136] to the decisions, although not satisfactory to my mind. Looking at the date when the assignment was made, the view I entertain is not interfered with by the argument founded on the 5 & 6 Vict. c. 45.

POLLOCK, C. B., added,—I was under an impression that the assignment was made after the passing of the 5 & 6 Vict. c. 45, but I now find that it was made before that Act passed, and as the 28th section of the Act reserves all rights then subsisting, if at that time this copyright was in another person the plaintiff has no title to it.

Rule discharged.

HARDWICK v. MOSS AND ANOTHER. June 4, 1861.—A surveyor of highways is entitled to the protection of the 109th section of the 5 & 6 Wm. 4, c. 50, if he had reasonable ground for believing that he was acting under the authority of that statute.—Therefore where a parish directed their surveyor to erect a machine for weighing stones purchased for the highways, and he employed a labourer to make an excavation in a public road for the purpose of placing the machine there, and left the material dug out in a heap at night without any light, whereby the plaintiff's vehicle was overturned and himself injured: Held, that the defendant was entitled to notice of action.

[S. C. 31 L. J. Ex. 205; 7 Jur. (N. S.) 804; 4 L. T. 802. Principle applied, *Poulsum v. Thirst*, 1867, L. R. 2 C. P. 452. Explained, *Judge v. Selmes*, 1871, L. R. 6 Q. B. 728.]

The declaration stated, that the defendants wrongfully and carelessly made a certain excavation in a certain highway leading from Bradford to Leeds for the purpose of erecting a certain weighing machine there, and wrongfully and carelessly placed certain large quantities of earth, stones and rubbish, dug up from the said excavation, in a heap in and upon the said highway, and suffered and permitted the same to remain there during the night, without any light or means to prevent persons from driving against the same: whereby the plaintiff, whilst he was lawfully driving along the said highway in the night time, drove his horse and carriage against the said earth, stones and rubbish, and upset the said carriage; and the plaintiff, who was then riding in the said carriage was thereby and by reason of the premises greatly injured, &c.

[137] Plea. Not guilty (by statute 5 & 6 Wm. 4, c. 50). Issue thereon.

At the trial, before Keating, J., at the last Yorkshire Spring Assizes, the following facts appeared:—The defendants were the surveyors of highways for a parish in Armley, in the borough of Leeds. In May, 1860, a vestry meeting was held, pursuant to a resolution of the board of surveyors of highways in the township of Armley, at which meeting it was resolved that it would be to the advantage of the town if a weighing machine were erected to check the weight of materials purchased for the use of the highways, and the surveyors were accordingly authorized to purchase one. No directions were given as to where it was to be placed. In order to carry into effect the resolution of the vestry, the defendants employed a labourer to make an excavation in the road leading from Bradford to Leeds for the purpose of placing the weighing machine there; and in so doing he threw the stones and earth dug out of the excavation into a heap in the road. The heap stood at a turning of the road, leaving a space of about twelve yards clear. There was no light in the night time to indicate the spot. In October, 1860, the plaintiff was driving, with other persons, in a dog-cart along the road from Bradford to Leeds, when, the night being dark, he

drove against the heap and, the vehicle being overturned, was severely injured. No notice of action was given.

It was submitted, on behalf of the defendants, that they had acted *bonâ fide* in the execution of their duty as surveyors, and were therefore entitled to notice of action under the 109th section of the 5 & 6 Wm. 4, c. 50. The learned Judge reserved the point, and a verdict was found for the plaintiff, with 70l. damages.

Temple, in last Easter Term, obtained a rule nisi to enter a nonsuit, pursuant to the leave reserved; against which

[138] Overend, Mellish and Quain shewed cause in the present term (May 31). The defendants are not within the protection of the 109th section of the 5 & 6 Wm. 4, c. 50, which enacts that "no action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this Act until twenty-one days' notice has been given thereof in writing," &c.; "and if the matter or thing shall appear to have been done under or by virtue of this Act, or if it shall appear that such action or suit was brought before twenty-one days' notice thereof given," &c., "the jury shall find a verdict for the defendant." This was not a matter or thing done under or by virtue of the Act. The Act does not authorize the digging a hole in a public highway for the purpose of placing on it a weighing machine. The rule laid down in *Smith v. Hopper* (9 Q. B. 1005) is, that those persons are within the protection of the clause who, although their act be not legally justifiable under the statute, act in a *bonâ fide* belief that they are executing some particular provision of the statute, provided such belief be not utterly unreasonable. There Lord Denman, C. J., in delivering the judgment of the Court, said that "several decisions have established that *bonâ fides* is not alone sufficient." . . . "And some of the cases have said (properly in our opinion) that it is not enough for the defendant to have thought generally that he possessed the power to do what was done; he must also think that it was done in execution of some particular provisions of the statute which applies." If that is the correct rule, no notice was necessary in this case. The language of the 109th section of the 5 & 6 Wm. 4, c. 50, justifies the conclusion that there must be some provision in the statute which the defendants had reasonable ground for supposing authorized them to do the act; for the words of that section are [139] not, no action shall be commenced "for anything done by him in the execution of his office," as in the Act relating to justices (24 Geo. 2, c. 44, s. 1), but no action shall be commenced "for anything done in pursuance of or under the authority of this Act." Therefore it is not enough that the act is done as surveyor, but it must also be done under an authority conferred by the statute. In *Davis v. Curling* (8 Q. B. 286), where a surveyor was charged with leaving gravel on the road for an unreasonable time, it was held that he was within the protection of the 5 & 6 Wm. 4, c. 50; but there the act complained of was committed in the course of his official duty. So in *Smith v. Shaw* (10 B. & C. 277), which was an action against a Dock Company for injury done to a vessel by reason of the improper directions of the Dock Master in transporting her into the docks, it was part of the duty of the Dock Master to direct the mooring of vessels. But, in *Lawson v. Dumlin* (9 C. B. 54), it was held that a Trinity House pilot, who, in navigating a vessel, negligently ran against and damaged another vessel, was not within the protection of the Pilot Act, 6 Geo. 4, c. 125. The party against whom the action is brought must have reasonable ground for supposing that the thing done by him was done in execution of or under the authority of the Act: *Cook v. Leonard* (6 B. & C. 351). Unless the act done is authorized by the statute, it is not an act done under or by virtue of the statute: *Edge v. Parker* (8 B. & C. 697), *Hopkins v. Crowe* (4 A. & E. 774). It is different where an authority is conferred by statute, and a party does an act under a *bonâ fide* but mistaken belief that he is acting in execution of the statute: *Cann v. Clipperton* (10 A. & E. 582). Since there is no provision in the 5 & 6 Wm. 4, c. 50, [140] authorizing surveyors to erect a weighing machine on a highway, the case falls within the principle of the decision in *The Proprietors of the Witham Navigation v. Pudley* (4 B. & Adol. 69). [Bramwell, B. A surveyor has authority to do all that is necessary in relation to the highway, and the vestry considered it necessary that there should be a weighing machine.] The true test is whether the defendant had reasonable ground for supposing that he was acting in the execution of some provision in the statute: *Kine v. Evershed* (10 Q. B. 143), *Arnold v. Hamel* (9 Exch. 404), *Read v. Coker* (13 C. B. 850). *Duncan v. Findlater* (6 Cl. & F. 894) has no application, for that was the case of trustees appointed under a

Public Road Act. The excavation of the highway being a wrongful act, the defendants are responsible for the negligence of their servant in executing it: *Ellis v. The Sheffield Gas Consumers Company* (2 E. & B. 767), *Burgess v. Gray* (1 C. B. 578), *Hole v. The Sittingbourne and Sheerness Railway Company* (6 H. & N. 488). They also referred to *The Attorney General v. The Sheffield Gas Consumers Company* (3 De Gex., Mac. & G. 304).

Temple, in support of the rule. The defendants were acting in the execution of their office as surveyors, and were therefore entitled to notice of action. By the 6th section of the 5 & 6 Wm. 4, c. 50, the inhabitants of every parish maintaining its highways are required, at a vestry meeting, to elect a surveyor, "who shall repair and keep in repair the several highways in the parish." By the 27th section the surveyor is empowered to levy a rate, which is to be expended in the repair of the highways. Since materials must be purchased with the money collected by the rate, it [141] is essential that there should be some means of weighing those materials, in order to ascertain whether the rate is properly expended. A weighing machine is therefore required, and, as it cannot be placed on the land of private individuals, the surveyor must of necessity make an excavation in part of the highway for the purpose of placing the machine there. *Smith v. Hopper* (9 Q. B. 1005) is an authority in favour of the defendants, for it cannot be doubted that the defendants believed that they were acting under the authority of the Act. The defendants may be liable to the penalty imposed by the 56th section for allowing stones to remain on the highway at night to the danger of any person passing thereon, but they are not liable in this action.

The argument having been adjourned,

POLLOCK, C. B., now said—We are all of opinion that the rule must be absolute. It seems to me that the rule laid down in *Smith v. Hopper* (9 Q. B. 1005), viz., that to entitle a defendant to notice in action, he must have acted in the bonâ fide belief that he was executing some particular provision of the statute, is far too narrow. In my judgment, if the act is done by a public officer in his capacity of public officer, with reasonable ground for believing that he was authorized by the statute to do it, he is entitled to notice of action. In this case there is no doubt but that the parish was bound to repair the highways, and for that purpose the surveyor must bring stones and pay for them—usually, I believe, according to weight, and consequently a weighing machine must be provided. In this case the parish gave directions that a weighing machine should be erected to check the weight of materials purchased for the use of the [142] highways, and the defendants were carrying out those directions when the accident occurred. I therefore think that they were acting in a public capacity, as surveyors of highways, and that they had reasonable ground for believing that they were acting under the authority of the Act.

MARTIN, B. I did not hear the whole of the argument, but, so far as I have heard it, I concur in opinion.

BRAMWELL, B. At first I was inclined to agree with the view contended for by the plaintiff; but the defendants have shewn that they had authority to erect the machine, and I think that in doing so they had reasonable ground for believing that they were acting under the authority of the Act.

CHANNELL, B. I am of the same opinion. I think it is established that the defendants had reasonable ground for believing that they were acting under the authority of the statute, and that, in my judgment, is sufficient to entitle them to notice of action.

Rule absolute.

[143] TAYLOR v. VERGETTÉ. June 12, 1861.—In an action, upon the 17 & 18 Vict. c. 102, for bribery at an election of a member of parliament, alleged to have been committed in April 1859, the writ issued on the 15th March, 1860, and was served on the 27th April following. An appearance was entered on the 4th May, 1860, and the declaration was delivered on the 17th April, 1861. On the 25th April, 1861, the defendant pleaded; and issue was joined on the 7th May, 1861, but in June 1862, the plaintiff had not proceeded to trial. Held, a "wilful delay" within the meaning of the 14th section of the 17 & 18 Vict. c. 102; and the Court stayed the proceedings.—Semble, that the application to stay the proceedings should have been made before plea.

—Also, that such delay could not be pleaded, but is only ground for an application to the Court to stay the proceedings.

[S. C. 30 L. J. Ex. 400; 9 W. R. 791; 4 L. T. 523.]

This was an action, upon the statute 17 & 18 Vict. c. 102, to recover three penalties of 100l. each, for alleged bribery by the defendant at an election for a member of parliament for the borough of Peterborough in the county of Northampton.

The writ issued on the 15th of March, 1860, and was served on the 27th of April, 1860. An appearance was entered on the 4th of May, 1860, and the declaration was delivered on the 17th of April, 1861. On the 25th of April, 1861, the defendant pleaded, "not guilty" (by statute 21 Jac. 1, c. 4, s. 4); and issue was joined on the 7th of May, 1861.

Field, in the present term (June 1), obtained a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to add the following pleas. First: that the writ was not issued within one year after the offence committed. Secondly, to the further maintenance of the action: the same plea. Thirdly, to the whole: that the action was not proceeded with without wilful delay. Fourthly, to the further maintenance of the action: the same plea. Or why all proceedings should not be stayed (a) on the grounds alleged in the said pleas.

[144] The affidavit of the defendant stated, in addition to the above facts; that no step was taken by the plaintiff between the 27th of April, 1860, and the 17th of April, 1861, and that during the whole of that period the defendant resided and carried on business in Peterborough to the knowledge of the plaintiff, who was an attorney at Peterborough: that there was no good cause or reason whatever for the delay which has taken place in proceeding with the action; and the deponent believed that the delay has been wilful and has taken place from a desire to annoy and prejudice the defendant, and to keep the charge of bribery hanging over his head and undisposed of as long as possible. The affidavit also stated that the defendant had a good defence to the action on the merits.

The affidavit of the plaintiff in answer stated, that the alleged bribery took place in April, 1859: that the time taken in prosecuting the action was such as the rules and practice of the Court allowed; and which time he had used in such a manner as appeared to him most convenient under the circumstances of the case; that he had not nor ever had any desire to annoy or prejudice the defendant, but was actuated solely by a desire to visit the penalties attached to bribery upon the defendant, with a view, by this action, to prevent a repetition of bribery at future elections at Peterborough: that there was a difficulty in getting the witnesses, and he had been unable until lately to obtain the information and evidence upon which he had been advised [145] to make the specific charges in the declaration in this action: that he could not bring the action to trial at an earlier period, with a fair prospect of success, than at the ensuing Summer assizes.

Macaulay and T. Chitty shewed cause. First, there is no ground for allowing the proposed additional pleas. The first and second are answered by the fact as stated in the plaintiff's affidavit. With regard to the third and fourth, wilful delay is not a matter which can be pleaded in bar to the action, but only affords ground for an application to the Court to stay the proceedings. Secondly, there has been no "wilful delay" within the meaning of the 17 & 18 Vict. c. 102, s. 14. Each step has been taken within the time allowed by the rules and practice of the Court; and circumstances over which the plaintiff had no control have prevented him from proceeding to trial.

(a) 17 & 18 Vict. c. 102, s. 14. "No person shall be liable to any penalty or forfeiture hereby enacted or imposed, unless some prosecution, action or suit for the offence committed shall be commenced against such person within the space of one year next after such offence against this Act shall be committed, and unless such person shall be summoned or otherwise served with writ or process within the same space of time, so as such summons or service of writ or process shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the Court out of which such writ or other process shall have issued; and in case of any such prosecution, suit, or process as aforesaid, the same shall be proceeded with and carried on without any wilful delay."

In *Petrie v. White* (3 T. R. 5, 10), Buller, J., said :—"What is meant by wilful delay in carrying on a suit in a Court of law, necessarily depends on the practice of that Court in which it is commenced. The legislature has thought fit to leave it to the discretion of the Court to judge, according to the practice of the Court, whether there be any wilful delay or not." In that case there was a delay of six years in proceeding to trial after issue joined. Here the delay is shewn to have been unavoidable.

Field appeared in support of the rule, but was not called upon to argue.

POLLOCK, C. B. I am of opinion that the rule ought to be absolute to stay the proceedings. It seems to me that [146] there has been such wilful delay as was intended to be prohibited by the 17 & 18 Vict. c. 102, s. 14. Although the delay is not so great as in *Petrie v. White* (3 T. R. 5), where the proceedings were suspended for six years, yet the bribery is alleged to have taken place in April, 1859, the action was not commenced until nearly a year afterwards, and the declaration was not delivered until April, 1861. The circumstances relied on as an excuse afford, in reality, no excuse. The plaintiff should have shewn in what way he meant to establish his case, and how the delay arose. He ought not to keep a proceeding of this kind hanging over the defendant's head without some reasonable excuse. It appears that both the plaintiff and defendant resided in the same town; and it is no more an answer to say that the plaintiff has not exceeded the time allowed by law for declaring than to say that there has not been so much delay as in the case of *Petrie v. White*. The plaintiff can, if he desires it, have the matter investigated by preferring an indictment; but since he has allowed two assizes to elapse without proceeding to trial, I think we ought to stay the proceedings.

MARTIN, B. I am of the same opinion. If we are to give any effect to the statute, I think this is a case in which we ought to interfere. With respect to the first branch of the rule, I am disposed to think that the non-commencement of the action, within the period prescribed by the statute, might be given in evidence under the general issue; though no doubt, to avoid all difficulty, the defendant was advised to plead the fact specially. But I think that the third plea could not be allowed. The allegation contained in it, is not the subject of a plea, but only ground for application to the Court to stay the proceedings. It is unnecessary, however, to consider the pleas, because in my judgment we ought to stay the proceedings on the ground of wilful delay. What are the facts? The bribery is alleged to have taken place in April, 1859, yet the writ did not issue until the middle of March, 1860. More than a month was allowed to elapse before the writ was served, although both plaintiff and defendant resided in the same town. The defendant entered an appearance within the proper time, but no declaration was delivered until more than eleven months afterwards. If ever there was evidence of wilful delay in proceeding with a suit, it is in this case. Then what is the plaintiff's excuse for this delay? It is that he has taken the time allowed by the practice of the Court, and that he has been unable to get the evidence requisite to try with success. That may be very true; but it affords no excuse for this delay. A person should not bring an action of this kind on speculation, but he ought, before he commences proceedings, to ascertain whether he has evidence to support it; and when he has commenced proceedings he should be prompt and regular in continuing them, so as not to keep the action hanging over the head of the defendant an unnecessary length of time. The question is, whether there has not been "wilful delay" within the meaning of the statute. The term "wilful delay" does not mean "perverse delay," but delay which the plaintiff cannot account for to the satisfaction of the Court in which the action is commenced. If the Court see that the action might have been commenced and prosecuted more speedily, and no sufficient reason is assigned for the delay, the plaintiff is undoubtedly guilty of "wilful delay." That has been so here; and I think this a clear case for staying the proceedings. As the enactment does not apply to criminal proceedings the plaintiff may still proceed by indictment. The only doubt I have had is, whether the application [148] to stay the proceedings ought not to have been made immediately after declaration and before plea; and as that has not been done, the rule will be absolute without costs.

Rule absolute accordingly.

THE WOLVERHAMPTON AND STAFFORDSHIRE BANKING COMPANY v. MARSTON, Executrix, &c. June 12, 1861.—An executrix, after probate and after judgment recovered against her for a debt due from her testator, by deed assigned all his property and effects to trustees for the benefit of his creditors. Held, that the assignment was valid, as against the judgment creditor.

[S. C. 30 L. J. Ex. 402; 7 Jur. (N. S.) 1040; 9 W. R. 790; 4 L. T. 524.]

In this case the defendant was executrix of her late husband, who had devised to her the whole of his property, subject to the payment of his debts. The plaintiffs had recovered judgment against the defendant, as such executrix, in an action on a bill of exchange accepted by the testator, and thereupon a writ of *fi. fa. de bonis testatoris* was issued. Upon the sheriff proceeding to levy under the writ, the goods seized were claimed by certain persons under a deed of assignment, executed by the defendant after probate of the will and after judgment, but three days before the execution, whereby she assigned all the property and effects of the testator to the claimants in trust to realise the same and pay the proceeds to his creditors. The sheriff thereupon took out an interpleader summons at Chambers, and when the parties attended before the Judge, it was agreed that the Court should determine their rights without an interpleader issue.

Gray, for the claimants. The assignment is valid, and passed the property to the trustees. It may be, that the executrix is liable for a *devastavit*, or perhaps a Court of equity would interfere; but, as the property of the testator [149] was legally vested in her, she had a perfect right to convey it. It is not suggested that there is any fraud in the transaction, and consequently there is nothing to invalidate the conveyance.

Raymond, for the execution creditors. The assignment is void as against the execution creditors. The executrix was bound to distribute the assets of the testator according to law; but instead of executing the trust which the law imposed on her, she has in fact delegated her authority to the claimants. But an executor cannot delegate his authority: Williams on Executors, p. 222, 5th ed. The executrix, in making the assignment, committed a breach of trust, and the claimants can acquire no title as against a previous judgment creditor. [Martin, B. In Sheppard's Touchstone, chap. 23, p. 474, it is laid down that an executor "may give or sell any of the goods or chattels; he may pay any of the debts due from, and receive or release any debts due to, the deceased."] That has no application to an assignment of the entire effects of the testator after a judgment obtained by one of his creditors against the executrix. There is a wide distinction between such an assignment of the assets and a sale of them for the purpose of paying debts. [Martin, B. A mere judgment is no direct charge on goods.] In *Tolpelt v. Wells* (1 M. & Sel. 395), it was held that a judgment confessed by an executrix to a creditor of the testator, as well for his own debt as in trust for the debts of many of the creditors, could not be pleaded in bar to an action brought against her by another creditor of the testator. There Lord Ellenborough said:—"The law is, that an executor upon action brought against him by a creditor of his testator has his hands tied, so that he cannot afterwards make any payment to the prejudice of that creditor." And Bayley, J., said:—"Where [150] an action is brought by a creditor of the testator against his executor, the executor is restrained from paying any other creditor in equal degree except upon compulsion."

Andrews appeared for the sheriff.

POLLOCK, C. B. I am of opinion that the assignment of the testator's effects by his executrix to trustees, for the benefit of his creditors, is valid as against the plaintiffs, who are the execution creditors. The case seems to me to fall within the principle of the decision in *Pickstock v. Lyster* (3 M. & Sel. 371), where a debtor, being sued by one of his creditors, pending the suit and before execution assigned all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken; and it was held that the assignment was not fraudulent within the 13 Eliz. c. 5, although made with the intent to delay the creditor who sued. It was there said that such an assignment was for the benefit of all the creditors, to procure an equal distribution amongst all of the fund to which all had an equal right, against one who had gained the first step upon them; and the assignment was

referred to an act of duty rather than of fraud, arising out of a discharge of the moral duties attached to the character of debtor, to make the fund available for the whole body of creditors. Then, if a debtor may make such an assignment, why may not his personal representative make it? Applying the principle of the decision in *Pickstock v. Lyster* (3 M. & Sel. 371), I think that this assignment is valid, notwithstanding its object was to defeat a particular creditor.

MARTIN, B. I entertain no doubt that this assignment is valid, and vested the property in the assignees. An executor may sell and dispose of the testator's effects, or distribute them amongst the body of creditors,—in fact he has [151] as much dominion over them as the testator had when alive.

WILDE, B. I also think that the assignment is valid. Whether or no the executrix committed a *devastavit* is another question. Upon that I give no opinion.

Order that the claim of the execution creditors be barred.

FORD v. LACY. June 11, 1861.—In trespass to land, the venue being laid in Essex, it was proved that the river Lea had formerly been the boundary of the counties of Essex and Middlesex; that the whole of its bed was in the parish of W. and in the county of Essex. The piece of land in question, which was a narrow slip on the Middlesex side of the river, extending from the river bank to some posts, had originally formed part of the bed of the river but had been left dry. The plaintiff, the tenant of the farm on the Essex side of the river, had cut and carried away the grass on the land in question every year since 1814. Vicarial tithes for the parish of W. had been collected upon it; it had been rated in W., and included in perambulations of the parish of W. A witness proved that it had always been reputed to be in W. The defendant, the occupier of a large meadow adjoining the slip in question, proved that by an award made under an Inclosure Act in 1804 the whole of the land up to the river was allotted to his landlord; and that cattle put on the meadow had always grazed over the slip in question, there being no fence to separate them. The learned Judge asked the jury: First, whether the pieces of land in question were in the county of Essex? Secondly, whether they were in the parish of W.? Thirdly, whether they were in the possession of the plaintiff? Fourthly, whether they were the property of the defendant's landlord? The jury having answered the first three questions in the affirmative and the last in the negative: Held, that the Judge was not bound to have directed the jury that land left by a river becomes part of the adjoining property and county.

[S. C. 30 L. J. Ex. 351; 7 Jur. (N. S.) 684. Adopted, *Great Western Railway of Canada v. Braid*, 1863, 1 Moore, P. C. (N. S.) 101. Referred to, *Foster v. Wright*, 1878, 4 C. P. D. 447; *Hindson v. Ashby*, [1896] 2 Ch. 12.]

Declaration. That the defendant broke and entered certain land of the plaintiff's, situate at Walthamstow in the county of Essex, abutting towards the north and east on the river Lea; towards the west, on land in the possession of the defendant, &c., and cut grass there, &c.

Pleas. First: not guilty. Secondly: not possessed. Thirdly: that the close was the land and freehold of T. Beale, and that the defendant, as the servant and by the command of T. Beale, committed the trespasses, complained of. Fourthly: that before the alleged trespasses T. Beale being seised in fee of the said lands demised the same to the defendant for a term not yet expired, by virtue whereof the defendant entered upon the land and became possessed thereof for the term, whereupon the defendant in his own right during the term committed the trespasses.

[152] The plaintiff took issues on the pleas.

At the trial, before Wightman, J., at the last Assizes for the county of Essex, it appeared that the action was brought for a trespass on certain narrow slips of land situate on the Middlesex side of the river Lea, and which had originally formed part of its bed but had been left dry. There was evidence that the river Lea had been the boundary of the county of Essex and of the parish of Walthamstow, and that the whole of the bed of it was in that county and parish. The plaintiff, who was the occupier of the ferry-house and land in Walthamstow, proved that ever since 1814, the defendant's landlord, Beale, and his tenants, had mowed the grass on the adjoining

land, but the owners of the ferry-house and their tenants had mowed the grass on these slips of land, carrying the hay away in boats; that they had planted willow trees upon the land, and had paid rates for it. The land had always been rated in Walthamstow and never in Edmonton. Vicarial tithes for the parish of Walthamstow had been collected upon it. There were boundary posts and a declivity shewing where the bed of the river had formerly been. One Humphreys, a surveyor, proved that in 1808 he had perambulated the parish of Walthamstow. He produced notes of the perambulation, and stated that he went with the others to the Edmonton side of the river as far as the posts; that the pieces of ground in dispute were said by the persons who walked to be in the parish of Walthamstow. He also said that these pieces of land were always reputed to be in the county of Essex. In an ancient parish map, produced from the vestry of the church, the lands appeared to be in Walthamstow. On cross-examination, the plaintiff admitted that the owners of the ferry-house had never put cattle on the land; and that cattle had been allowed to stray upon it from an extensive meadow belonging to Beale, the defendant's landlord, which adjoined the slips in question, and was not separated from them by any fence.

[153] The defendant's case was, that the land belonged to Beale and that it was in Middlesex. He contended that, though the river Lea might change its course, in law it continued to be the boundary of the two counties. He put in the Edmonton Enclosure Act, 40 Geo. 3 (not printed), and the award of the Commissioners made under it in 1804, shewing that the allotment to Beale extended to the river side. Witnesses called by the defendant said that the river was the boundary of the county of Middlesex; and an old map of Essex was produced shewing the river as the boundary of the county of Essex. The witnesses said that the cattle on the meadow had always grazed over the land, but did not deny that the plaintiff had mowed the grass every year for fifty years.

The learned Judge left it to the jury to say: First, whether the pieces of land were in the county of Essex? Secondly, whether they were in the parish of Walthamstow? Thirdly, whether they were in the possession of the plaintiff? Fourthly, whether they were the property of Beale, the defendant's landlord? His lordship stated at the same time that the answer to the last question would, in the judgment of the jury, probably depend on the acts of ownership exercised by the defendant's landlord, which were consistent with and probably shewed the existence of a right of common. The jury having answered the three former questions in the affirmative, and the last in the negative, the verdict was entered for the plaintiff.

Lush, in Easter Term, obtained a rule for a new trial, on the ground that the learned Judge ought to have directed the jury that land left by a river becomes part of the adjoining property and county. He referred to Schultes on Aquatic Rights, p. 138.(a)

[154] Hawkins and Garth now shewed cause. The land in question was a shelving bank on which boundary posts were placed. The plaintiff for forty-seven years had cut the grass on the strip of land between the river and the posts. The defendant and his predecessors had cut the grass up to the posts, leaving that which was beyond. It was proved that the land had been walked over in two perambulations of the parish of Walthamstow, and that it had always been rated in that parish. No witness proved that it was ever deemed to be in the county of Middlesex. Where a county is bounded by a river, the question to what county land which has been left by the receding of the water belongs, may, in the absence of evidence, be matter of presumption; but in the present case there was distinct evidence that this land was in Essex. [Pollock, C. B.

(a) The passage is as follows:—"Thus, by a series of legal opinions established on the basis of reason, and deduced from the earliest periods of our juridical history, it must conclusively follow, that all islands, relict land, and other increase arising in the sea and in navigable streams, except under local circumstances before alluded to, belong to the Crown; and that all islands, relict land and the soil of inland unnavigable rivers and streams, under similar circumstances, belong to the proprietors of the estates to which such rivers act as boundaries; and hence it may be considered as law, that all islands, sand-beds, or other parcels of agglomerated or concreted earth which newly arise in rivers, or congregate to their banks by alluvion, reliction, or other aqueous means, as is frequently to be observed in rivers where the current is irregular, such accumulated relict property belongs to the owners of the neighbouring estate."

If for fifty years the land has been treated as part of the county of Essex, we must presume that the water receded suddenly.] The passage from Schultes' *Aquatic Rights* must be taken with some qualification. In Hale's *De Jure Maris*, part 1, c. 4, it is said :—"If a subject hath had by prescription the property of a certain tract, or creek, or navigable river, or arm of the sea, even while it is covered with water, by certain known metes or extents; this, though it should be relieted, the subject will have the propriety in the soil re-[155]-lietted." The plaintiff here is in the same position as if he had built a wall to inclose his own land, so that the boundaries of it were known. [Pollock, C. B. If the outline of the land is altered imperceptibly, and no notice is taken of it, the conclusion is that the accretion belongs to the county which it adjoins; but if there are fixed boundaries recognised every two or three years the rule does not apply. Is there any distinction between the boundaries of counties and those of the lands of private owners? Martin, B. The real question is, whose property is the land?] It was proved that for about fifty years the plaintiff cut all the grass, though the defendant's cattle were in the habit of coming upon the land. Under these circumstances, if the verdict had been for the defendant on the fourth issue, it would have been against the evidence.

T. J. Clarke, in support of the rule. There was no evidence that these pieces of land were in the county of Essex in 1804. The Edmonton Enclosure Act and award shew that in that year Beale, the defendant's landlord, had a good title to the land up to the river. It should have been left to the jury to say whether this land was afterwards gained by gradual accretion or otherwise. The attention of the jury was not sufficiently called to the state of the law on this point. The decision in *Rex v. Lord Yarborough* (3 B. & C. 91) is rested by Abbott, C. J., in delivering the judgment of the Court, on the ground that the accretion was gradual, and must be deemed imperceptible, since the increase could not be observed when actually going on, though a visible increase took place every year. In *The Abbott of Ramsay's case* (Dyer, 326 b.) a claim to sixty acres of land left by alluvion was established against the Crown. One of the reasons for the rule is stated by Best, C. J., in [156] *Gifford v. Lord Yarborough* (5 Bing. 163, 166), to be that "much land, which would remain for years, perhaps for ever, barren, is in consequence of this custom rendered productive as soon as it is formed." The title of the adjoining owner is not affected merely because the old boundary line is capable of being ascertained. That appears from the case of *In re the Hull and Selby Railway* (5 M. & W. 327, 332).

MARTIN, B. I think that the rule must be discharged, and in that opinion the Lord Chief Baron, who has left the Court, concurs. I assume that the law is correctly laid down by Lord Hale, *De Jure Maris*, part 1, c. 1, "If a fresh river between the lands of two lords or owners do insensibly gain on one or the other side, it is held (22 Ass. 93) that the propriety continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds." And again, part 1, c. 4, "If the mark remain or continue, or extent can reasonably be certain, the case is clear." Here the real point was involved in the third and fourth questions which were left to the jury, viz., were these pieces of land in the possession of the plaintiff? and did they belong to the defendant's landlord? On these points the evidence appears to have been one way. The plaintiff planted trees on the land and cut the grass upon it. All that can be suggested against the direction of the learned Judge is, that he did not call the attention of the jury to the law as laid down by Lord Hale. But on the evidence there seemed hardly any necessity for him to advert to it.

BRAMWELL, B. I do not dissent from any of the propositions of law stated by Mr. Clarke. For myself I am inclined to think that this was in fact a case of gradual [157] accretion, where the land ought to have belonged to the defendant's landlord. Possibly there were considerations which shewed that it did not. Mr. Clarke is right when he says that the adjoining owner is entitled to the benefit of gradual accretions. But he fails to shew that there was any misdirection. A Judge is not bound to submit every perplexing point to the jury, and in case of non-direction we are only bound to interfere when the verdict is against evidence, and part of the explanation of the miscarriage is that the Judge omitted to direct the jury properly. But the rule is not moved on the ground that the verdict is against evidence. Therefore, without saying that I am satisfied with the verdict, or that the defendant ought not to have succeeded; without saying that it would not have been better that the learned Judge

should have adverted more fully to the law of accretion; I think that the direction was sufficient, and therefore the rule must be discharged.

CHANNELL, B. I agree that the rule must be discharged. If I am at liberty to review the evidence, I cannot say that I think it was all one way. But it is not necessary to do that, because the rule was not moved on the ground that the verdict was against evidence. As to the ground of misdirection, four questions were left to the jury. In a certain sense the question of imperceptible accretion was properly left to the jury, and they must have considered it. It is said that it was a misdirection of the learned Judge not to have stated the law more fully to the jury. But I agree with my brother Bramwell, that before setting aside the verdict on that ground, we ought to see that the jury have formed a wrong estimate of the value of the evidence in consequence of the omission. But I am not prepared to say that the verdict was wrong; and I entirely agree that the rule as [158] to the property in the soil of private rivers, is that laid down by Lord Hale in the passages cited by my brother Martin.

Rule discharged.(a)

CARNES v. NISBETT. June 4, 1861.—N. entered into the service of C., a surgeon, as his assistant, under an agreement, by which he bound himself not to practice within five miles of a certain village "without the consent in writing of C. first had, under the penalty or penal sum of 100l. to be recoverable by C. as liquidated damages, the said sum of 100l. having been specified by the parties hereto as the amount to be paid and recoverable by C. against N. for the breach or non-observance of the clause." N. having commenced practice within the prescribed distance, C. caused a writ to be served upon him, the indorsement claiming 100l. the amount of the penalty, and also stating that the plaintiff intended to claim a writ of injunction. The Court refused to entertain an application for an injunction made by the plaintiff before declaration.

[S. C. 30 L. J. Ex. 348; 7 Jur. (N. S.) 1250; 9 W. R. 811; 4 L. T. 558.

See further, p. 778, post.]

In this case an application had been made to Martin, B., at Chambers, for an injunction to restrain the defendant from practising as a surgeon and apothecary within five miles of Cassop, in the county of Durham, and the learned Judge had referred the parties to the Court.

It appeared from the affidavits, that by an agreement in writing, dated the 13th of February, 1860, the plaintiff, a surgeon, had engaged the defendant as his assistant, and the defendant had agreed to serve him from month to month, until either party should give to the other a month's notice, at a salary of 70l. a year, payable fortnightly. The agreement proceeded as follows:—"The said W. Nisbett also to be allowed for his own use and benefit all fees received from the practice of midwifery, and also from any private practice in the immediate neighbourhood of Cassop. In consideration whereof W. Nisbett doth agree to serve, &c., [159] and that he the said W. Nisbett shall not nor will either directly or indirectly, by himself or in conjunction with any other person or persons, practise as a surgeon or apothecary, or surgeon accoucheur within the distance of five miles from Cassop, without the consent in writing of the said J. Carnes first had and obtained, under the penalty or penal sum of 100l., to be recoverable by the said J. Carnes as and for liquidated damages, the said sum of 100l. having been specified by the said parties hereto as the amount to be paid and recoverable by the said J. Carnes against the said W. Nisbett for the breach or non-observance by the said W. Nisbett of the said last mentioned clause."

On the 21st of January, 1861, the plaintiff gave the defendant a notice to determine the contract, upon which the defendant went to reside at Quarrington, within two miles of Cassop, and commenced practice as a surgeon there. The plaintiff then wrote to the defendant requiring him to desist from practice, and on his refusal to do so commenced this action against him. The writ was indorsed as follows:—"The

(a) See Grotius, *De Jure Belli et Pacis*, book 2, c. 3, s. 16. Puffendorf's *Law of Nature and Nations*, book 4, c. 7, s. 11. Dig. book 41, tit. 1, c. 7, s. 1-6; c. 12, 16, 29, 38, 56, 65.

plaintiff claims 100l., being the amount of a penalty under an agreement between the plaintiff and defendant, dated the 13th of February, 1860. The plaintiff also intends to claim a writ of injunction to restrain the defendant from practising as a surgeon within &c., under the 17 & 18 Vict. c. 128, s. 79." The writ had been served, but no declaration had been delivered.

The defendant had filed an affidavit to shew that his understanding of the agreement was, that he should be restrained from practising within five miles of Cassop so long as he continued in the service of the plaintiff and no longer.

T. Jones, in support of the application. The agreement binds the defendant not to practise within five miles of [160] Cassop, and the fact that he is liable to a penalty if he does so does not give him a right to elect to pay the penalty. [Pollock, C. B. The plaintiff has apparently so construed the agreement. Bramwell, B. I think it appears, from *Sainter v. Ferguson* (1 M'N. & G. 286, 290), that if in a case like the present the plaintiff chooses to bring his action for the penalty, and then comes to the Court for an injunction, the Court ought not to interfere. Channell, B. The indorsement on the writ appears to afford an answer to the application.] *French v. Macale* (2 Dru. & War. 269) was also referred to.

Per Curiam. There will be no rule.

Rule refused.

THE STOCKPORT WATERWORKS COMPANY v. POTTER AND OTHERS. Jan. 8, 1861.—

The defendants, calico printers, had for many years been in the habit of using the water of a certain brook for the purposes of their works. Arsenite of soda has latterly been used in large quantities in the process of dying calico, and arsenic from the defendants' works was traced in the mud of the reservoir of the plaintiffs (the Stockport Waterworks Company), which was eleven miles below the defendants' works, and also in the water supplied by them to the town. The plaintiffs gave evidence that the defendants might have prevented the arsenic from escaping if they had constructed a large settling reservoir below their works. The witnesses were cross-examined to shew that this would have been very expensive, but the defendants gave no evidence as to the mode in which they carried on their works. In answer to a question put by the Judge, the jury found that the defendants' trade was a lawful trade, carried on for purposes necessary or useful to the community in a reasonable and proper manner, and in a reasonable and proper place. Held: First, that there was no evidence that the defendants' trade was carried on in a reasonable and proper manner and in a proper place; and semble, that, if such evidence had been given, it would have been no answer to an action by the plaintiffs.

[S. C. 31 L. J. Ex. 9; 7 Jur. (N. S.) 880. See further, 3 H. & C. 300.]

Declaration. That the plaintiffs were lawfully possessed of certain lands, reservoirs, filters, waterworks, &c., in the county of Chester, and they were of right entitled at and from a certain place in a certain river or watercourse in the said county to take, draw and convey, and cause to flow quantities of the waters of the said river or watercourse [161] from and out of the same unto and into the said lands, reservoirs, filters, waterworks, &c.; and to have the same and the use and benefit of the same for the purpose of supplying the town of Stockport with water, for profit to the plaintiffs in that behalf; and they were so entitled to take, draw, convey and have the said water as aforesaid without the same being heated, polluted, fouled, corrupted or spoiled; yet the defendants, on divers days, &c. heated, polluted, &c., the waters of the said river, and caused and procured large quantities of poisonous, deleterious, foul, noxious, impure, dirty and offensive substances, compounds, ingredients, matters and things, to be discharged and to run into the said waters flowing in the said river, &c., and thereby the waters flowing in the river and taken by the plaintiffs became polluted, fouled and corrupted, and the plaintiffs were hindered from supplying the said town with such pure water as they otherwise would, &c. (There were three other counts varying the statement of the plaintiffs' right to the water.)

Pleas (inter alia). First: not guilty. Secondly: not possessed. Thirdly: that the plaintiffs were not of right entitled at and from the said place in the said river to

take water into their reservoirs for the purpose mentioned ; and were not entitled to take and have the said water without the same being heated, polluted, fouled and corrupted as alleged. Tenthly : that before and at the times of the committing of the grievances, the defendants were and still are the occupiers of certain works and premises for carrying on, and wherein they carried on, certain trades and businesses, to wit, the trades and businesses of calico printers, bleachers and dyers, the said works and premises being situate near to a certain brook or stream falling and discharging itself into a certain river, and falling and discharging itself into the river or watercourse mentioned, higher up the same than [162] the said lands, reservoirs, filters, mains, pipes and waterworks of the plaintiffs : that the defendants, and the occupiers for the time being of the said works and premises, have, for the full period of twenty years next before the commencement of this suit, carried on therein the trades and businesses aforesaid ; and have of right and without interruption taken water of and from the said brook or stream, from time to time, as often as occasion required, for the necessary purposes of their said trades and businesses, and used the same for such purposes in the last mentioned works, and let off and emptied into the said brook or stream the water so used after the same had been so used in the last mentioned works ; the same, by reason of such use thereof, necessarily containing therein certain small quantities of certain poisonous, deleterious, foul, noxious, impure, dirty and offensive substances, and compounds, ingredients, liquids, matters and things necessary to be, and having been, used in and for the carrying on of the said trades and businesses in the last mentioned works ; and thereby the said water and liquids having become and being necessarily a little hot, foul, corrupt, and dirty, the defendants thereby and by reason of the premises a little heated, polluted, fouled, corrupted, injured and spoiled the water of the said river or watercourse, &c. : that the alleged grievances were necessarily and unavoidably caused in and by such use and exercise of such right as aforesaid by the defendants as such occupiers as aforesaid, and whilst in and for carrying on, in their said works, such trades and businesses as aforesaid and as necessary thereto.

The plaintiff joined issue on the first, second and third pleas.

Replication (inter alia) to the tenth plea. New assignment : that the plaintiffs sue not only for the grievances and wrongful acts committed by the defendants and in that plea [163] admitted, but for grievances and wrongful acts committed by the defendants in excess of and beyond their rights, and to a greater extent and degree, and on other occasions and for other and different purposes and matters, than those mentioned and referred to in that plea.

Plea to new assignment : not guilty.

At the trial, before Channell, B., at the last Chester Assizes, it appeared that the plaintiffs claimed by virtue of certain grants, and also under certain acts of parliament, and by user for more than twenty years, to take water from the river Mersey at a certain point called Nab's Pool, for the purpose of supplying the town of Stockport with water. The defendants were calico printers, having works about eleven miles above Nab's Pool, upon a brook, called the Glossop Brook, which falls into the Etherow a short distance below the defendants' works. They had for many years been in the habit of using the water of the brook for the purposes of their works, returning it into the stream and thus polluting the water to some extent. In 1858 the pollution of the water was found to be very greatly increased ; in fact the quantity of impurity had been increasing ever since 1847. The water and the sand in the river had become discoloured and slimy. The peculiar colour was traced to the defendants' works. It was proved that in the process of dyeing calicoes cow-dung had been formerly used as a mordant, but that since 1844 arsenite of soda and potash have been frequently used as a substitute for it. Considerable quantities of arsenic were found in the mud in the reservoirs of the plaintiffs' works. The water below the outlet from the defendants' works was tested and arsenic found in suspension to the extent of .06 grains per gallon of water. The fish in the river were killed. In mud taken from the plaintiffs' reservoir arsenic was found in the proportion of 4.6 grains to one pound weight of mud. Arsenic was [164] found in water taken from the George Inn at Stockport. It was proved that in calico printing all the arsenic is washed away after being used, none being left in the calico. Some scientific witnesses stated that, by proper precautions, the defendants might have prevented the arsenic from escaping : that if there had been a large and sufficient settling reservoir the

arsenic must have been precipitated. The witnesses were cross-examined to shew that this would be difficult and very expensive.

The learned Judge left several questions to the jury, and amongst others, eighthly, was the discharge of the water from the defendants' works with noxious matter causing damage to the plaintiffs, necessary and unavoidable, or might the same have been avoided by them, by using reasonable care, that is, not by any extravagant outlay, but in the ordinary course of management of their business with such an outlay as such a business requires? Ninthly, has the defendants' discharging matters into the stream occasioned injury to the plaintiffs, in excess of the rights exercised by them for twenty years before the discharge of the matters complained of? Tenthly, was the defendants' trade a lawful trade carried on for purposes necessary or useful to the community, and carried on in a reasonable and proper manner, and in a reasonable and proper place?

To the eighth question, the jury answered that they knew of no means by which the pollution could be avoided. The ninth and tenth questions they answered in the affirmative. The learned Judge directed a verdict to be entered for the plaintiffs, reserving leave to the defendants to move to enter a verdict for them upon the plea of not guilty, with reference to the finding of the jury on the tenth question.

Grove, in Easter Term, obtained a rule nisi accordingly. He referred to *Hole v. Barlow* (4 C. B. N. S. 334).

[165] Collier, MacIntyre and Coxon shewed cause in this term (May 30 and 31). First, there was no evidence in support of the finding of the jury on the tenth question. It did not appear that the defendants had taken any precautions to prevent the nuisance from their works. If it would have been an answer that they carried on their works in a proper manner, it was for them to have shewn affirmatively that they did so. But in fact they gave no such evidence. It was proved that poisonous matter from the works of the defendants found its way not only into the mud of the plaintiffs' reservoir, but into the water supplied by them to the town of Stockport. Assuming that the defendants' trade was carried on in a proper place and in a proper manner, that is no answer to the charge of creating a dangerous nuisance. In *Hole v. Barlow* (4 C. B. N. S. 334), which was an action for a nuisance occasioned by the burning of bricks on the defendants' land, the act was one which is perfectly lawful in itself, if done in a proper manner and in a convenient place. The Court appear to have thought that burning bricks was a matter of public necessity. [Pollock, C. B. My impression is, that if a person carries on a noxious trade in a particular place to which the exigencies of society cause a town to extend, the assent of the growing population to the nuisance must not be presumed. But the case of a farmer burning weeds is a different matter. So in the case of a man having a field of brick earth, for the only mode of using it is to burn it into bricks on the spot.] The doctrine in *Hole v. Barlow* (4 C. B. N. S. 334) applies merely to those cases where the annoyance complained of is caused by the exercise of a right, and produces nothing worse than inconvenience to another: Com. Dig. Action on the Case for a Nuisance (C.); 1 Rol. Ab. 107, pl. 20; Gale on Easements, [166] p. 287, 2nd ed. [Bramwell, B. Take the case of manure put down in a street for the purpose of being carried into a garden.] Such a temporary annoyance produced a by man in the bonâ fide enjoyment of his own land would not afford a cause of action, though it might be otherwise if done maliciously. (They also referred to Vin. Ab. Nuisance Common (F. 2); *Aldred's case* (9 Rep. 59 a.), *Bradley v. Gill* (1 Lutw. 69); *Hegingbotham v. The Eastern and Continental Steam Packet Company* (8 C. B. 337); *Morley v. Pragwell* (Cro. Car. 510); *Wood v. Waud* (3 Exch. 748); *Walter v. Selfe* (4 De Gex & S. 315); *Baines v. Baker* (Ambl. 158); *Elliotson v. Feetham* (2 Bing. N. C. 134).)

Grove, Welsby, Horatio Lloyd and Potter, in support of the rule. It must be taken as found, not that the water was injured or rendered unfit for drinking, but that, in consequence of the discharge of colouring matter and arsenic into the stream from the defendants' works, it was frequently necessary to clean out the plaintiffs' reservoirs. Noxious ingredients were always used, though of late years there has been some increase in the quantity. It appears from the recitals and preambles of the different acts of parliament relating to the Glossop Reservoirs, that there are numerous calico printing works on the river: that it is a trade recognised, protected, and provided for by the legislature. The defendant's trade is a lawful trade, useful, and, in fact, necessary, for the community. Such a trade, if carried on in a proper

manner and in a proper place, is not a nuisance. There are authorities for that position before the decision in *Hole v. Barlow* (4 C. B. N. S. 334), such as Roll. Ab. Action sur Case, p. 89, [167] pl. 7, *Poynton v. Gill*, which was the case of a smelting house for lead. In Roll. Ab. Nusans. Common, p. 139, pl. 2, it is said, "Si homme fait candells deins un vill, per que il cause un noysom sent al inhabitants, uncore ceo nest ascun nusans, car le needfulness de eux dispensera ove le noisomness del smell," citing 3 Jac. 1, b. 2, *Rankett's case*. [Bramwell, B. That would go to shew that such a building would be no nuisance wherever erected. The same case is cited, Vin. Abr. Nuisance (F.), pl. 2. It is doubted by Hawkins: Pl. C. c. 75, s. 10.] In an *Anonymous case*, (a) upon an information for erecting a glass house, it was said that a man ought not to be punished for erecting anything necessary to the exercise of his lawful trade. Twisden said he had known an information adjudged against one for erecting a new house near Serjeant's Inn, but the other justices doubted, and agreed that it was unlawful only to erect such things near the king's palace. In *Rex v. White* (1 Burr. 333, 337), which was an indictment for making spirit of sulphur, and thereby impregnating the air with noisome stinks, it was said by Lord Mansfield, that "the very existence of the nuisance depends upon the number of houses and the concourse of people, and this is a matter of fact to be judged of by a jury." It is true that was an indictment, but there is no distinction between an indictment and an action: *Rex v. Pease* (4 B. & Ad. 30); *Vaughan v. The Taff Vale Railway Company* (5 H. & N. 679). [Channell, B. In *Rex v. Pease* what was complained of was a legalized nuisance.] *Hole v. Barlow* (4 C. B. N. S. 334) did not proceed on the ground that the inconvenience was of a temporary character. That case and *Baines v. Baker* (Ambl. 158) shew that while on the one hand persons may [168] have a right to have air and water pure, on the other hand there is a necessity that many trades shall be carried on which must contaminate air and water. If the doctrine contended for by the plaintiffs is to be carried to its full extent, there is hardly a manufactory in Manchester which may not be interfered with by the riparian proprietors on the Irwell. The onus of proving that the defendants' trade is carried on in a proper manner is not upon the defendants. Such a trade may be said to be carried on in a proper manner if carried on in the usual manner with reference to the necessities of commerce. (They also referred to *Bliss v. Hall* (4 Bing. N. C. 183).)

Cur. adv. vult.

The following judgment was now pronounced:—

MARTIN, B. I believe we are all of opinion that there was no evidence to go to the jury upon the tenth question; and, secondly, if there was, it is immaterial, and can have no effect on the rights of the parties. The tenth question was, "Was the defendant's trade a lawful trade?" No doubt it was. Was it "carried on for purposes necessary or useful to the community?" No doubt it was. Was it carried on "in a reasonable and proper manner, and in a proper place?" On that there is really no evidence whatever. No one saw how the business was conducted; and it is impossible to say that there was any evidence that it was carried on in a reasonable and proper manner, or that there could be anything more than a mere surmise on the subject. But, suppose there was, how could it affect the people of Stockport? The defendants carried on their trade primarily for their own profit, and the public are benefited by the carrying on of all trades, for they have [169] an interest in persons using their industry and capital. But what answer is that to an action by persons whose water for drinking is affected by arsenic poured into it by persons carrying on such a trade? As to the passage from Comyns' Digest which was referred to in the argument, I apprehend it means that there are a variety of trades the carrying on of which may cause inconvenience and annoyance to persons living in the immediate neighbourhood, but which are nevertheless lawful. Taken in that sense, the position is quite correct. As to *Hole v. Barlow* (4 C. B. N. S. 334), we all think that, under the circumstances of that case, the judgment was right. There may be expressions used by some of the Judges in which we should not coincide, but we do not at all dispute the authority of that case. The jury there thought that the kiln was used for a mere temporary purpose: it was erected in order to burn the clay on the spot on which it was found; and they thought, as a matter of fact, that there was not that which amounted to a nuisance.

(a) 1 Ventris, 26; S. C. apparently, nom. *Rex v. Morris*, 2 Keb. 500.

BRAMWELL, B. I think this rule ought to be discharged. One of the great questions argued before us was how far *Hole v. Barlow* (4 C. B. N. S. 334) had decided anything in favour of the defendants, and how far this case was brought within it. For my part I desire to avoid expressing any opinion on *Hole v. Barlow*. We decide this case simply on the ground that it is not within the principle laid down in *Hole v. Barlow*, because there the Court meant, and indeed said, that it must be shewn that the trade was carried on in a reasonable and proper manner. It may be, that they held it to be law in that particular case, that if the trade were so carried on, some inconvenience, more or less in the nature of a nuisance, must be endured by the persons suffering under the circum-[170]-stances there stated. In the present case there was no proof that the defendants' trade was carried on in a reasonable and proper manner. In point of fact, we know that if the defendants chose they might have obviated the mischief that has happened; and yet it was gravely argued that there was reasonable evidence to go to the jury, that they could not carry on the trade without causing this mischief. There was no evidence whatever of that nature—all the evidence was on the part of the plaintiffs. The plaintiffs' witnesses protested that the mischief might be obviated, and there was no evidence on the part of the defendants to shew that it could not. It was said that the business was carried on in the usual way. That may be so, but if so it was an inconvenient way, the inconvenience of which might have been remedied. Therefore I think there was no evidence to go to the jury in support of the proposition for which the defendants' counsel contended. I can well understand that the defendants conceived they were acting in accordance with the law, and that, if they were to do what was required of them, they would be giving up a right which it was for the public interest that they should assert.

CHANNELL, B. I agree that the rule must be discharged. I do not desire to throw the least doubt on the decision in *Hole v. Barlow*. At the trial I thought that the present case did not come within the principle of that decision, and accordingly, notwithstanding the answer of the jury to the tenth question submitted to them, I directed that the verdict should be entered for the plaintiffs. I also felt considerable doubt whether there was any evidence to go to the jury in support of one of the elements involved in the tenth question. It was contended at the trial that there was no evidence on this point to go to the jury. But if I had [171] refused to put the question to the jury, and in the opinion of the Court there was any evidence, a new trial would have been inevitable. Whatever doubt I entertained at the trial has been cleared up in the course of the argument, and I am now satisfied that there was no evidence to go to the jury on one of the matters involved on the tenth question, which, according to the decision in *Hole v. Barlow*, was necessary to be established in order to raise a defence on that ground.

Rule discharged.

[172] TRINITY VACATION, 25 VICT.

UDELL v. ATHERTON AND ANOTHER. July 6, 1861.—A principal is liable, in an action of deceit, for the false and fraudulent representations of his agent as to the quality and value of an article, whereby a person has been induced to purchase it for more than its worth, notwithstanding that the principal neither authorized nor knew of the fraudulent conduct of his agent. Per Pollock, C. B., and Wilde, B. Dissentientibus Martin, B., and Bramwell, B.

[S. C. 30 L. J. Ex. 337; 7 Jur. (N. S.) 777; 4 L. T. 797. Discussed, *Archbold v. Lord Howth*, 1866, Ir. R. 1 Ch. 608; *Lloyd v. Grace*, [1912] A. C. 731. Explained, *Barwick v. English Joint Stock Bank*, 1867, L. R. 2 Ex. 265; *S. Pearson & Son, Limited, v. Dublin Corporation*, [1907] A. C. 358. Observations adopted, *Mackay v. Commercial Bank of New Brunswick*, 1874, L. R. 5 P. C. 410. Approved, *Weir v. Barnett*, 1878, 3 Ex. D. 245. Commented upon, *Holdsworth v. City of Glasgow Bank*, 1880, 5 A. C. 339. Applied, *Baldry v. Bates*, 1885, 52 L. T. 622.]

The first count of the declaration stated, that the defendants were possessed of a certain log of mahogany which they well knew to be rotten and defective; yet that they, by fraudulently concealing from the plaintiff that the said log was rotten and defective, induced the plaintiff to buy the same for more than its value, to wit for

99l., and to accept two bills of exchange, payable to the defendants' order for the said sum, the said log being worth much less than the said sum. Averments: that the plaintiff hath been forced to pay one of the bills and will be forced to pay the other, and by reason of the premises hath sustained loss. Second count: that the defendants by falsely and fraudulently representing to the plaintiff that a certain log of mahogany was a sound and perfect log of mahogany, and that the same was reasonably worth in the trade at the rate of 3s. a foot, induced the plaintiff to buy the said log at the said rate. Averments: that the said log was not worth 3s. a foot, and that the plaintiff had sustained other loss.

Plea. Not guilty.

The cause was tried, before Martin, B., without a jury, at the London Sittings after Michaelmas Term, 1860, when the following facts appeared:—The plaintiff was a cabinetmaker and the defendants were timber merchants. In April, 1860, one Youngman, who was employed by the defendants to sell their timber on commission, took the plaintiff to [173] the West India Docks and shewed him three logs of mahogany belonging to the defendants. Youngman asked 3s. 6d. per foot for two of the logs and 4s. 6d. per foot for the third. Youngman represented the third log as a very fine log and perfectly sound. He called several times on the plaintiff and urged him to buy this log, repeating his representations as to its quality. On one occasion he said, "there is not finer wood in London, I will warrant it worth 6s. a foot." The plaintiff said "Never mind 6s., will you warrant it worth 3s. a foot?" and Youngman replied, "I will." The plaintiff then offered to buy it at 3s. a foot, but Youngman refused to sell it at that price. A few days afterwards he sent the plaintiff an invoice, in which the log was charged 3s. a foot, together with a delivery order for the log, and two bills of exchange respectively drawn on the plaintiff at four and six months' date, and payable to the defendants' order. The plaintiff accepted the bills and removed the log to his premises. The four months' bill was paid at maturity and before the plaintiff discovered any defect in the log. Previously to the six months' bill becoming due, the plaintiff ordered the log to be cut up, and he then discovered a large hole in one of its sides, which was caused by a branch of the tree having died before it was felled. On account of this defect the log was not worth more than 1s. 3d. a foot at the utmost. Youngman afterwards called upon the plaintiff and said that he was never so deceived in a log in his life, and he admitted that it was a very bad one. Plaintiff said he ought to have told him of the defect in the log, and he replied that he did not know of it. Youngman had previously offered to sell the log to a timber merchant, named Oliver, who refused to buy it on account of its defective quality, and had pointed it out to Youngman. After this Oliver again saw the log, and it had been turned over [174] so that the hole in it could not be seen. The plaintiff complained to the defendants of the defective quality of the log, and they said that they had neither authorized nor wished Youngman to sell wood as sound which was defective, and they referred the plaintiff to him. The defendants refused to make any allowance, and insisted on the payment of the whole of the agreed price. There was no evidence that the defendants knew of the fraudulent representations of Youngman, or that they were aware of any defect in the log. Upon these facts the learned Judge was of opinion that the plaintiff could not recover in this form of action, and his lordship directed a nonsuit.

Hawkins, in last Hilary Term, obtained a rule nisi for a new trial, on the ground that the learned Judge had improperly ruled that the defendants could not, under the circumstances, be made liable for the fraud of their agent.

Coleridge and Kingdon shewed cause in last Easter Term (April 23). The question is, whether an innocent principal is liable in damages for the fraudulent misrepresentation of his agent. It is conceded that the principal could not have enforced this contract, but it is submitted that he is not liable for his agent's fraud, of which he had no knowledge. As regards liability for damage, a stricter rule prevails where the relation of master and servant exists, than in the case of principal and agent. Every servant is in one sense an agent, but every agent is not a servant. Blackstone treats of servants as distinguished from agents, and divides them into four classes: Black. Com., vol. 1, p. 425. It is clear that a principal is not criminally responsible for an act of his agent not authorized by him, nor is he liable for a malicious trespass committed by his agent. Even where the agent is a servant, the master is only chargeable when [175] the servant acts in execution of his orders: *Middleton v.*

Fowler (1 Salk. 282), *Croft v. Alison* (4 B. & Ald. 590), *McManus v. Crickell* (1 East, 106). In *The Attorney General v. Siddon* (1 C. & J. 220), where a master was held liable in a penal action for the illegal act of his servant, the act was done for the benefit of the master, and therefore the Court deemed the act of the servant the act of the master. But a principal is not responsible for the unauthorized fraud of his agent. The authorities in the Year Book, 9 Hen. 6, 53 B., cited in Roll. Abridg. "Action sur Case," (S.) 1 (T.), 1, are to this effect, that if a servant sells bad merchandize for good, no action of deceit lies against the master, for he has commanded the servant to sell it to anyone in particular; and if a servant in a tavern sells bad wine, an action of deceit will not lie against him for he has only done it as servant. [Martin, B. The doctrine is now exploded, that a servant is not responsible for an unlawful act because his master ordered it; every person is liable for a wrongful act done by him.] In *Wilde v. Gibson* (1 H. L. Cas. 605, 615) it was held that concealment by the vendor's agent of a right of way over the property sold was not sufficient to set aside the purchase when perfected by conveyance and payment of the purchase money, but there must be proof of direct personal knowledge and concealment by the principal. In the course of the argument, Lord Campbell, C. J., said:—"In an action upon contract, the representation of an agent is the representation of the principal, but in an action on the case for deceit, the misrepresentation or concealment must be proved against the principal." Unless there is fraud on the part of the principal, or the agent in making the misrepresentation has acted within the scope of his authority, the principal is not liable: *Burnes v. Pennell* (2 H. L. Cas. 497), [176] *Cornfoot v. Fowke* (6 M. & W. 358), *Wilson v. Fuller* (3 Q. B. 68). [Wilde, B. This question could not arise in *Cornfoot v. Fowke*, because in that case there was no fraud in the principal or agent.] A principal employs an agent to transact a particular business, and if the latter commits a fraud he acts beyond the scope of his authority. It is true that in *Cornfoot v. Fowke* (6 M. & W. 373), Parke, B., said: "That if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, knowingly commit a fraud in making it, not only is the contract void, but the principal is liable to an action;" but that dictum is founded on *Hern v. Nicholls* (1 Salk. 289), where Lord Holt ruled that a merchant was liable for the deceit of his factor abroad. That case, however, is no authority for the position, since it was a nisi prius ruling and may have proceeded on the ground that the merchant, confiding in his factor, had warranted the goods. Moreover, in *Coleman v. Riches* (16 C. B. 104, 117), Cresswell, J., said, "*Hern v. Nicholls* was a case of misrepresentation, not fraud: the defendant there adopted the act of the factor." In *Grammar v. Nixon* (1 Stra. 653), a goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an assay then shewn. It appeared that he had forged the assay, and that the ingot was made out of a lodger's plate which he had stolen, and it was held that the master was liable. But that was not the case of principal and agent, but of master and servant. *Crockford v. Winter* (1 Camp. 124), where Lord Ellenborough said, "for the frauds of an agent the principal is civilly liable," was an action for money had and received to recover back the money obtained by the fraud, not an action of deceit. [Wilde, B. In *Wilson v. Fuller* (3 Q. B. 68), Tindal, C. J., [177] considered that a representation by an agent, if fraudulently made, would equally bind the principal as if made by himself.] In *Moens v. Heyworth* (10 M. & W. 147, 157), Parke, B., said:—"I think it essential that there should be moral fraud, and indeed all the cases shew that it is, though the word legal fraud is used." [Martin, B. *Coleman v. Riches* (16 C. B. 104) is an authority in point.] In *Ormerod v. Huth* (14 M. & W. 651), the Court of Exchequer Chamber affirmed the principle laid down in *Moens v. Heyworth*. The only authority for the proposition, that an innocent principal is liable for the fraud of his agent, is *Hartopp v. Hoare* (3 Atk. 44, 47), where Lee, C. J., referring to *Hern v. Nicholls* (1 Salk. 289), said:—"And there is no doubt but the verdict was right in that case, for the defendant employed his factor in the act of selling, in which the deceit was committed, and by employing him as a factor he created a credit in him." [Denman, amicus curiæ, referred to *Brady v. Todd* (9 C. B. N. S. 592).] This subject is discussed in Smith's Mercantile Law, p. 158, 5th ed.; and in Story on Agency, sect. 452, where the doctrine that a principal is liable for the fraud of his agent is stated with this qualification, that the act is done by the agent in the course of his employment. The cases which decide that an innocent principal is not liable for the criminal acts of his agent are in effect authorities

that he is not liable for the fraud of his agent, because it is not an act within the scope of his authority. [Bramwell, B., referred to Bacon's Abridg. Master and Servant (K.), and the judgment of Ashurst, J., in *Fenn v. Harrison* (3 T. R. 757, 760). The true principle is laid down in *Coleman v. Riches* (16 C. B. 104), viz., that a master is civilly responsible for the fraud or negligence of his servant acting in the course of his employ-[178]-ment, but not for an act of wilful fraud or negligence done by him out of the scope of his authority, or inconsistent with the course of his employment. Here the agent was employed to sell timber on commission, not to warrant it or misrepresent its quality or value. For such purposes he was not the agent of the defendant: *Grant v. Norway* (10 C. B. 665), *Hubbertsty v. Ward* (8 Exch. 330). They also referred to the note to *Pasley v. Freeman*, in 2 Smith's Lead. Cas. p. 81, 4th ed.; the note to *Chandelor v. Lopus*, 1 Smith's Lead. Cas. p. 141, 4th ed., and *Williamson v. Allison* (2 East, 446).

Barnard and Willoughby, in support of the rule. According to the argument for the defendants, the plaintiff would have no remedy for the loss he has sustained. [Martin, B. He has a remedy against the agent.] A principal is liable for a fraudulent misrepresentation by his agent, where that misrepresentation is part of the contract; more especially where the principal having knowledge of the fraud, does not repudiate the contract. The rule of law is correctly stated in the passage cited from the judgment of Parke, B., in *Cornfoot v. Fowke* (6 M. & W. 358). Again, in *Murray v. Mann* (2 Exch. 538, 540), Parke, B., said:—"The rule of law is, that if an agent is guilty of fraud in transacting his principal's business, the principal is responsible." [Bramwell, B. Suppose a person employs an auctioneer to sell some furniture by auction, and he takes upon himself to say that it is of the very best description, but in fact it is very bad furniture, would the person employing the auctioneer be liable for a false representation?] That differs from the case of a merchant employing a commission agent. *Wilson v. Fuller* (3 Q. B. 68) is an authority for the plaintiff, for Tindal, C. J., in his judgment, admits that [179] if the representation by the agent had been fraudulently made it would have bound the principal. [Pollock, C. B. The learned Judge merely states what would have happened under other circumstances. Martin, B. It was a mere judicial dictum. The true rule is, that wherever an agent, acting within the scope of his authority, makes a fraudulent misrepresentation, his principal is liable.]

Cur. adv. vult.

The learned Judges, having differed in opinion, now delivered the following judgments:—

WILDE, B. I am of opinion that the rule ought to be absolute to enter the verdict for the plaintiff; and I have the authority of the Lord Chief Baron for saying that he agrees with the judgment.

This was an action of deceit. The cause was tried before my brother Martin, who will state the facts more fully. But the short result of them was, that the plaintiff bought of the defendants' agent a log of mahogany: that he was induced to do so by certain statements of the agent which were false to his own knowledge, dishonest, and fraudulent. He has paid the defendants the price so obtained, which is twice the real value of the log, and he brings his action accordingly.

The question is thus raised, whether a principal, who has had the benefit of a contract made by his agent, is responsible for a deliberate fraud committed by his agent in the making of the contract, by which fraud alone the contract was obtained.

I say "responsible" generally, because I am not aware that if this action of deceit does not lie against the principal any other form of action will. If this be so, the consequences appear to be as follows:—

[180] The man who has reaped the benefit of a fraud committed on his behalf keeps the fruits in his pocket; the man defrauded in the contract has to look to the intermediate person and not him with whom he contracted. If the agent is a man of no means this remedy would be fruitless. If the agent is able to pay he does so without remedy over, and the person defrauded is reinstated out of the funds of one man while the fruits of the fraud are retained by another.

These results make it desirable to examine closely the principles upon which such a decision is to be supported.

It is said that a man who is himself innocent cannot be sued for a deceit in which he took no part, and this whether the deceit was by his agent or a stranger. To this,

as a general proposition, I agree. All deceits and frauds practised by persons who stand in the relation of agents, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal.

On this principle it was that the Court of Common Pleas, in *Grant v. Norway* (10 C. B. 665), held a shipowner not responsible for the fraud of the captain in signing bills of lading without any goods on board; and so, in the case of *Coleman v. Riches* (16 C. B. 104), a wharfinger was held not liable for a false receipt, which his agent had given, representing that goods had been received at the wharf, which had not so been received. In neither of these cases did the principal authorize or in any way adopt or obtain the benefit of the fraudulent act. But does this principle apply to fraud committed in the making of contracts which the principal has adopted and of which he has claimed and obtained the benefit?

[181] The contract is made by the agent for the principal, but when made, if authorized or adopted, it becomes in law the contract of the principal. Can the principal treat the contract as his, and repudiate the fraud upon which it was built as the agent's? In the making of the actual contract, when the agent speaks he does so with the voice of the principal, for it is the principal's contract he is making.

In the representations which immediately preceded the contract, is the agent speaking only for himself? If so, on what principle is it that the principal could not sue upon a contract in itself valid, but preceded and brought about by fraudulent representations of the agent? And yet this is the plain law.

This brings me to another difficulty. For it would surely be an anomalous state of things, that the innocent principal could not recover upon his contract because fraudulently obtained by his agent, but that, if before discovery the contract be performed, he may ever after keep the benefit of it. Can the buyer's right, upon any sound principle, be made to depend on the extent to which the transaction has been completed? If the fraud had been discovered before the log was cut, could not the buyer have rescinded the contract? If so, why may he not recover now, when the state of things is unaltered by any laches or default of his.

A distinction has indeed been made in equity between contracts performed and unperformed. The latter are sometimes set aside for mistake or surprise, while the former are not. But no such distinction has ever been made in favour of fraud. Fraud, in all Courts and at all stages of the transaction, has, I believe, been held to vitiate all to which it attaches.

Next, as to the authorities. There is, I believe, no case in which the principal's immunity, under such circumstances, has been established. The only dictum in favour of it is, I believe, that of Lord Campbell in the course of argu-[182]-ment in *Wilde v. Gibson* (1 H. L. Cas. 605, 615). It may be doubted if it is correctly reported, at any rate it is to be taken, in my opinion, in reference only to the point then under argument.

The authorities the other way are as it seems to me overwhelming. Baron Parke, in *Moens v. Heyworth* (10 M. & W. 157), says:—To support this action for false representation, it is necessary “to prove that by words or acts of the defendants, or their agents, it was made falsely and for the improper purpose of inducing the other party to purchase.” Again, in *Wilson v. Fuller* (3 Q. B. 77), Tindal, C. J., in delivering the considered judgment of the full Court of Exchequer Chamber, says:—“There was there a fraudulent concealment by Wadeson (the agent) which it must be admitted would bind Mrs. Wilson, if proved.” And here Wadeson was only agent and Mrs. Wilson avowedly innocent, and the action against her, as here, for deceit. Again, the Chief Justice says:—“As to the representation made by Wadeson, which if fraudulent it may be admitted would bind her,” &c. And again, in the much canvassed case of *Cornfoot v. Fawke* (6 M. & W. 373), Baron Parke, who certainly was not disposed to overstrain the rigid rules of law in favour of any general views of equity, said: “It must be conceded that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, knowingly commit a fraud in making it, not only is the contract void but the principal is liable to an action.” Lastly, this point was decided in *Hern v. Nicholls* (1 Salk. 289), often quoted, and so far as I know never impeached.

To these dicta must be added the authority of the Exchequer Chamber in a still later case, *Ormerod v. Huth* (14 M. & W. 651). It was an action for deceit for fraudu-

lently putting forward certain parcels of cotton as fair samples; and the defendants, the sellers, were there charged, as here, with making the [183] fraudulent representation. At the trial it appeared that the sale was by the defendants' brokers. Coltman, J., who tried the cause, directed the jury, "That unless they could infer that the defendants, or their brokers, were acquainted with the fraud that had been practised in the packing, or had acted in the transaction against good faith or with a fraudulent purpose, the defendants were entitled to the verdict." On a bill of exceptions the Exchequer Chamber upheld this ruling, saying:—"If, indeed, the representation was false to the knowledge of the party making it, this would be conclusive evidence of fraud." And the "party making it" in that case was, if anybody, the agent.

I find no case in which this principle has been seriously doubted. I find no text writer who does not adopt it. It is well stated in Mr. Story's *Principal and Agent* at sect. 134: "For where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the *res gestæ*." And again, at sect. 135, he says:—"If the agent at the time of the contract makes any representation, declaration, or admission, touching the matter of the contract, it is treated as the representation, declaration or admission of the principal himself."

The defendant has adopted the sale made by his agent and received the price. He has, by the fraudulent statements of the agent, obtained rather more than twice what he could have obtained by an honest sale. It is not the case of any matter collateral, as a warranty may be. It is not the case of a representation made out of and beyond the particular business then transacting by the agent on the principal's behalf. It is the representations made in the very dealing itself, in the conversation that resulted in the contract, that are in question.

[184] The defendant claims the right of separating the contract from that which induced it, of holding the price and ignoring the false statements which largely enhanced it. In my opinion, justice, the common reason of mankind, and every sound rule of law are opposed to his doing so. Whatever his previous authority to the agent, whatever his own innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether.

There are, no doubt, many frauds committed by agents which would not bind their principals. But I hold that the statements of the agent which are involved in the contract as its foundation or inducement are in law the statements of the principal.

To this most equitable and reasonable extent the identity of the principal with the agent has I conceive been long established in our laws. It has been much discussed whether an untrue but innocent statement by an agent, when coupled with a knowledge in the principal, would support an action of deceit against the principal or bar an action on the contract. Such were the cases of *Cornfoot v. Fowke* and *Fuller v. Wilson*.

The artificial identification of the agent and principal, by bringing the words of the one side by side with the knowledge of the other, induced the apparent logical consequence of fraud. On the other hand the real innocence of both agent and principal repelled the notion of a constructive fraud in either. A discordance of views, varying with the point from which the subject was looked at, was to be expected. And the result is found in the elaborate reasoning of the judgments in the above cases.

But what bearing have they upon the case now in hand?—a remarkable one. The point now in dispute was tacitly conceded by every one. If the agent's statements were not [185] those of the principal, it was needless to inquire whether they were fraudulent. It would have been enough to establish that what the agent had said he had said without authority, and the immunity of the employer would have been established—it was needless to inquire whether the statement was fraudulent. According to the defendant's argument in the present case, the statements by the house agent in *Cornfoot v. Fowke*, not being authorized, in no way affected his principal whether fraudulent or not; and yet the whole inquiry was confined to whether they were fraudulent or not—a needless investigation if they did not bind the principal at all.

But the same question has arisen and been the subject of decision in another form, I mean on the question of admissibility of evidence. Whenever the unauthorized statements of the agent are not in law the statements of the principal, they would not

be admissible in evidence against the principal. To whatever extent they are admissible, they must in law be considered the statements of and binding on the principal.

Now, what is the rule and where is the line between admissibility and inadmissibility drawn? There was no more careful and accurate Judge than Sir William Grant, and he states the rule thus:—"What the agent has said may be what constitutes the agreement of the principal, or the representations or statements may be the foundation of or the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation:" *Fairlie v. Hastings* (10 Ves. 126). And this, said Tindal, C. J., in *Garth v. Howard* (8 Bing. 451, 453), "is the leading case on the subject."

Other Judges have laid down a similar rule. In *Lang-[186]-ham v. Allnutt* (4 Taunt. 511, 519), Gibbs, C. J., says:—"When it is proved A. is agent of B., whatever A. does or says or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B." In *Doe v. Martin* (4 T. R. 39, 66), Lord Kenyon says:—"Without imputing any fraud to Martin, and, indeed, it is negatived by the verdict, the maxim, that the principal is civilly responsible for the acts of his agent, universally prevails, both in Courts of law and equity; and, therefore, whatever misconduct and fraud are imputed to Cruttenden, it must affect his principal, Martin."

It remains to answer some of the objections made. It is said that the reason why no action could be maintained by the seller on the contract is, that the principal cannot stand in a better position than the agent who actually made the contract; and that as the agent could not sue on the contract the principal cannot. But this reasoning applies only to derivative rights. Whereas here the contract is the principal's from the first though made by the agent; and as his title is not derivative so it is not prejudicially affected by any acts but those which are in the eye of the law his own.

Another principle has been invoked, as it seems to me improperly. When one of two innocent people must suffer, he who has entrusted the fraudulent agent must it is said be content to bear the loss. If such a principle applied to this case, I should have thought that he who entrusted was the seller and not the buyer, who was deceived. But to me it appears to have no application. It applies, as it seems to me, only to cases in which by the fraud of the agent both parties, he who employed him as agent and he who dealt with him, have been defrauded. Whereas here there is [187] only one sufferer, the other being largely a gainer by the deceit as matters now stand; and if made to pay the excess of price back would still retain the real value of the log.

I will only add that the great importance of the question, and the sincere respect I have for those who take an opposite view, have induced me thus fully to vindicate what I believe to be the law, in favour of those who have been cheated and against those who claim to retain the proceeds of the cheat.

BRAMWELL, B. This case was tried before Baron Martin without a jury. He nonsuited the plaintiff, and I think rightly.

The material facts were, that the defendant was the owner of some mahogany lying at one of the docks near London. Youngman took the plaintiff to see the mahogany; the plaintiff, through the agency or intervention of Youngman, ultimately bought one of the logs, paid the defendant for it the price agreed with Youngman, took it away and had it cut up. In the course of the dealing Youngman warranted the timber to be worth 3s. a foot, and also made a variety of statements as to its condition, calculated to and which did influence the plaintiff in buying the log, and which (as the plaintiff said) were false to Youngman's knowledge. There was no evidence or suggestion that the defendant knew either of the representations made, or that the state of the log was what it afterwards turned out to be, or that he had in any way directed or sanctioned the fraud, if any, or any representation, statement, or warranty; indeed, as soon as he heard of the plaintiff's complaint, which was after the log was paid for and cut up, he denied all knowledge of or responsibility for the fraud, and referred the plaintiff to the wrongdoer, Youngman. The log turned out to be worthless, and the plaintiff brought this action, not on Young-[188]-man's warranty, but for that the defendant fraudulently induced him, the plaintiff, to buy the log by fraudulently making these false representations.

When it is considered that to support this declaration the plaintiff must prove actual moral fraud (per Parke, B., 2 Exch. 541; per Lord Cottenham, C., 1 H. L. 621), it seems manifest according to common sense and plain English, that the plaintiff must

fail; for it is admitted that no such fraud has been committed by the defendant himself, nor authorized by him either by previous authority or by any ratification or adoption of it when he knew of it: see per Lord Cottenham, 1 H. L. 625. He ratifies the sale indeed, but the fraud is no part of the sale, no part of the contract—it is collateral to it. It might have been made by some person, in no sense the defendant's agent, but who wanted the log bought or removed, and whose fraudulent statement induced the buyer to deal for it; but the owner, by selling it to a buyer so influenced, would not be responsible for a fraud so committed. The present alleged fraud is equally collateral to the contract, is as little made by the defendant's agent for that purpose, and as little adopted, and becomes as little the moral fraud of the defendant as in the case put. Tested then by the way in which the plaintiff has shaped his case, he ought to fail, for he shews neither the actual commission of fraud by the defendant, nor any authority for its commission, nor any ratification or adoption of it. He fails then to shew that the defendant induced him to buy the log by "fraudulently stating," &c. That this is so, *Wilde v. Gibson* seems in point, and it may be fairly asked, in what other shape can the plaintiff put his case?

But, independently of considerations arising from the way in which the plaintiff has shaped his case, I think he ought to fail. I think he could not have put it in any way in which he could recover. I do not repeat those remarks [189] already made which bear on this, but there are further considerations. The wrong that was done to the plaintiff was inducing him to buy by fraudulent representations. This was actually done by Youngman, and against him the plaintiff has a remedy, as he would have had had Youngman made the same representations with the same object and result, being in no sense the defendant's agent. It was done at the time of the dealing or sale though the loss did not accrue till after. Now, supposing mahogany had risen in value, and suppose the plaintiff had discovered the fraud and not paid for the log or removed it, the defendant agreeing thereto on disclosure of the fraud, would not the plaintiff have had in such a case a cause of action against Youngman? Certainly. Would he against the defendant? As certainly no. What then is the difference? It is said to consist in this, that the defendant has had the benefit of the fraud and so he ought to be liable. But why? The reasoning would equally apply had Youngman been in no sense his agent. Or suppose Youngman had received the money and cheated the defendant of it, would the plaintiff then have or not have a remedy against the defendant? It certainly would be a most singular thing that the defendant should be liable for this fraud of Youngman's, though not liable on Youngman's warranty, which he is not, though the same reasoning would apply: (see *Penn v. Harrison* (3 T. R. 760), per Ashurst, J.; and the case of *Brady v. Todd* (9 C. B. N. S. 592)). Youngman was not a general agent of the defendant, nor was there any evidence of usage in the trade for such warranties; and, indeed, the defendant's counsel admitted that the reason Youngman's warranty was not relied on was because he had no authority to give one, and the cases referred to shew the defendant was not bound by it though he received the price agreed for on the face of it. There [190] is the answer to the general dictum of Gibbs, C. J., in *Langhorn v. Allnutt* (4 Taunt. 511, 519). Let us suppose an agent saying, "I will give a warranty and in writing, then I know the extent of my liability, but I will make no representations lest I should be troubled with questions as to their extent and correctness;" would it be reasonable in such a case that a party should sue the principal on alleged false representations because he could not do so successfully on the warranty? The cases referred to shew that, by adopting the transaction, everything done by the agent is not adopted. It is asked, could the defendant have enforced the purchase of the log after both he and the plaintiff knew of the fraud? Probably not. It may be that the contract itself is void, or voidable at the option of the defrauded party while all is in fieri; or it may be it is so up to the discovery of the fraud. But suppose the plaintiff had taken away the log, and not paid for it. What then would be the case of the defendant? Suppose the log was worth half what it was sold for, is the defendant to have nothing, or the real value, or the agreed price? It seems to me the latter. It seems to me the defendant may fairly say, "I do not rely on the contract, but you have taken my goods, and you took them on a representation made by you to me you were to pay so much for them, and that you must pay." It is a mistake to assume the defendant is availing himself of Youngman's fraud. He wants that money for which he agreed the plaintiff might have the log. It may be that, without any repre-

sentation or fraud, he would have got as large a price from some one who trusted to his own judgment. To what extent is such a liability to be carried? Suppose at a sale of furniture and goods in a house there is a gun, and the auctioneer, in answer to inquiries, fraudulently asserts it to be of a certain make, which both he and the owner (who however is not present) [191] know it is not, and then it is bought and used under such circumstances as to make damages recoverable on its bursting, is the seller liable? Suppose in this case the log had been used as a beam to a house, and the log from its defects had given way and the house fallen, would the defendant be liable for damages thereby occasioned? If not, why is he now? If he would be, would he not have great right to complain of the buyer? Has he not, if he is liable to this claim? The defendant may fairly say:—"This is very hard on me: You don't use your own judgment: you trust to representations made to you, the falsity of which you might have ascertained by inspection and inquiry" (for if not there would be no knowledge thereof in Youngman, and so no fraud), "you don't tell me of them, nor give me the option of adopting or rejecting them, and now because they were made you bring this action." How could the defendant, how can anyone, guard himself from such a liability as this? It is in vain he tells his agent to make no representation. Is it his business to ask the buyer if any statements have been made? Surely it is more the buyer's duty, when they have been made, to ask if they are with the sanction and approval of the principal. In short the rule ought to apply, that, as between two innocent persons, he who has trusted must take the consequence; he who has enabled the commission of a fraud must be responsible for it. Now here that is the plaintiff; he trusted Youngman, the defendants did not: the plaintiff enabled Youngman to cheat him by trusting his representations and making neither inspection of the log nor inquiry of the defendants. It is clear Youngman would be liable to the plaintiff. Are the defendants jointly liable with him, or are they separately liable, each for the whole, or for what part? Would a recovery against Youngman be a bar to this action? As to the argument that the fraudulent agent may be a pauper, no doubt he may be, but that is [192] no reason for fixing a person not otherwise liable. If it were, it would apply though the log had never been taken or paid for; and would apply to make the seller liable on a warranty. For these reasons and independently of considerations arising out of the form in which the plaintiff has shaped his case, I think he fails to make out any cause of action against the defendant.

It remains to examine the authorities. Of course, if there was one directly in point in any of the superior Courts I should adopt it, and leave its correctness to be questioned on appeal. But there is not, though it must be admitted there are dicta opposed to my view which are entitled to the greatest weight and respect. (Story's Agency, sects. 58, 59, 132, 133; Parsons on Contracts, p. 52, 55, 3rd ed.; Lord Wensleydale's expression in *Murray v. Mann* (2 Exch. 538), and in *Cornfoot v. Fowke* (6 M. & W. 373).) There is however no decision in point, and it is conceived that the opinions in question were founded on authorities which do not warrant them to the extent to which the plaintiff applies them, an extent probably far beyond the meaning of their authors. The first case relied on is *Hern v. Nichols* (1 Salk. 289), but it is clear that was an action on a warranty, which was formerly called an action for deceit, and a good warranty is shewn there, for it is said "the plaintiff bought the silk for _____ silk and the defendant sold it to him for such, which it was not." It is true the factor had committed a fraud, but that did not make the case less one of warranty. The observation of Holt, C. J., in that case, that he who employs and puts a trust in the deceiver should be the loser, certainly affects the plaintiff more than the defendants. *Grammar v. Nixon* (1 Stra. 653) is a case where the fraudulent agent was acting within the [193] presumable scope of his authority. In *Murray v. Mann* (2 Exch. 538) the dicta are very wide; but all that was decided was that money had and received could not be maintained by a principal against an agent who had received money for the principal, but who could not retain it, and had been compelled to return it, owing to the fraudulent way in which he had obtained it. *Fuller v. Wilson* (3 Q. B. 68) cannot be considered as an authority, for the Court of Exchequer Chamber declined to review the question in *Cornfoot v. Fowke* (6 M. & W. 373), and merely decided that the case was not proved. On the other hand *Fenn v. Harrison* (3 T. R. 760) and the case of *Brady v. Todd* (9 C. B. N. S. 592) are authorities for our decision, for the reasons above given. *Croft v. Alison* (4 B. & Ald. 590) and

similar cases point the same way. So, also, do *Coleman v. Riches* (16 C. B. 104), *Grant v. Norway* (10 C. B. 665), though, no doubt, in those cases the defendant sought to be charged as principal never, in any sense, had the benefit of the fraud. But the judgment of Rolfe, B., in *Cornfoot v. Fowke* is nearly direct on the question for the defendants, and so are the opinions of Lord Cottenham, Lord Brougham and Lord Campbell in the House of Lords in *Wilde v. Gibson* (1 H. L. Cas. 605). I think therefore the nonsuit should stand.

MARTIN, B. This action was tried before me without a jury, and the facts are these. The defendants authorized a person called Youngman to sell a log of mahogany. Youngman fraudulently concealed from the plaintiff a defect in the log, who, upon the assurance that it was sound, bought it at 3s. per foot. There was evidence that it was not worth [194] 1s. 3d. The price was payable by two bills, which were given to the defendants and paid by the plaintiff. The log was delivered to the plaintiff and sawn up, and partly used by him. It was admitted that neither directly nor indirectly were the defendants personally guilty, or had they any knowledge of the fraud; and the question is, whether they are liable to an action for a false and fraudulent misrepresentation.

The circumstance that the defendants have received the full consideration of a contract which the plaintiff might have avoided for fraud, and the alleged injustice of permitting them to retain the price of 3s. per foot for an article worth only 1s. 3d., and which price was agreed to be paid by the plaintiff upon a false and fraudulent misrepresentation made by the agent of the defendants, has been strongly urged as creating a liability; but, notwithstanding I think there is none. The contract was procured by fraud, and was therefore voidable by the plaintiff. It was not void, for the plaintiff might have insisted upon its performance. It was voidable at his election. The fraudulent misrepresentation was not part of the contract, it was a collateral matter which would have entitled the plaintiff to have avoided it. There would have been no legal objection to the defendants suing as plaintiffs in an action; but it is clear that a plea of fraud would have been a good answer. The plaintiff only knew Youngman in the transaction; and although the defendants might sue upon the contract, they could have no greater right against the plaintiff than Youngman had, and as the plaintiff would have an answer to the action if brought by Youngman he must also have one to an action brought by the defendants. So, also, I apprehend, if the plaintiff had discovered the defect before he had so used the log as to incapacitate him from returning it, he might have returned it to the defendants and rescinded [195] the contract. In truth the contract was voidable for fraud against every one so long as it was executory and capable of being avoided. But the contract has been executed. The plaintiff has taken to the log and used it, and the defendants have received the price, and whatever remedy exists for the plaintiff must be by way of action. The allegation in the declaration upon which the plaintiff's right of action rests is, that the defendants made a false and fraudulent representation. But how can it be said with truth that the defendants made such a representation? They themselves never made it; they never authorized Youngman to make it; they never knew of it until long afterwards and until after the contract had been executed. All that they did was to authorize Youngman to sell the log honestly. No doubt they afforded the occasion upon which the fraudulent misrepresentation was made, but they did nothing more; and in my opinion this is too remote to render them liable to this action. Youngman however is clearly liable upon the facts as assumed, and if he be a solvent man the plaintiff may obtain from him the redress to which he is entitled. I do not think the circumstance, that he possibly may be a person not capable of paying damages, is one which can legally be taken into consideration in order to determine the liability of the defendants. The ability to pay does not affect the question of legal liability for a wrong: all that can reasonably be required is, that the law should afford redress against the individual who commits it.

For these reasons, if there were no authorities upon the subject, I should be of opinion that the defendants are not responsible, but I think the weight of authority is in favour of the defendants. It is true there are dicta of most eminent Judges in favour of the action, but they are dicta only. The first is by Lord C. J. Tindal, in the judgment of the Ex-[196]chequer Chamber in *Wilson v. Fuller* (3 Q. B. 68), that a principal is bound in a civil action by a fraudulent concealment of which his agent was guilty. The next is by Baron Parke in *Cornfoot v. Fowke* (6 M. & W. 373), that

if one employ an agent to make a contract, and that agent (though his principal be perfectly guiltless) knowingly commits a fraud in making it, not only is the contract void but the principal is liable to an action, and he cites *Hern v. Nichols* (1 Salk. 289). This was a decision at Nisi Prius by Lord Holt, and, as in many other old cases, it is extremely difficult to say whether it was an action upon a warranty or one for deceit, properly so called; if it were upon a warranty or contract it would be no authority upon the present point. In *Coleman v. Riches*, hereinafter mentioned, Mr. J. Cresswell, in speaking of it, says it was not a case of fraud. So also, in *Murray v. Mann* (2 Exch. 538), Baron Parke again said, if an agent be guilty of fraud in transacting his principal's business the principal is responsible. There was another case referred to, *Grammar v. Nixon* (1 Str. 653), but in reality it has no bearing upon the present. It was the case of a servant, not an agent. The relation of master and servant is entirely different from that of a principal vendor and his agent or brokers to sell. I quite agree that no higher authority of the kind can be cited than the opinions of Lord C. J. Tindal and Baron Parke, but upon the other hand there is the authority of the Lord Chancellor, Lord Campbell, in *Wilde v. Gibson* (1 H. L. 605), the other way. He there says: "In an action upon contract the representation of an agent is the representation of the principal, but in an action on the case for deceit the misrepresentation must be proved against the principal." This, in my opinion, is an accurate [197] statement of the law. But I think this case is concluded by adjudged cases. In the case of *Grant v. Norway* (10 C. B. 665), where the master of a ship had signed bills of lading for goods which had never been shipped, it was held that his doing so did not make his owner responsible to one who had made advances upon the faith of the bills of lading. That is a much stronger case than the present. The master of a ship is the general agent of the owner; Youngman was not the general agent of the defendants, he was merely the agent to sell this single log. The representation of the master was a false and fraudulent misrepresentation; it was false, and false to his knowledge, and this constitutes a false and fraudulent misrepresentation: *Pothill v. Walters* (3 B. & Ad. 114); yet the owner was held not to be responsible. So also, in *Coleman v. Riches* (16 C. B. 104), the defendant was a wharfinger at Bristol, and one Board was his general manager at the wharf. The plaintiff had bought a parcel of wheat from one Lewis; Board signed a wharf receipt, in the usual form, for the wheat as received from Lewis at the wharf. Upon the production of the receipt, and on the faith of it, the plaintiff paid the price to Lewis. In fact the wheat had not been delivered, and the receipt was fraudulently concocted between Lewis and Board. The Court of Common Pleas held that the defendant was not liable in an action for a false and fraudulent misrepresentation. This case seems to me in point, and I concur with what Mr. J. Cresswell says, which I think applicable to the present, "that the agent was employed, not to make statements but contracts." It has been decided that an agent to sell a chattel has not authority to give a warranty except specially authorized. This matter was much discussed in *Coleman v. Riches* (16 C. B. 104), and Mr. J. Cresswell expresses his clear opinion that the agent has no [198] such authority, and this is in accordance with principle. The mere authority to an agent to sell must be to sell according to the ordinary rule of law, and that is "caveat emptor." But the point has been expressly decided by the Court of Common Pleas in *Brady v. Todd* (9 C. B. N. S. 592), where it was held, that an agent, being a servant, authorized to sell a horse, had not authority to bind his master by a warranty that the horse was sound and quiet in harness. This case therefore substantially overrules the Nisi Prius decision in *Alexander v. Gibson* (2 Camp. 555). If, therefore, an agent to sell has not authority to bind the principal by a warranty, how is it possible that he can render him liable as upon a false and fraudulent misrepresentation? In my judgment, therefore, the present case is concluded by adjudged cases, and if the plaintiff is to succeed it ought to be by the judgment of a Court of error. For my own part, as I have already said, I am satisfied upon legal principle the defendants are not liable. I use the tests applied by Mr. J. Cresswell in *Coleman v. Riches* (16 C. B. 104). First, was Youngman in fact authorized by the defendants to make the representation? He was not. Secondly, was his situation such as to bring the representation he made within the scope of his authority? I think not. He was employed to sell in accordance with the ordinary rule of law, but he was not employed to represent that to be true which he knew to be false.

For these reasons I am of opinion that the defendants are not responsible, and

that the plaintiff must seek his remedy against Youngman, who, upon the evidence in the case, made the false and fraudulent misrepresentation.

Some passages were referred to from Mr. Justice Story's Work, and also some placita from Rolle's Abridgment. They were cited to the Court of Common Pleas in the [199] cases before mentioned, and I do not think it necessary to refer to them.

As to the alleged hardship upon the plaintiff, there is none. He dealt exclusively with Youngman, and if he be not of ability to pay, the plaintiff is only in the condition of all persons who have received a wrong at the hands of a person unable to make redress. As to the defendants, I do not know the authority as to price given by them to Youngman, but it may have been that he was not to sell the mahogany at a lower price than 3s. per foot; in other words, that the defendants would keep their wood if they did not receive in exchange for it a sum of money equal to 3s. per foot. Now the plaintiff has taken the log and has used it. By reason of his own act he cannot restore it to the defendants. Why then should they be deprived of the price or any part of it? It is said that the circumstance of the defendants having received the price agreed to be given upon the false representation made by their agent, renders them liable to pay the difference between the contract price and the real value. But is this so in reason and justice? It may well have been that the defendants insisted that no lower price should be accepted than 3s. per foot. If the log had turned out worth 20s. per foot the plaintiff would have had the benefit. The defendants may have only received what they insisted upon having before they parted with the log. The plaintiff by his own act has deprived the defendants of the possibility of its ever being restored to them. What right has he in reason or justice to deprive the defendants of any portion of that price which they may have insisted upon having before they parted with their property? If Youngman has committed a wrong he is responsible for it; but why are the defendants, who have committed none, to be deprived of their property, and also of a part of what may have been the stipulated price? The maxim of law is, "In [200] *pari delicto potior est conditio defendantis*." I think the same rule ought to prevail in this case, where there is equal innocence.

The result of our judgments is that the rule will be discharged

Rule discharged.

BRADLEY v. DUNIPACE. July 6, 1861.—A flour Company abroad shipped on board a vessel, of which the defendant was master, 1676 bags of rye meal, some of which weighed twelve stone each, and some eight stone each. They were shipped from lighters, all mixed together, and the master knew nothing of their relative capacity. The master signed two bills of lading, one for 1209 bags and the other for 467 bags, deliverable to order. The latter bill of lading was for "467 bags rye meal, gross 35 tons 9 cwt.," and at the foot of it was "contents unknown and not responsible for weight." The bags were all marked alike, and no means were taken to identify by marks in the bills of lading any particular bags; and there was nothing on the face of the bills of lading from which the master could see that they were intended for different consignees. When the ship arrived, the defendant by mistake delivered to the plaintiff, who was the consignee of 467 bags of twelve stone each, several bags which weighed only eight stone.—Held: Per Pollock, C. B., and Wilde, B., that the master was not responsible to the consignee for the nondelivery of 467 bags of the proper weight. Per Bramwell, B., and Channell, B., that the master was responsible.

[S. C. 31 L. J. Ex. 210; 5 L. T. 356: affirmed 1862, 1 H. & C. 521.]

Declaration. That by a bill of lading made on the 7th day of June, 1860, by the defendant and delivered to the plaintiff, the defendant promised the plaintiff that certain goods of the plaintiff in the said bill of lading mentioned, and then shipped on board the said ship in the port of Stettin, should be delivered at Hull, certain perils and casualties, and other things, only excepted, to the plaintiff, he paying freight and other charges for the same. And the delivering of the goods aforesaid at Hull aforesaid was not prevented by any of the perils or casualties, or other things aforesaid; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to enable the plaintiff to maintain this action: Yet the said goods were not delivered to the plaintiff at Hull aforesaid, whereby the same were wholly lost to the plaintiff.

Plea. Payment of 11. 10s. into Court: and that the said [201] sum is enough to satisfy the claim of the plaintiff in respect of the matter therein pleaded to.

Replication. That the said sum is not sufficient to satisfy the claim of the plaintiff as in the plea alleged. Issue thereon.

At the trial, before Wilde, B., at the Liverpool Summer Assizes, 1861, the following facts appeared (as stated by Wilde, B., in his judgment, post, p. 208). The defendant was the master of a vessel called the "Hawk." A flour Company at Stettin shipped on board his vessel 1676 bags of rye meal. These bags, as it afterwards turned out, weighed some of them twelve stone each, and some eight stone each. But the master was told nothing of their weight and knew nothing of their relative capacity, except what their appearance may have told. They were all sent on board in lighters, and mixed up together as one lot without reference to their size. Nothing was said or done at the time of the shipment to indicate that the 1676 were intended to be separated into two lots. They were accordingly stowed as they were delivered on board, all mixed together. Afterwards and before sailing, the master had two separate sets of bills of lading put before him for signature, one for 1209 bags and the other for 467 bags, making together the 1676 bags before mentioned. All the bags were marked alike. The bills of lading were both deliverable to order of the shippers. There were no means taken by the shippers to identify by marks in the bills of lading any particular bags as the subject of either bill of lading particularly, and there was nothing on the face of the bills of lading from which the master could see they were intended for different consignees. When the ship arrived, the master delivered 1209 bags to the holder of the larger bill of lading; and 465 bags to the plaintiff, who was the indorsee of the other bill. This was two bags short of the number; and the defendant paid into Court what was admitted to be sufficient to cover their [202] value. But the plaintiff further complained that the weight of the bags delivered to him was not sufficient. And the charge made against the defendant, in substance, was that he had, by mistake, delivered too many of the large bags to the holder of the other bill of lading.

The defendant contended that under the terms of the bill of lading, he was not responsible for weight; and that he had complied with his contract by delivering the right number of bags with the right marks.

The plaintiff contended that the proper bags were in fact identified on the face of the bill of lading (a) by their weight.

The description in the bill of lading was as follows:—"467 bags, rye meal bran, gross 35 tons 9 cwt., English [203] weight, under the subjoined marks." And in the margin there was the mark annexed, which, as before stated, was the same.

At the foot of the bill of lading there was the following:—"Contents unknown, and not responsible for weight measure, leakage, breakage or damage."

(a) The bill of lading for the 467 bags was as follows:—"Dunipace, from Hull, captain of the steam-ship called the 'Hawk,' which is now loading in Stettin, in order to sail to Hull (where my discharging is to take place), certify that I have received in the hold of the said ship from the Directory of the Stettin Steam-Mill Joint Stock Company

"(467) Four hundred and sixty-seven bags rye meal bran, gr. 35 t. 9 cwt. gross, thirty-five tons and nine hundred weight Engl. weight, under the subjoined marks, good and well conditioned, in order (if God give me a safe voyage) to deliver them in the like good condition at Hull, to order, on payment of the freight of (15) fifteen shillings British sterling per ton, in full, and average accustomed. For the fulfilment hereof I pledge my person, goods and the ship with all appurtenances: Whereof I have signed two bills of lading of like contents, only availing as one.

"Stettin
Steam-Mill
Joint Stock
Company,
Corn Mill."

"Stettin, 7th June, 1860.

"The goods to be taken out within twenty-four hours after the ship's arrival, or to pay ten pounds per day demurrage; and the goods may be discharged and landed by the broker at the risk and expense of the receiver. Contents unknown, and not responsible for weight, measure, leakage, breakage, or damage.

"ROBT. DUNIPACE."

Indorsed

"The Directory of the Stettin Steam-Mill Joint Stock Company.

"TH. FUITSCH."

Upon these facts the learned Judge directed a verdict for the plaintiff for 34l. 18s. above the amount paid into Court (being the value of five tons, which was the deficiency of weight); and leave was reserved to the defendant to move to enter the verdict for him.

Overend, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that the learned Judge, upon the evidence, ought to have directed a verdict for the defendant.

Edward James and Cross shewed cause in the same term (Nov. 20). The language of the bill of lading must be taken most strongly against the defendant who has signed it. The defendant admits that he has received 467 bags of meal of the gross weight of 35 tons 9 cwt., and he is therefore bound to deliver that quantity. [Bramwell, B. Suppose the bags had been only 5 lbs. short of the weight, would the defendant have been liable? Or suppose the same consignor shipped 105 Cheshire cheeses weighing 5 cwt. and 105 Dutch cheeses weighing only 500 lbs., and that they were all sent on board together, though intended for different consignees, would the master discharge his duty by delivering the Dutch cheeses to the person to whom the other cheeses were consigned?] If the weight of 35 tons 9 cwt. be divided by 467, it will be clear that the shipment was intended to be all twelve stone bags. The words in the bill of lading, "not responsible for weight," do not mean "I will not be responsible for the non-delivery of the quantity [204] which I have received," but "I will not be responsible if the goods are not of the weight described in the bill of lading." Such a provision would exempt the master from liability where the loss of weight has arisen from causes beyond his control, as, for instance, evaporation; but not where the deficiency is caused by his negligence: *Phillips v. Clark* (2 C. B. N. S. 156). [Wilde, B. In *Gibson v. Sturge* (10 Exch. 622), where a portion of a cargo of corn shipped at Odessa, became heated in the course of the voyage, whereby its bulk was increased, this Court held that freight was payable on the quantity of corn shipped, and not on its measurement at the port of discharge.] The 18 & 19 Vict. c. 111 recites, that "it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading, in the hands of a bona fide holder for value, should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid;" and by section 3, "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board." [Pollock, C. B. All the responsibility which the master undertook was to deliver 467 bags. Wilde, B. Suppose several pipes of port and sherry are shipped together, without any mark to distinguish them, under one bill of lading which states that the contents are unknown, what is the master to do? Bramwell, [205] B., He should refuse to sign the bill of lading unless the wines were distinguished by some mark.] Here the master has signed a bill of lading, not only for a certain number of sacks, but for sacks of a particular weight. Moreover, upon these pleadings, the payment of money into Court admits the contract as alleged in the declaration, and no other defence is available than that the money paid into Court is sufficient to satisfy all damage in respect of the non-delivery of the goods.

Overend and Quain, in support of the rule. The sacks were delivered on board the ship without being weighed. The master did not know their weight, and in order to protect himself he has inserted in the bill of lading the words "contents unknown, and not responsible for weight." If some of the sacks had contained aniseed, the master would not have been responsible, and if he could protect himself as regards the contents of the bags, why not as regards their weight? If the deficiency in weight was one pound only in two bags, could it be said that the master would be liable? There was no obligation on him to weigh the bags; and as he was bound to receive them irrespective of any knowledge of their weight, why should he be responsible for the deficiency? To render him liable there should either have been some specific set of bags attached to each bill of lading, or an express warranty to deliver bags of the exact weight shipped. There was nothing to identify 467 bags with either bill of lading. The whole 1676 bags were all mixed together and shipped from lighters at

the same time. All that the master undertook to deliver was 467 bags out of the number of 1676 which he received.

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered.

[206] BRAMWELL, B. The judgment which I am about to deliver is that of myself and my brother Channell.

The way to treat this case is to consider it, at first, as though the bill of lading had not had on it "contents unknown, not responsible for weight, breakage, leakage or damage." In that case would the plaintiff have had a right to complain that a portion of the bags delivered to him were eight stone bags and not twelve stone bags? We think he would. It is true that the two sorts of bags were delivered on board ship promiscuously, but their difference in size was obvious. Now, when the captain was called on to sign two bills of lading which might, as they did, get into different hands, he must have known that it was not left to him to deliver the large bags to which of the two owners he pleased, and give the small to the other. It may be that, in some cases, a captain could not distinguish which part of a shipment is to satisfy one bill of lading, and which another; and it may be that in such case he would well be warranted in refusing to sign two bills of lading; as if two casks with no marks were delivered, and he was called on to sign two bills of lading, one for a cask of beer brewed by A., another for a cask brewed by B., with nothing to distinguish which was which; but if he does sign two bills of lading, and especially if he can distinguish which part of a mixed parcel of goods applies to one bill of lading and which to another, he must deliver the goods accordingly. The shipper has a right to expect that he will so deliver when he signs two bills, and the captain cannot be heard to say, "I did not attend to it, or think of it, or cannot do it without taking some pains, and so I will not." The captain, if he objects, should object when the bills of lading are tendered to him for signature.

We are not to be understood as saying he would not be responsible if he could not identify the parcels, but he is if he can; and here he clearly could, for it is obvious that [207] large bags were meant for the bill of lading for 467 bags, for there are as many, and at twelve stone to a bag they weigh thirty-five and a half tons (in the bill of lading it is 35 tons and 9 cwt.), and that the other bags were for the other bill of lading. There were more than 467 large bags, and probably the weight of those that remained and of the eight stone bags was the weight, or about the weight, mentioned in the other bill of lading. We think, therefore, the bags are as clearly identified as though the one bill of lading had been for 467 "twelve stone bags," and the other "all the bags except 467 twelve stone bags."

Then, does the memorandum make any difference? We think none. Its object was to protect the captain, if he delivered the right bags, but they had not the right weight in them. It is not correct to say that the plaintiff complains he has not the right weight. His complaint is, he has not the right bags. This is manifest. Suppose the qualities of the twelve stone bags and eight stone bags had differed, the former being superior. The plaintiff then would have complained of something beyond a loss of weight. The illustration given during the argument may be repeated. Eleven cheeses are sent to a ship, one weighs 100 pounds, the others 10 pounds each. Two bills of lading are given, one for one cheese weighing 100 pounds, the other for ten cheeses weighing 100 pounds, and each has such a memorandum as exists here,—could the captain rightfully deliver a 10 pound cheese to the holder of the first bill of lading, and the 100 pound cheese and nine 10 pound cheeses to the holder of the other? Impossible. So if two casks were sent, one of beer and one of wine worth ten times the beer.

We think, therefore, that the captain having signed two bills of lading by which undoubtedly different goods were meant, and especially as he was able to distinguish which [208] was which, was bound to do so, notwithstanding a memorandum introduced for the purpose, not to protect him from delivering the wrong bags, but from the right bags not having the weight named.

WILDE, B. I have to deliver the judgment of the Lord Chief Baron and myself.

This was an action on a bill of lading, for not delivering the proper quantity of goods to the indorsee of the bill of lading.

The question in the cause was reserved for the Court upon facts not disputed at

the trial, and they were as follows:—(His lordship then stated the facts as above set forth, p. 201, and proceeded.) The plaintiff's contention was, that if the weight of 35 tons 9 cwt. be divided by 467, it will be clear that the shipment was intended to be all twelve stone bags. If the calculation be made, it will I think be found that the weight given does not by any means exactly correspond with 467 bags at twelve stone each. To make the full weight, each bag must weigh more than twelve stone.

These being the terms of the bill of lading, the question that arises is, whether the master has contracted to deliver the specified weight as well as the specified number of bags.

It was not argued, that, provided the right bags were delivered, he was bound to the exact weight. The memorandum as to not being "responsible for weight" was said to apply to such and only such a complaint. But it was said that he was bound to the weight so far as it identified the particular bags.

I have great difficulty in adopting this conclusion. It gives rise to several considerations of great importance, because of most general application.

How far is the master of a vessel bound to seek out the identity of the bales, packages, or particular goods, which the shipper intends to be the subject of a separate consign-[209]-ment, by an investigation of their weight? Whose duty is it, after goods have been put on board as one lot, all mixed together and the subject of one shipment only, to manifest on the bill of lading any intended separation of them by some clear identifying marks? What would be the practical working of a rule which cast on the master the duty of weighing packages of various sizes, until he had made the right weight out of the right number of packages?

On this subject a most important admission was made at the trial, namely, "that no weighing ever takes place on board ship." Such is the present practice. How far will a decision, that this duty is cast upon the master in future, be compatible with the means at his command or the expeditious discharge of the ship?

It is said that, in the present instance, the calculation could be easily made. But the principle is a general one, and the form of the bill of lading of most common occurrence. It is obvious that numerous cases may arise in which the calculation would be most difficult, and the bales or packages which in the present instance were of only two, might be of many and various sizes. Out of 1000 bales of various sizes, the master might have to select six or ten as the subject of a separate bill of lading, without any mark to guide him—all confused together by the shipper when delivered on board, and all similar in outward appearance.

Is the principle to apply to all such cases, or only to those in which the calculation is easy and apparent?

Be it remembered also, that the question on this record is one of contract, and not negligence. Can the meaning of the contract depend upon the facility of the calculation by which the master might have fulfilled it?

And so the argument, that with a little trouble the master might have made all right, receives its answer. For if that had been the question, and the charge against him had been [210] that he was negligent in the discharge of his duty, the case ought to have, and would have, been submitted to the jury. On such a question the jury would have looked at the whole case. They would have considered whether the real fault was with the master, who was never accustomed to weigh goods at all, or with the shipper who had the simplest and most usual of all means of identification in his power, by putting a separate mark on the bags intended for separate delivery.

These considerations induce me to approach the real question, namely, the construction of the contract itself, with the desire to see my way very clearly before I impose on the shipowner an obligation to which it is probable he did not intend to bind himself, or a practice for which the means at his disposal on board ship do not fit him.

Now the words "gross 35 tons 9 cwt. English weight" are to be read in connection with the memorandum "not responsible for weight." And after much consideration, and the fullest desire to agree with the rest of the Court, I am of opinion that there is nothing which entitles me to restrain the generality of the memorandum; that the master is, as he has in terms said in the bill of lading, not responsible for weight; and that he complied with his contract when he delivered the right number of bags with the right marks.

What then was the object of inserting weight at all? To this I answer—To enable

the merchant to sell the goods before arrival. Without it there would be no definite quantity to sell. I believe it to be ordinary and usual to insert it for that purpose.

The practice of not weighing on the ship would seem to shew that it is not usual to adopt it for the purpose of identification. And I am loth, by the mere construction of the contract, or on any view of what trouble the master might reasonably take, to interfere with the existing course of [211] business, with reference to which the contract itself must be presumed to have been made.

My judgment is therefore for the defendant; and I think the rule to enter the verdict for him should be absolute.

BRAMWELL, B. The Court being equally divided in opinion, my brother Wilde withdraws his judgment, in order to afford an opportunity of taking the case to a Court of error. The rule will therefore be discharged.

Rule discharged.

CHARLES PLANT AND WILLIAM PLANT v. THOMAS TAYLOR, PETER THOMASON, MARY ANN MILLS, JOHN JOHNSON AND SARAH his Wife. July 6, 1861.—In 1738 a term of 500 years was created under a settlement made on the marriage of the father of R. T., for the purpose of raising portions for younger children, and afterwards to attend the inheritance. In 1783, the father of R. T. being dead, by a deed to which the younger children were parties, the term was assigned to H. as a security partly for the money necessary to pay the portions, and which by the deed were declared to have been paid. In 1784, R. T., the owner of the fee, executed a settlement by which the premises were conveyed in trust for himself for life, remainder to T. T., his son, for life, with power of appointment to his lawful children as tenants in common in fee, and in default of such issue to E. T. for life with the like power of appointment. This settlement was made expressly subject to the term, which was assigned to O. and declared to attend the inheritance. In 1841, a deed was executed by T. T. and his three reputed children, whereby it was declared that O. should stand possessed of the term as a security for 100l. lent to W. to them, and subject thereto to attend the inheritance. In 1843, T. T. executed an appointment, subject to the mortgage, under which appointment his three reputed children (the defendants) claimed. In 1844, by a deed, reciting the above deeds, the administrator of O. conveyed the term to M. in trust for J. M. (the husband of one of the defendants), who had paid off W., and then upon trust for the defendants; and, subject to those trusts, to attend the inheritance. E. T. executed a power of appointment in favour of her children, under which the plaintiffs claimed.—The plaintiffs proved that, at the time T. T. married the mother of the defendants, he was married to another woman. The defendants proposed to prove, by the reputed son of T. T., declarations of his father shewing that the first marriage was invalid; but this evidence was rejected.—Held: First, that this was a satisfied term within the meaning of the 8 & 9 Vict. c. 112, and could not be set up against the owners of the inheritance.—Secondly, that evidence of the declarations of T. T. was properly rejected.

[S. C. 31 L. J. Ex. 289; 8 Jur. (N. S.) 140; 5 L. T. 318. Referred to, *Haines v. Guthrie*, 1884, 13 Q. B. D. 830; *Brocklebank v. Thompson*, [1903] 2 Ch. 353.]

Ejectment to recover possession of a dwelling-house, land, and premises, situate at Cranage, in the county of Chester.

At the trial, before Byles, J., at the Chester Spring Assizes, [212] 1860, the following facts appeared:—By indentures of lease and release, the lease made the 26th and the release made the 27th January, 1784, between Richard Taylor and Hannah his wife of the one part, and W. Chesworth and G. Chesworth of the other part: Richard Taylor, as well for making a provision for the said Hannah his wife, in performance of a certain agreement made previous to and in consideration of their marriage, &c., and in consideration of the sum of 10s., &c., did grant, bargain, sell, release and confirm unto the said W. Chesworth and G. Chesworth, and their heirs and assigns, all that messuage or dwelling-house, &c. (the premises in question): habendum, upon the trusts therein contained, that is to say, to the use of the said Richard Taylor during his life:

remainder, to the use of the said Hannah Taylor, during her life : remainder, to the use of Thomas Taylor, only son of the said Richard Taylor, during his life : remainder, to the use of the children of the said Thomas Taylor, the son, lawfully begotten, and their heirs, in such shares as the said Thomas Taylor by deed or will should appoint ; and for want of such appointment, to the use of the said children equally, as tenants in common : and for default of such issue, to the use of Elizabeth Taylor, daughter of the said Richard Taylor, during her life : remainder to the use of the children of the said Elizabeth Taylor, lawfully begotten, and their heirs, in such shares as the said Elizabeth Taylor by deed or will should appoint ; and for want of such appointment, to the use of her children as tenants in common. Covenant by the said Richard Taylor that the premises thereby settled then were and should remain free from incumbrances, except an indenture of mortgage of the said premises, bearing date the 27th day of September last, to J. Hollins, for the term of 500 years, for securing the sum of 440l. and interest, which said term, as to the thereby released premises, was thereby agreed to be assigned in trust to attend the inheritance thereof.

[213] By indenture of lease, release and assignment, the lease made the 5th, and the release made the 6th of July, 1784, between Richard Harwar of the first part, Richard Taylor of the second part, J. Hollis of the third part, W. Chesworth and G. Chesworth of the fourth part, and R. Okell of the fifth part : reciting (inter alia) that by indenture of release, dated the 20th April, 1770, made between the said Richard Taylor of the one part, and Thomas Harwar of the other part, the said messuage, &c. (the premises in question) were conveyed in fee to Thomas Harwar by way of mortgage for securing payment of 60l. and interest : that by indenture of release, dated the 21st August, 1783, made between Richard Taylor and Hannah his wife of the first part, Thomas Harwar of the second part, J. Cross of the third part, Joseph Harwar of the fourth part, and Richard Harwar of the fifth part, the premises in question were released to J. Cross to make him tenant of the freehold for suffering a recovery, and that the recovery when suffered should enure to the use of Richard Harwar, his heirs and assigns, in trust for Thomas Harwar, for securing payment of 150l. and interest, and after payment, in trust for Richard Taylor, his heirs and assigns : that by indenture, dated the 27th September, 1783, between G. Chesworth, administrator of Peter Chesworth (surviving trustee named in the indenture of lease therein recited, as to the term of 500 years thereby limited), of the first part, William Taylor, Robert Taylor, John Russell and Margaret his wife, James Wakefield and Hannah his wife, Mary Taylor and Elizabeth Taylor (which said William Taylor, Robert Taylor, Margaret Russell, Hannah Wakefield, Mary Taylor and Elizabeth Taylor were the six younger children of Thomas Taylor, then deceased, by Elizabeth his wife, then deceased), of the second part, and Richard Taylor of the third part : reciting that by indentures of lease and release, dated the [214] 1st and 2nd of March, 1738, made previous to the marriage of the said Thomas Taylor with the said Elizabeth his wife, the said messuage, lands, &c., were settled to the use of the said Thomas Taylor, father of the said Richard Taylor, for his life, and after his decease, subject to a jointure for Elizabeth his wife for her life, to the use of William Taylor and Peter Chesworth, their executors, &c., for the term of 500 years, in trust for raising 200l. for the portions of the younger children of the said Thomas Taylor by Elizabeth his then intended wife ; with remainder to the first and other sons of the said Thomas Taylor, in tail general ; also reciting that Richard Taylor had applied to J. Hollins to lend him the sum of 200l. to discharge the trusts of the said term of 500 years, and also to advance him the further sum of 200l. : it was witnessed that in consideration of 200l., by the direction of the said G. Chesworth and Richard Taylor paid by the said J. Hollins, viz. 33l. 6s. 8d. to each of the six younger children of the said Thomas Taylor, and the further sum of 240l. to the said Richard Taylor also paid by the said J. Hollins, the said G. Chesworth (by desire of the said younger children), and also the said Richard Taylor, did bargain, sell, and assign unto the said J. Hollins the said messuage, lands, &c. : habendum for the remainder of the said term of 500 years, subject to the proviso for redemption on payment of 440l. and interest : also reciting that by an indenture, dated the 27th September, 1783, Thomas Harwar, on payment to him of 150l. 6s. 6d., released the said Richard Taylor from all claims, and also released to the said Richard Harwar all the estate and interest of him the said Thomas Harwar in and to the said messuage, lands, &c., vested in Richard Harwar, in trust : also reciting the indentures of lease and release of the 26th and 27th January,

1784 (the marriage settlement of Richard Taylor): also that it had been agreed that the messuage, lands, &c., comprised in the [215] indenture of the 27th January, 1784, should be conveyed by Richard Harwar to the said W. Chesworth and G. Chesworth, and their heirs, upon the trusts therein limited; and that the residue of the said term of 500 years, as to the same messuages, lands, &c., should be assigned to the said R. Okell, in trust to attend the inheritance thereof, for the same uses: It was witnessed that for the considerations, &c., Richard Harwar did bargain, sell, assign, &c., unto W. Chesworth and G. Chesworth, all that messuage, &c. (the premises in question): habendum, upon the trusts and subject to the proviso, declarations, agreements, and limitations in the indentures of lease and release of the 26th and 27th January, 1784, limited, expressed, and declared concerning the same: and it was further witnessed, that for the considerations, &c., J. Hollins did assign, &c., unto the said R. Okell the said messuage, &c.: habendum, for the remainder of the said term of 500 years, in trust for the said W. Chesworth and G. Chesworth, their heirs and assigns, for such uses, trusts, &c., as in the said indentures of lease and release of the 26th and 27th January, 1784, were limited, expressed and declared concerning the same: "To the intent that the same term may be preserved and kept on foot to attend, wait upon, and go along with the freehold, reversion, and inheritance of the same premises, in order to protect and defend the same from and against all mesne incumbrances, if any such there be."

By indenture of mortgage, dated the 23rd January, 1841, made between Thomas Taylor, the elder, of the first part, Mary Ann Taylor, John Johnson and Sarah his wife, and Thomas Taylor, the younger, of the second part, and Samuel Whitehead of the third part: reciting the indentures of lease and release of the 26th and 27th January, 1784; the indenture of the 6th July, 1784: also reciting that Robert Taylor and Hannah his wife had died; that Thomas Taylor, [216] the elder, had attained the age of 74 years; that the said Mary Ann Taylor, Sarah Johnson and Thomas Taylor, the younger, were the only surviving children of Thomas Taylor, the elder, and had attained the age of twenty-one years; and that the parties of the first and second parts had applied to the said Samuel Whitehead to lend them 100l.: it was witnessed that in consideration of 100l., &c., the said Thomas Taylor, the elder, Mary Ann Taylor, John Johnson and Sarah his wife, and Thomas Taylor, the younger, did grant, &c., and demise unto the said Samuel Whitehead, his executors, &c., all that messuage, &c., comprised in and conveyed by the indentures of lease and release of the 26th and 27th January, 1784: habendum, for the term of 2000 years, upon trust, when he should think proper, to sell the same. Declaration: that the said R. Okell should stand possessed of the said hereditaments for the residue of the said term of 500 years, in trust for the said Samuel Whitehead, his executors, &c., and to be assigned and disposed of as he or they should direct or appoint, for better securing the repayment of the said sum of 100l. and interest; and, subject thereto, "in trust to attend, wait upon, and go along with the reversion and inheritance of and in the said premises, in order to preserve the same from all mesne charges and incumbrances, if any such there were."

By indenture of the 1st May, 1843, made between the said Thomas Taylor, the elder, of the one part, and Mary Ann the wife of James Mills, Sarah the wife of John Johnson, and Thomas Taylor, the younger, of the other part: reciting the indentures of lease and release of the 26th and 27th January, 1784, the death of the said Richard Taylor and Hannah his wife; and that Mary Ann Mills, Sarah Johnson, and Thomas Taylor, the younger, were the only surviving children of Thomas Taylor, the elder: also reciting the indenture of the 23rd January, 1841: that Thomas [217] Taylor, the elder, was desirous of settling the hereditaments thereafter mentioned: It was witnessed, that in consideration of the natural love and affection which the said Thomas Taylor, the elder, had and bore for and towards his said children Mary Ann Mills, Sarah Johnson, and Thomas Taylor, the younger, &c., the said Thomas Taylor, the elder (pursuant to and in exercise and execution of the powers and authority for that purpose vested in him by the indenture of the 27th January, 1784), did, by that deed, &c., attested by two persons, &c., appoint all that messuage, land, &c., comprised in and conveyed by the indentures of lease and release of the 26th and 27th January, 1784, to the use of the said Mary Ann Mills, Sarah Johnson and Thomas Taylor, their heirs and assigns for ever, as tenants in common: subject nevertheless to the payment of the mortgage sum of 100l. and interest due under the mortgage security; and such mortgage debt shall from henceforth become the proper debt of the said Mary Ann

Mills, Sarah Johnson and Thomas Taylor, the younger,—habendum, to them, their heirs and assigns for ever, as tenants in common, subject as thereinbefore mentioned.

On the 21st November, 1844, administration of the goods, chattels, &c., of Robert Okell, deceased, limited to the said term of 500 years, was granted by the Consistory Court of the Bishop of Chester to Alfred Collins.

By indenture of the 2nd December, 1844, made between Samuel Whitehead of the first part, James Mills and Mary Ann his wife, John Johnson and Sarah his wife, and Thomas Taylor, the younger, of the second part, the said James Mills of the third part, James Turner of the fourth part, Alfred Collins of the fifth part, and Joseph Mills of the sixth part: reciting the indenture of mortgage of the 23rd January, 1841: the indenture of release of the 27th January, 1784: the indenture of release of the 6th July 1784, and [218] the indenture of appointment of the 1st of May, 1843: that the sum of 100l. still remained owing to the said Samuel Whitehead, under the said indenture of mortgage, but that all interest had been paid: that the said Samuel Whitehead having requested the parties thereto of the second part to pay him the said sum of 100l., the said James Mills had, at the request of the said other parties of the second part, agreed to pay the same sum on having the security of the mortgaged hereditaments and premises in manner thereafter expressed for the repayment of the same and interest: It was witnessed, that in pursuance of the said recited agreement, and in consideration of 100l. paid by the said James Mills, at the request and by the direction of the other parties thereto of the second part, to the said Samuel Whitehead, he, the said Samuel Whitehead, at the request and by the direction and on the nomination of the said James Mills, did thereby bargain, sell and transfer, and at the like request and by the like direction of the said James Mills, and on his nomination, the several other persons parties thereto of the second part, and each and every of them, did thereby ratify and confirm unto the said James Turner, his executors, &c., in trust nevertheless for the said James Mills, the said sum of 100l. secured by the recited indenture of mortgage and the interest, &c. And as to the said messuage, lands, &c., for all the residue then unexpired of the said term of 2000 years created by the recited indenture of mortgage; nevertheless upon and for the trusts for sale, &c., declared in the same indenture. And after reciting that the said James Mills was desirous, and it had been agreed, that the said term of 500 years created by the indenture of the 2nd March, 1738, should be got in and assigned to the said Joseph Mills, upon the trusts thereafter declared concerning the same: and reciting the death of R. Okell in the year 1806, and the grant of administra-[219]-tion of his goods, chattels, &c., limited to the said term of 500 years: It was witnessed, that in pursuance of such desire of the said James Mills, &c., the said Alfred Collins, at the request and by the direction of the several persons parties thereto of the second part, &c., did thereby bargain, sell, and assign unto the said Joseph Mills, his executors, &c., all and singular the said messuage, lands, &c., comprised in the said term of 500 years: habendum, for all the residue then to come and unexpired of the said term of 500 years created by the said indenture of the 2nd March, 1738: Upon trust, in the first place, for more effectually securing unto the said James Turner, in trust nevertheless for the said James Mills, payment of the said sum of 100l. and interest according to the purport, true intent and meaning of the said recited indenture of mortgage, &c.: Upon trust, in the next place, for the said Mary Ann Mills, Sarah Johnson and Thomas Taylor, the younger, and their respective heirs and assigns, as tenants in common, and to be from time to time assigned and disposed of as they should direct; And, subject to the trusts aforesaid, to attend and wait upon and go along with the reversion and inheritance of the same premises, in order and to the intent to protect and preserve the same from all mesne charges and incumbrances, if any such there were.

The defendants Thomas Taylor, Mary Ann Mills, and Sarah Johnson were the reputed children of Thomas Taylor, the only son of Richard Taylor, who made the settlement of the 27th January, 1784; and the defendants were in possession of the property in question under the appointment by Thomas Taylor of the 1st May, 1843. The defendant Peter Thomason was the tenant in possession. The plaintiff William Plant was the son of Elizabeth Plant (formerly Elizabeth Taylor), the only daughter of Richard Taylor, and the plaintiff Charles Plant was the only son and heir of her other son Thomas, and they claimed the [220] property under an appointment made

by Elizabeth Plant, in pursuance of the power contained in the settlement of the 27th January, 1784, in default of lawful issue of Thomas Taylor.

Evidence was adduced on the part of the plaintiffs to prove that, in the year 1794, Thomas Taylor married Ann Wickstead, and that shortly afterwards, and in the lifetime of Ann Wickstead, he married Martha Bardsley, who was the mother of the three above-named defendants. Ann Wickstead died in the year 1844. The defendant Thomas Taylor and his two sisters had received the rents of the premises since 1844. James Mills, the husband of Mary Ann Mills, was dead.

On the part of the defendants, it was proposed to prove that Ann Wickstead, at the time Thomas Taylor married her, was a married woman. The defendant Thomas Taylor was then called as a witness, and the defendants' counsel proposed to ask him what his father, Thomas Taylor, had said with reference to his marriage with Martha Bardsley. It was objected that any declarations of his father made to the defendant, as to his legitimacy, were not admissible in evidence. The learned Judge rejected the evidence on the ground that the defendant was no member of the family, since it was proved that he was illegitimate.

The defendants' counsel then submitted that the term of 500 years created by the indenture of the 2nd March, 1738, was still subsisting, and was a bar to the plaintiffs' recovery in this action. The learned Judge was of that opinion, and accordingly directed a verdict for the defendants, reserving leave to the plaintiffs to move to enter it for them.

V. Williams, in Easter Term, 1860, obtained a rule nisi accordingly, on the ground that the term of 500 years was a satisfied term, and had ceased, under the 8 & 9 Vict. c. 112, and that the defendants were not entitled to its protection.

[221] Welsby, in the same term, obtained a rule whereby it was ordered, that in the event of the Court making the plaintiffs' rule absolute to enter the verdict for them, the plaintiffs then shew cause why a new trial should not be had on the ground of the improper rejection of the evidence of the declarations of Thomas Taylor, deceased.

Welsby (with whom was Beavan) shewed cause (a) against the plaintiffs' rule to enter the verdict for them. The term of 500 years, created by the indenture of the 2nd of March, 1738, is not a term which has ceased under the 8 & 9 Vict. c. 112, and the defendants are entitled to its protection. The first section of that Act enacts "that every satisfied term of years which, either by express declaration or by construction of law, shall upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid; except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said 31st day of December, 1845; and shall, for the purpose of such protection, be considered in every Court of law and of equity to be a subsisting term." First, this term of 500 years is not a satisfied term. Secondly, it is not a term which, on the 31st December, 1845, was, either by express declaration or construction of law, attendant on the inheritance; for, by the indenture of the 2nd of December, 1844, it was expressly assigned in trust for se-[222]-curing payment of a mortgage debt and interest; and upon a further trust for the three defendants, the children of Thomas Taylor, the elder, and, subject to those trusts, to attend the inheritance: *Doe d. Clay v. Jones* (13 Q. B. 774). Thirdly, assuming that the term was, on the 31st December, 1845, attendant upon the inheritance, it is within the exception of the statute, for the indenture of the 2nd of December, 1844, contains an express declaration that the term shall attend the inheritance, in order to protect it from incumbrances. The defendants would have been entitled to the protection of this term, if the 8 & 9 Vict. c. 112 had not passed, and therefore it must, for the purpose of their protection, be considered a subsisting term. *Cottrell v. Hughes* (15 C. B. 532) is an authority that regard must be had to the right of the defendants on the 31st of December, 1845, and if at that time a Court of equity would not have restrained the defendants from

(a) In Trinity Term, 1860, June 8.

setting up this term they are now entitled to its protection. In that case, two terms of 1000 years each were created, for mortgage purposes, in the years 1762 and 1763. The mortgage debts having been satisfied, the two terms were in the year 1773 assigned to H. in trust to attend the inheritance for the benefit of the plaintiff's great-grandfather, who was then seised in fee. In the year 1778, the estate was limited in strict settlement on the marriage of the plaintiff's grandfather, and in the year 1813, by a settlement made by the plaintiff's father and grandfather, the estate was limited to the plaintiff's father for life, with remainder to such of his children as he should appoint. In 1840, the plaintiff's father, assuming and covenanting that he was seised in fee, sold the estate to D.; and on that occasion the two satisfied terms of 1000 years were assigned by the executors of H. to a trustee for D., to attend and protect the inheritance. D. had no notice at the time of [223] the purchase of the settlement of 1813. In 1844, the plaintiff's father executed the power conferred on him by the settlement of 1813, and thereby limited the estate, after his death (which took place in 1853), to his eldest son, the plaintiff, in fee. In ejectment by the plaintiff against the devisee of D., the Court of Common Pleas held that, inasmuch as a Court of equity would not have restrained the setting up of those terms by D. in a Court of law, they must be considered as still subsisting, notwithstanding the statute 8 & 9 Vict. c. 112; and consequently the plaintiff was not entitled to recover, because those terms preceded the estate acquired by him under the settlement of 1813, and therefore the title to the legal possession for the remainder of the terms was not in him, but in the assignee thereof. A Court of equity would not have restrained the defendants from setting up this term, for it was assigned in trust for them, as a security for a mortgage debt which they purchased for valuable consideration. He was then stopped by the Court.

Grove, Southgate and Vaughan Williams, in support of the rule. First, is this term of 500 years a satisfied term? Secondly, is it attendant upon the inheritance? And, thirdly, are the defendants entitled to its protection? In the year 1784, this term was assigned to attend the inheritance, and it would remain attendant unless disannexed by a person entitled to sever it. The defendants had no power to do so. This Court must decide upon equitable principles: *Cottrell v. Hughes* (15 C. B. 532); *Doe d. Cadwalader v. Price* (16 M. & W. 603). In equity a term attendant upon the inheritance is considered as a part of it: *Villiers v. Villiers* (2 Atk. 71). If a purchaser for valuable consideration, and without notice of a prior incumbrance, procures an assignment of a term in [224] trust for himself, he is entitled in equity to the benefit of it; but it is otherwise where he has purchased with notice: *Maundrell v. Maundrell* (10 Ves. 271). A purchaser, or mortgagee, cannot protect himself by taking a conveyance from a trustee after notice of the trust, for by taking the conveyance he becomes the trustee: *Saunders v. Dehew* (2 Vern. 270). Neither can a person protect himself by a satisfied term, unless it is in some sense got in, either by an assignment, or making the trustee a party to the instrument, or taking possession of the deed: *Maundrell v. Maundrell* (10 Ves. 271). Here Whitehead had notice of the limitations in the settlement of the 27th of January, 1784, for it is recited in the indenture of mortgage of the 23rd of January, 1841, and therefore he had no equity as against Elizabeth Taylor. He got no assignment of the term from Okell, the trustee of it, but a mere declaration of trust in his favour; and he did not get possession of the deed of the 2nd of March, 1738, which created the term. Under the indenture of mortgage of the 23rd January, 1841, Whitehead had no interest beyond the life of Thomas Taylor, the elder. The appointment of the 1st of May, 1843, was void, for Thomas Taylor could only exercise the power in favour of his lawful issue. The equity of James Mills is still weaker than that of Whitehead, for he was the husband of one of the defendants, and he had constructive notice, by the recital of the indenture of the 2nd of December, 1844, that the term was satisfied. (Welsby referred to *Jones v. Powles* (3 Myl. & K. 581).) All the cases shew that the term is gone at law, and the question is, whether, before the 8 & 9 Vict. c. 112, a Court of equity would have restrained the defendants from setting it up. Now, in a Court of equity, no person can avail himself of the protection of a term unless he is a purchaser for valu-[225]-able consideration and without notice of the prior charge. If such a person takes a defective conveyance of the inheritance, and procures an assignment of a term in trust for himself, he is entitled to the benefit of it: *Willoughby v. Willoughby* (1 T. R. 763). But where the purchaser does not procure an assignment of the term to his trustee,

but merely takes a declaration of trust, the term will enure for the benefit of the inheritance: *Maundrell v. Maundrell* (7 Ves. 567; 10 Ves. 271); *Sanders on Uses*, p. 322, 5th ed.; *Sug. Vend. & Purch.*, p. 510, 13th ed. Whitehead, not having procured an assignment of this term, had no interest in the estate after the death of Thomas Taylor, the tenant for life, and consequently he could convey none to James Mills; and James Mills could acquire no right to the term by paying the mortgage debt. The object for which this term was created, viz., the raising portions for younger children, having been satisfied, the term became part of the inheritance: *Watkins on Conveyancing*, p. 47, 9th ed. Then how is James Mills entitled to recover 100l. upon this term? He was not a purchaser for valuable consideration of Whitehead's mortgage, but merely paid his wife's debt; and therefore he cannot, by taking an assignment of the term, preserve it as a charge upon the inheritance for his benefit: *Huntingdon v. Huntingdon* (2 Brown, P. C. 1). But assuming that he is a purchaser for value, in a Court of equity the onus would be on him to plead that he is a purchaser without notice: *The Lady Bodmin v. Vandenbendy* (1 Vern. 179); *Kelsall v. Bennet* (1 Atk. 522); *Hughes v. Garner* (2 Y. & C. Eq. 328, 335). But, having had notice of the settlement of the 2nd January, 1784, he was bound to make inquiries as to the marriage of Thomas Taylor: *Jones v. Williams* (24 Beav. 47), when he would have ascertained [226] that the children were illegitimate. Whatever is sufficient to put a party on inquiry is good notice, in equity, to that party: *Smith v. Low* (1 Atk. 490), *Taylor v. Stibbert* (2 Ves. Jun. 437), *Daniels v. Davison* (16 Ves. 249). *Jones v. Powles* (3 Myl. & K. 581) proceeded on the ground that a long possession had followed the alleged devise, and no reasonable diligence could have led to a discovery of the forgery. *Worthington v. Morgan* (16 Sim. 547), *Hewitt v. Loosemore* (9 Hare, 449), *Jackson v. Rowe* (2 Sim. & S. 472), and *Montefiore v. Browne* (7 H. L. 241), are also authorities that Whitehead should have made inquiries. In *Cottrell v. Hughes* the defendant was a purchaser for valuable consideration without notice of the settlement, and he had the legal estate. They also referred to *Sugden's Vend. and Purch.*, p. 412, 623, 13th ed.

Cur. adv. vult.

Grove and V. Williams then shewed cause against the defendants' rule for a new trial. Evidence of the declarations of Thomas Taylor, the elder, as to the legitimacy of his children, was properly rejected. [Pollock, C. B. Declarations of a deceased person are only admissible for the purpose of reputation, not of proving facts. It may be proved by the declaration of a parent that one of his children was older than another (see *Taylor on Evidence*, p. 528, sect. 578, 3rd ed.), but his declaration is not admissible for the purpose of proving that his marriage with a second wife, in the lifetime of the first, was valid, because the first wife was married at the time she married him.] The principle on which the declarations of deceased persons are admitted, is that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even [227] position, without any temptation to exceed or fall short of the truth: *Whitelocke v. Baker* (13 Ves. 511, 514). Here Thomas Taylor had the strongest interest in making the declaration, because he was liable to an indictment for bigamy. The declarations, to be admissible, must have been made ante litem motam. "If there be lis mota, or anything which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible:" *Monkton v. The Attorney General* (2 Russ. & Myl. 147, 160). *Lis mota* is the arising of that state of facts on which the claim is founded, without anything more: *Walker v. The Countess of Beauchamp* (6 C. & P. 552). Here it does not appear at what time the declarations were made. [Pollock, C. B. Before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself; Taylor on Evidence, sect. 578, p. 526, 3rd ed.] Here the relationship was disproved. A paper writing found among an ancestor's papers, in the custody of a stranger in blood, and not signed by the ancestor nor by any of his family, is not admissible to shew that state of the family: *The Vaux Peerage* (5 Cl. & F. 526). [Pollock, C. B. The declarations must be respecting facts of a domestic nature, not such as are cognizable in a Court of criminal justice.] This is not a case in which the fact sought to be established by hearsay is required to be proved for the purpose of pedigree, and on that ground also the declaration is inadmissible: *Rex v. The Inhabitants of Erith* (8 East, 539). [Pollock, C. B. In an action for goods sold and delivered,

declarations of a deceased parent are not admissible to prove the defendant is an infant. It is different where the question is one of pedigree.]

[228] Welsby and Beayan, in respect of the rule (June 19). The declaration was improperly rejected. The question in the cause was whether the defendants, Thomas Taylor and his two sisters, were the lawful appointees of Thomas Taylor, the elder; and that depended on the further question, whether they were his lawful children. No doubt the plaintiffs, who began, adduced evidence to prove that they were illegitimate; but the illegitimacy could not properly be held to be established until the fact was found by the jury, and it ought to have been taken that a relationship existed between the witness and the declarant at the time when evidence of his declarations was tendered. [Pollock, C. B. It was the province of the Judge to decide as to the effect of the plaintiff's evidence, and as soon as he was satisfied as to the previous marriage, the illegitimacy was for this purpose proved. Besides, there is good ground for supposing that the declarations were not made without bias.] Suppose the only evidence tendered on the part of the plaintiffs to prove the illegitimacy had consisted of declarations of deceased members of the family, as it might have done, is it to be said that it could not be met by counter evidence of the same nature, to disprove the illegitimacy? The "family," in such a case, meant the family of which the party alleged himself to be a member. Thomas Taylor was a member of this family for all the purposes which ought to make his declaration credible. The fact of the birth, marriage, or death of a child may be proved by entries in a book by a deceased parent, or other relation, such entries being receivable as their written declarations. Thus, upon a question whether a testator at the time of making his will was of full age, a written memorandum by a deceased parent, stating the time of his birth, was allowed to be strong evidence: *Herbert v. Tuckal* (Sir T. Raym. 84). In like [229] manner, the declarations of parents are admissible to prove that a birth took place before marriage, as well as to disprove the fact of marriage: *Goodright d. Stevens v. Moss* (Cowp. 591). [Wilde, B. In *Doe d. Jenkins v. Davies* (10 Q. B. 314), where the question was whether S. deceased was legitimate or not, a certificate of the marriage of S.'s alleged father to her mother was produced by a witness, who said he received it from S. The question was then put, whether S. made, at that time, any statement respecting her mother's marriage: it was held that question was admissible, it having been before proved, to the satisfaction of the Judge, that S. was a member of the family, and it not appearing that any dispute was at that time known to exist. Here it was proved to the satisfaction of the Judge that the children were illegitimate.] That being the very issue in the cause, the Judge ought not to have held it to be proved when the plaintiffs' evidence only had been heard, but should have received all evidence which, according to law, tended either to the proof or disproof of the issue. As to the alleged *lis mota*, there is no pretence for saying that there was any controversy existing on the subject at the time when the declarations were made.

Cur. adv. vult.

The judgment of the Court was now delivered by

CHANNELL, B. This was an action of ejectment, tried before my brother Byles, at the Cheshire Spring Assizes, of last year. It was brought to recover certain premises at Cranage, in the county of Chester. Both the plaintiffs and defendants claimed under a settlement made by one Richard Taylor (whom we will call "the settlor"), the plaintiffs claiming as tenants in common in fee, by virtue of an ap-[230]-pointment made by one Elizabeth Taylor, entitled in default of lawful children of Thomas Taylor, the elder; the son and heir of the settlor: the real defendants (who were admitted to defend as landlords) claiming as tenants in common in fee, either as entitled by an appointment made by him under the settlement, or as his heirs in default of appointment; and likewise claiming the benefit of an alleged outstanding term, created long anterior to the settlement, and to the history of which it is necessary to draw attention.

This term of 500 years was created in 1738, under a settlement on the marriage of Richard Taylor's father, for the purpose of providing portions for his younger children, and afterwards to attend the inheritance and protect it from all mesne incumbrances, if any. There were limitations in the settlement which, not having been relied upon by either party, it is unnecessary to notice. In 1783 R. Taylor's father having died, by a deed, to which the younger children were parties, it was assigned to one Hollins as a security partly for the money necessary

to pay them their portions, and which by the deed were declared to have been duly paid to them. The fee in the meantime remained in Richard Taylor, the settlor, and he in January, 1784, executed the settlement under which, as we have said, both parties in this action claim, and by which the premises were conveyed in trust for himself for life, then to the use of his son Thomas Taylor, the elder, for life, with power of appointment to all or any of his lawful children, or in default of appointment to such lawful children as tenants in common in fee; remainder to Elizabeth Taylor for life, with like power of appointment in favour of her children, or in default of appointment to such children as tenants in common in fee. The plaintiffs, William Plant, her son, and Charles Plant, the only son and heir of her other son, Thomas, [231] claim as such children, and by virtue of an appointment made by her will in their favour. The defendants, children of Thomas Taylor, the elder, claim under an appointment made by him in their favour, as well as by virtue of the term in question, to the history of which we will now recur.

The settlement of 1784 was made expressly subject to the term, which was assigned to one Okell, and declared again "to attend the inheritance."

In 1841, a deed was executed by Thomas Taylor, the elder, reciting that his father, the settlor, had died, and that he himself had surviving three children, mentioning the defendant Taylor and his two sisters, the other defendants; and the term was then, by the administrator of Okell, assigned to one Whitehead, as security for 100l., and afterwards to attend the inheritance.

In 1843, Thomas Taylor, the elder, executed the appointment in favour of the defendants (under which they claim as tenants in common in fee), subject to Whitehead's mortgage.

In December, 1844, there was a deed executed by which Whitehead and his trustee conveyed the security of the term to Joseph Mills, in trust for James Mills (husband of one of the defendants), who had paid off Whitehead, and after satisfying that money, it was declared that the trust was to be for the benefit of defendants, and to attend the inheritance.

Supposing the defendants to be the lawful children of Thomas Taylor, the elder, it is admitted that the plaintiffs would not be entitled, and that the defendants would not require the benefit of this term. On the other hand, supposing the defendants not to be the lawful children of Thomas Taylor, the elder, they would not be entitled, either under the appointment made by him or under the settlement in default of appointment; for the settlement only gave the power and made the limitation expressly in favour [232] of lawful children. At the trial it was denied that they were his lawful children, by reason that previous to his marriage with their mother he had been married to another woman, one Anne Wickstead, who, it was admitted, lived until 1844.

At the trial the plaintiffs proved their pedigree as heirs of Elizabeth Taylor, who would be entitled in default of lawful children of Thomas, and their title was not disputed in such event. On the other hand, on the part of the defendants, it was proposed to prove declarations by Thomas Taylor to disprove his first marriage, which were objected to and rejected. The learned Judge was not asked to put the question of legitimacy to the jury, nor to determine it as a question on which the admissibility of the evidence might depend.

It was proved by the defendant Taylor that he and his sisters had received the rents since 1844, and had lately built a house on the premises. James Mills had died in the interval, and Joseph Mills, the legal owner of the term, supposing the mortgage not satisfied, was no party to the action. The question was not raised whether the mortgage to Hollins was satisfied, and as other parties had been so many years in possession, it should seem that it must have been.

The learned Judge, there being no question of fact which he was required to leave to the jury, directed a verdict for the defendants; but doubting whether the defendants could set up the term, and being of opinion that but for the term of 500 years the plaintiffs were entitled to recover, he gave the plaintiffs leave to move to enter the verdict for them.

A rule to shew cause why the verdict so entered should not be set aside, and a verdict entered for the plaintiffs, pursuant to the leave reserved, was obtained by Mr. Grove.

The ground as stated in this rule is, that the term relied upon by the defendants

was a satisfied term, which had [233] ceased, under the stat. 8 and 9 Vict. c. 112, and that the defendants were not entitled to its protection.

A cross rule was obtained by Mr. Welsby, on behalf of the defendants, calling upon the plaintiffs conditionally, in the event of the Court being of opinion that the term of 500 years could not be set up, to shew cause why there should not be a new trial, on the ground of the improper rejection of evidence of the declarations of Thomas Taylor deceased.

These rules having been argued before the Lord Chief Baron, my brother Wilde, and myself, we took time to consider our judgment.

As the defendants' rule for a new trial is to be made absolute only in the event of the plaintiffs' counsel satisfying the Court that they are right in their contest that the term cannot be set up, we think it will be most convenient to dispose of the plaintiffs' rule first.

By the 8 & 9 Vict. c. 112, s. 1, it is enacted: "That every satisfied term of years which, either by express declaration or by construction of law, shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine, as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said 31st day of December, 1845, and shall for the purpose of such protection be considered in every Court of law and of equity to be a subsisting term."

[234] In *Doe d. Cadwalader v. Price* (16 M. & W. 603), this Court, in dealing with the question whether a satisfied term, which by the operation of the statute is declared to cease and determine, may yet be held to afford protection as if it continued to exist, held, that it had to consider whether the party claiming the protection of the term was entitled to protection as against an incumbrancer, and as that was a question of equity, the Court had thrown upon it the duty of a Court of equity.

For the defendants, in support of their right to set up the term, the case of *Cottrell v. Hughes* (b) was mainly relied on, and it was contended that the term here was one which would have afforded protection to the defendants if the statute had not passed, and therefore continued to exist for the purpose of affording the same protection.

For the plaintiffs it was argued that this term was a satisfied term, which, as against the owner of the inheritance, a Court of equity would not allow to be set up; that, on the assumption of the illegitimacy of the defendants, the plaintiffs are the owners of the inheritance; that prior to the assignment to Whitehead the term was simply a term to attend the inheritance; that a term attendant on the inheritance, in equity follows all the equities of the inheritance; that it cannot be disannexed from the inheritance except by one who has power to create a term, or to deal with the inheritance; that in the settlement recited in the deeds of 1841 and 1844 there was a remainder to Elizabeth Taylor; that therefore Whitehead and Mills had notice of her title; that Whitehead got no assignment or possession of the deed creating the term, but only a declaration of trust which must be taken subject to the limitations of the settlement; that Whitehead had not so good an equity as Eliza-[235]-beth Taylor had under her remainder, and that James Mills and the defendants, so far as regards the term, could have no better equity: that James Mills, to have the benefit of the term, must have been a purchaser for value without notice, which he was not, for he had constructive notice, by the recitals in his own deed, that the object of the term was satisfied; that a purchaser who has had notice which puts him on inquiry must follow it up, and that negligence is imputable if no inquiry be made; that Whitehead had no right or interest after the death of Thomas Taylor, and that Okell was trustee for Whitehead at least only during the life of Thomas Taylor. That the trusts of the deed of 1844 in favour of the defendants were void, that the mortgage to secure the 410l. was satisfied, and that the only remaining trust was to attend the inheritance, which was in the plaintiffs.

The Court of Common Pleas, in *Cottrell v. Hughes*, agreeing with the decision of

(b) 15 C. B. 532. (Reported more fully in 3 Com. Law Rep. 496.)

this Court in *Doe d. Cadwalader v. Price*, on the point that the protection to be afforded is not merely such as might have been set up in a Court of law, but such as a Court of equity would have given effect to, decided for the defendant, on the ground that in equity the defendant would not have been restrained from setting up the term.

In giving its judgment the Court adopted the view suggested by Mr. Butler in his note (s. 15) to Co. Litt. 290 b., that the meaning of the expression in the assignment of these terms, that they are to protect the inheritance from all mesne incumbrances (if any), is, that if there is a term created prior to the purchase or mortgage, and the purchaser procures an assignment of it to himself, this gives him the legal interest discharged from any incumbrances subsequent to the creation of the term, but prior to his purchase.

[236] Mr. Butler adds, that to entitle a party to the benefit of a satisfied term he must have the following requisites:—He must be a purchaser for a valuable consideration, and at the time of his purchase he must have no notice.

Upon the best consideration we have been able to give to the subject we think that the plaintiffs are right, and that the term in question cannot be set up as an answer to their case.

In this case there have been no mesne incumbrances, except such as have been created by the very dealings with the term itself by way of mortgage. The mortgage by Thomas Taylor to Whitehead was invalid. Taylor had no power to charge the estate, or at least only for his own life, and the assignment of the term for any other purpose than to attend the inheritance was wholly unauthorized.

The decision in *Cottrell v. Hughes*, so much relied on by the defendants, was a decision in favour of the defendant there, because he was a purchaser for value without notice and had a legal estate. We think, on the authority of that case and the authorities there cited, we are bound to hold that this term could not afford any protection to the defendants, even if the 100l. paid by Mills to Whitehead remains unpaid, simply because they have no interest to protect, the mortgage to Whitehead being invalid or creating an interest only to the extent we have noticed; and therefore that the first rule to enter the verdict for the plaintiffs must be made absolute. (a)

[237] It becomes necessary, then, to dispose of the cross rule for a new trial.

In the course of the argument we expressed a strong opinion that the evidence rejected by the learned Judge was rightly rejected. As we have stated more than once, the sole question of fact in dispute at the trial was the legitimacy of the defendant Taylor and the female defendants. This depended on the validity of the marriage of the persons who were *de facto* their father and mother.

The fact of the marriage of the father, Thomas Taylor, with Anne Wickstead before his marriage with the mother of the defendant Taylor, and that Anne Wickstead was at that time living, was proved.

The defendant, Taylor, was called as a witness to prove declarations by his father respecting his first marriage. Before a declaration can be admitted in evidence the relationship of the declarant *de jure*, by blood or marriage, must be established by some proof, independent of the declaration itself. See the cases cited in Taylor on Evidence, vol. 1, p. 526, note 4.

Slight evidence, no doubt, would be sufficient. Here there was no proof of any relationship *de jure* between the declarant and the defendant. The proof was the contrary.

Perhaps the learned Judge was right in rejecting the evidence, on the ground that any declaration made by Thomas Taylor, the father, on the subject, though not made *post litem motam*, or after dispute as regards the property had actually arisen, would be a declaration by a person whose mind could not be free from bias. It was manifestly in many ways directly for his interest to make a declaration tending to disavow his

(a) See *Shaw v. Johnson*, 1 Drew. & S. 412, 7 Jur. N. S. 1005, where it was held by Kindersley, V. C., that a term assigned to a trustee for a purchaser and then to attend the inheritance, before the 31st December, 1845, protected it after that day. With respect to this case Lord St. Leonards observes, that "there is no date in the report in Drew. & S., but in the Jurist it appears that the mortgage was long before the period fixed for merger of satisfied terms. The attendant term, therefore, was not a satisfied term within the Act, as it was by mortgage agreed to be a security for the mortgagee." Sugden's New Statutes relating to Property, p. 282, 2nd ed.

first marriage, or having a tendency [238] to shew that it was an illegal marriage, and consequently did not invalidate the second.

No case has been cited in which the declaration of a deceased person, obviously for his interest, has ever been received.

We are of opinion that the rule to enter a verdict for the plaintiffs must be made absolute, and the rule for a new trial must be discharged.

Rules accordingly.

THE ATTORNEY GENERAL *v.* FLOYER, SEYMER AND DIGBY. (IN RE BANKES.) July 6, 1861.—In 1774, H. B., the owner in fee of certain real estates, devised them to his son H. for life, remainder to his first and other sons in tail male. In 1810, H., being tenant for life, and W. his son tenant in tail, suffered a recovery to such uses as they should jointly appoint, and in default of such appointment, to the use of H. for life, in confirmation of the same estate for life; remainder to such uses as W., after the decease of H., should appoint; and in default of such appointment to the purposes limited by the will of H. B. In 1821 H. and W. by indenture of settlement appointed the estates to such uses as they should jointly appoint, and in default of such appointment to the use of H. for life; remainder to W. for life; remainder to his first and other sons in tail male; remainder to G., the second son of H., for life; remainder to the first and other sons of G. in tail male. This deed contained a power for W. and G., when in possession of the estates, to charge them with portions for their daughters and younger children. H. and W. died without having exercised either of the powers created by this deed. In 1855, G., the tenant for life in possession of the estates, and E. his son, the tenant in tail in remainder, executed a disentailing deed, and thereby conveyed the estates to such uses as they should jointly appoint; and in default of such appointment to the uses of the settlement of 1821. On the following day G. and E., by indenture of settlement, appointed the estates to such uses as they should jointly appoint; and in default of such appointment to the use of G. for life; remainder to trustees during the life of E., with remainders over. This deed also contained a power for G. to charge the estates with portions for his daughters and younger sons, which power he exercised.—Held: First, that H. and W. were the joint “predecessors” of G., within the meaning of the Succession Duty Act, 1853, and that G. was chargeable with duty at the rate of 1l. per cent. on one half the property as upon a “succession” derived from his father, and 3l. per cent. on the other half, as upon a succession derived from his brother.—Secondly, that E. was chargeable with duty at the same rate.—Thirdly, that duty was chargeable on the portions of the daughters and younger sons of G. at the rate of 1l. per cent., as their interest was derived from their father.

[S. C. 7 Jur. (N. S.) 1062; 4 L. T. 646: reversed 1862, 9 H. L. Cas. 477; 11 E. R. 814 (with note).]

Information in equity by the Attorney General (so far as material) as follows:—

1. The object of this information is to obtain from the defendants, who are the executors of the will of George [239] Bankes, late of Kingston Hall, in the county of Dorset, the two first named of whom are trustees of the settlement of 1855, made by his eldest son Edmund George Bankes, payment of the duty in respect of the succession of the said George Bankes in certain real property to which he became beneficially entitled in possession on the death of his brother, William John Bankes; and also of the duty in respect of the succession in the same property of his eldest son, the said Edmund George Bankes, who became beneficially entitled thereto in possession on his said father's death. And also of the duty in respect of the succession of several younger children of the said George Bankes, in the same property under the appointments made by his will. The question for the decision of the Court is, as to the rate of duty payable in respect of such successions.

2. Henry Bankes, formerly of Kingston Hall, was, at the time of making his will and of his death, the absolute owner of certain real property situate in the counties of Dorset and Cumberland. And on the 18th August, 1774, he made his will, which was duly executed and attested, and thereby devised his said real property unto J. Wynne and W. Wynne, to hold the same unto them, their heirs and assigns, to the

use of the testator's son, Henry Banks, for life: remainder to the use of the first son of the said Henry Banks (the son) and the heirs male of the body of such first son: remainder to the use of the second and all others sons of Henry Banks (the son), successively and in remainder, and the heirs male of their bodies.

3. The testator, Henry Banks, died in September, 1776, and his will was duly proved in the Prerogative Court of the Archbishop of Canterbury, by the executrix thereof.

4. Henry Banks, the younger, who was the first son of Henry Banks (the son), died in 1806, without issue, and William John Banks, who was the second son of Henry Banks [240] (the son), thereupon became and was, at the time of the date and execution of the indenture next hereinafter stated, the first tenant in tail in remainder expectant on his father's death, of the real property devised by the said will, and he attained his age of twenty-one years in the year 1809.

5. By an indenture of bargain and sale, dated the 28th June, 1810, and made between Henry Banks (the son) of the first part, the said William John Banks of the second part, J. Holmes of the third part, and J. Lowden of the fourth part, and which was duly executed and enrolled in the Court of Common Pleas: after reciting (inter alia) that Henry Banks (the son) and William John Banks were desirous and had determined to suffer a common recovery of the lands, tenements, and hereditaments devised by the will of the said testator, Henry Banks, and of settling the same to the uses, upon the trusts, &c., in the said indenture limited and declared: It was witnessed that for barring and destroying the estate tail of the said lands, &c., and all remainders and reversions expectant or depending on the same estate tail, &c., and for settling and assuring the same to the uses by the said indenture limited and declared concerning the same, Henry Banks (the son) did bargain and sell, and William John Banks did grant, bargain, sell, ratify and confirm, unto the said J. Holmes and his assigns, the said lands, &c. (being the real property devised by the said testator's will), to hold the same unto the said J. Holmes and his assigns during the joint lives of the said J. Holmes, Henry Banks (the son), and William John Banks, to the intent that the said J. Holmes might become tenant of the freehold of the lands, &c., by the indenture bargained and sold, to the end that one or more common recovery or recoveries might be suffered, with a declaration that the same should enure to the uses by the same indenture expressed and declared, (that is to say) as to a certain part thereof to [241] the use of Henry Banks (the son), his heirs and assigns for ever; and as to the other part thereof (being that portion of the said real property to which the question in this suit relates) to the use of such person or persons, for such estate or estates, and for such interest or interests by way of annuity, rent-charge, or otherwise, and in such parts, shares, and proportions, and upon such trusts, and for such ends, intents and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, as Henry Banks (the son) and William John Banks jointly, by any deed, sealed and delivered by them in the presence of and attested by two witnesses, should direct, limit, and appoint; and in default of such direction, limitation and appointment, to the use of Henry Banks (the son) during his life, with the same powers of leasing, and other powers and privileges, as were given or limited to him by the will of Henry Banks, the testator, in confirmation of the same estate for life, and the powers and privileges annexed thereto: with remainder to the use of such person or persons, for such estate or estates, &c., as the said William John Banks, at any time after the decease of Henry Banks (the son), by any deed, &c., should direct, limit, or appoint; and in default of such appointment, to the same ends, intents and purposes, powers, provisoes, and limitations, as were limited by the will of Henry Banks, the testator, after and expectant on the several estates limited for the life of Henry Banks (the son).

6. A common recovery was duly suffered in Trinity Term, in the year 1810.

7. By an indenture of settlement, dated the 2nd June, 1821, made between Henry Banks (the son) of the first part, the said William John Banks of the second part, H. Seymer, W. Bond, G. Pickard and H. Masterman of the fourth part, and which was duly executed and attested: [242] after reciting (inter alia) that Henry Banks (the son) was seised in fee simple of divers hereditaments in the county of Dorset, in addition to those limited to the use of Henry Banks (the son) in fee as aforesaid, and was also possessed of certain leasehold hereditaments in the said county: and also reciting that the freehold and leasehold hereditaments of Henry Banks (the son) were

convenient to be held together with the other hereditaments so subjected to the joint power of appointment of Henry Banks (the son) and William John Banks: and also reciting that Henry Banks (the son) and William John Banks, by way of family arrangement, agreed to join in settling the lands and hereditaments thereafter released and assigned, to the uses, upon the trusts, &c., thereafter limited, expressed and declared, and for that purpose Henry Banks (the son) and William John Banks had determined to execute their joint power of appointment: It is witnessed that, in pursuance of the agreement in that behalf, and for settling and assuring the lands and hereditaments first thereafter released, Henry Banks (the son) and William John Banks, by virtue and in execution of the power or authority given, limited or reserved to them in the indenture of bargain and sale, bearing date the 28th June, 1810, and the recovery suffered in pursuance of the agreement for that purpose contained in the same indenture, did, by that their deed, sealed and delivered by them jointly in the presence of two witnesses, &c., jointly direct, limit and appoint that the lands and hereditaments first thereafter released should thenceforth remain, continue and be, and that the said recovery should enure to the uses, upon the trusts, &c., thereafter limited, expressed and declared: and it is thereby also witnessed that, in pursuance of the agreement in that behalf, and for the considerations aforesaid, Henry Banks (the son) and William John Banks [243] did grant, bargain, sell and release unto the said H. Seymer and W. Bond, their heirs and assigns for ever, first, the lands and hereditaments therein particularly described (being all the same premises as are described in and conveyed by the before stated indenture of bargain and sale, and by the recovery suffered in pursuance thereof); and, secondly, the hereditaments therein also particularly described (being hereditaments whereof Henry Banks (the son) was seised for an estate of inheritance in fee simple), to hold the same unto the said H. Seymer and W. Bond, their heirs and assigns, to the uses and upon the trusts, &c., thereafter limited, expressed and declared: and it was thereby declared and agreed, by and between the several parties to the said indenture of settlement, that the appointment and release thereby made should severally operate and enure, and that all lands and hereditaments thereby released should thenceforth stand and be settled to the uses and trusts, &c., which were in effect as follows (that is to say): as to a certain part thereof (being the same part as was by the before stated indenture of bargain and sale limited to the use of Henry Banks (the son) in fee simple), to the use of Henry Banks (the son), his heirs and assigns, for ever; and as to the other parts thereof (which are hereinafter referred to as "the settled estates," and include that portion of the real property devised by the said testator's will, as aforesaid, to which the question in this suit relates), to the use of such person or persons, for such estate or estates, &c., as Henry Banks (the son) and William John Banks jointly should, by deed &c., direct, limit or appoint, and in default of such direction, limitation or appointment, to the use intent and purpose that Frances Banks, the wife of Henry Banks (the son) (who died in her husband's lifetime), should, in case she should survive Henry Banks (the son), receive during her life a yearly [244] rent-charge of 700*l.* out of the said settled estates, and subject thereto, and to the term of 500 years hereinafter limited, to the use of Henry Banks (the son) during his life, with remainder to the use of G. Pickard and H. Masterman for the term of 500 years, upon the trusts thereafter expressed (being trusts, amongst others, for the payment of a certain annuity to Edmund George Banks), with remainder to the use of William John Banks and his assigns during his life; with remainder to the use of the first son of William John Banks and the heirs male of the body of such first son; and, on failure of such issue, to the use of the second and every other son of William John Banks severally and successively in remainder, and the heirs male of their bodies; with remainder, in default of such issue, to the use of the said George Banks, second surviving son of Henry Banks (the son), and his assigns, during his life; with remainder to the use of the first son of the said George Banks and the heirs male of the body of such first son; and, on failure of such issue, to the use of the second and all other sons of the said George Banks, severally and successively in remainder, and the heirs male of their bodies: with similar limitations, in default of issue, to Edward Banks, third surviving son of Henry Banks (the son), and his son, and their issue in tail male, with remainders over. Then followed a power for William John Banks, George Banks and Edward Banks, respectively, when they should be in actual possession of the settled estates under the limitations before mentioned, by deed or

will attested by three witnesses, to charge all or any part of the settled estates, that is to say, each and either of them the said George Bankes and Edward Bankes might charge any sum not exceeding 10,000*l.* for each of his daughters and younger sons, who, as to a son or sons, might attain the age of twenty-one years, or who, as to a daughter or daughters, might [245] attain that age or be married, for maintenance money, to commence from or at any time after the death of the person entitled to make and actually making any such appointment.

8. Henry Bankes (the son) and William John Bankes never exercised the joint power of appointment given or reserved to them by the said indenture of 1821; and Henry Bankes (the son) died on the 17th December, 1834, leaving his sons William John Bankes and George Bankes surviving him.

9. Upon his father's death, William John Bankes became tenant for life in possession of the settled estates, and afterwards, and after the time appointed for the commencement of the Succession Duty Act, 1853, that is to say, on the 15th April, 1855, William John Bankes died, a bachelor, leaving his brother, the said George Bankes, surviving him, who thereupon succeeded to the settled estates comprised in the said settlement of 1821, under the disposition thereby made thereof and became entitled to the beneficial enjoyment of the same, and entered into possession thereof accordingly.

10. Under and by virtue of the Succession Duty Act, 1853, there became payable to her Majesty in respect of the succession of the said George Bankes in the said settled estates, according to the value thereof, a duty upon such value, payable by eight half-yearly instalments, the first whereof ought to have been paid at the expiration of twelve months next after George Bankes became entitled to the beneficial enjoyment of the said settled estates; but although the said George Bankes was alive when the first of such instalments became due, he did not pay the same. He died before any other of the instalments became due.

11. At the time of the date and execution of the disentailing deed next herein-after stated, the said George Bankes was tenant for life in possession of the settled estates com-[246]-prised in the settlement of 1821, under the disposition thereby made thereof, and Edmund George Bankes was his first son, and as such was tenant in tail male in remainder expectant on his said father's death of the same estates; and by an indenture or disentailing deed of the 2nd July, 1855, between the said George Bankes of the first part, the said Edmund George Bankes of the second part, and John Gregory of the third part, and executed at or about the time it bears date by the said George Bankes and Edmund George Bankes respectively, and afterwards duly enrolled in the Court of Chancery, pursuant to the Statute for the Abolition of Fines and Recoveries, the said Edmund George Bankes, with the consent of the said George Bankes, his father, as protector of the said settlement of 1821, disentailed the settled estates comprised therein as aforesaid; and he and the said George Bankes conveyed the same to such uses, upon such trusts, for such estates, &c., as the said George Bankes and Edmund George Bankes should by any deed or deeds jointly appoint, and in default of such appointment to the uses and upon the trusts and subject to the powers, provisoes and declarations by the said settlement of 1821 respectively limited, declared and contained of and concerning the same, so far as the same were then subsisting and capable of taking effect.

12. By an indenture of settlement, dated the 3rd July, 1855 (being the next day after the date and execution of the said disentailing deed), and made between the said George Bankes of the first part, the said Edmund George Bankes of the second part, and the said J. Floyer and H. Seymer of the third part, the said J. Floyer of the fourth part, and the said J. Gregory of the fifth part, and which was executed by the said George Bankes and Edmund George Bankes, and all other parties, at or about the time it bears date; after reciting (inter alia) the settlement of June, 1821, and the disentailing deed of the 2nd July, 1855, [247] it is witnessed that the said George Bankes and Edmund George Bankes by virtue and in execution of the power given to them jointly by the indenture of the 2nd July, 1855, did by that their deed absolutely and irrevocably jointly appoint that all and singular the said settled estates, with their appurtenances, should from and ever after the execution of the said indenture be and remain, and that the said indenture should operate and enure to the uses upon the trusts, &c., thereafter respectively limited, declared and contained of and concerning the same. And it is further witnessed that the said Georges Bankes

and Edmund George Banks, by way of further assurance, and in aid of the appointment by them thereby made, did thereby grant unto the said J. Floyer and H. Seymer, their heirs and assigns, all the said settled estates, including therein as well that portion thereof which was derived under the will of the testator Henry Banks, as also that portion which was derived from Henry Banks (the son); habendum to the uses, &c., upon the trusts thereafter limited and declared concerning the same; and it was thereby agreed and declared by the several parties thereto, that all and every the said settled estates should thenceforth stand and be limited to such uses, upon such trusts, &c., as the said George Banks and Edmund George Banks should by any deed or deeds jointly appoint, and in default of such appointment to the use of the said J. Floyer and H. Seymer, their executors, &c., for the term of 500 years, upon the trusts thereafter declared (to secure annuities); and after the determination of the same term, and in the meanwhile subject thereto, to the use of the said J. Gregory, his executors, &c., for the term of one day, upon trust to prevent the merger of the said term of 500 years, and subject to the same terms and the trusts thereof, to the use of the said George Banks during his life, and after his decease to the use of the said J. Floyer [248] and H. Seymer, their executors, &c., for the term of 1000 years from the day of the decease of the said George Banks, upon the trusts thereafter declared; and from and after the determination of the same term, &c., to the use of J. Gregory, for the term of one day upon trust to prevent the merger of the term of 1000 years, and subject to the same terms and the trusts thereof, to the use of the said J. Floyer and H. Seymer, their heirs and assigns, during the life of the said Edmund George Banks, upon the trusts thereinbefore declared. Then followed limitations to the use of the first and other sons successively of the said Edmund George Banks, during their lives, with remainder to their first and other sons in tail male. This indenture also contained a power, in terms similar to that in the indenture of the 2nd June 1821, enabling George Banks, and the other tenants for life in possession, to charge the settled estates with portions not exceeding 10,000*l.* for each of his daughters and younger sons.

13. The said George Banks, on the 28th July, 1855, made his last will and testament, whereby, after reciting the powers in the settlements of the 2nd June, 1821, and 3rd July, 1855, to charge the estates with portions for daughters and younger sons, in the exercise of every power enabling him so to do, he charged all the lands and hereditaments which were settled by the settlements of 1821, and which were resettled by the resettlement of 1855, with certain sums of money (in the will mentioned) as portions for his three younger sons and his four daughters.

(The 14th paragraph stated that, one of the daughters of George Banks having died, by a codicil to his will he charged the estates with additional portions for his three other daughters. The 15th paragraph stated that by another codicil George Banks revoked the appointment to one of his daughters.)

[249] 16. The said George Banks died on the 6th day of July, 1856, without having altered or revoked the appointment made by his said will and codicils, and left his eldest son, Edmund George Banks, and his five younger children him surviving, and the same will and codicils were, on the 15th August following his death, proved in the Prerogative Court, by the above named defendants, his legal representatives.

17. Upon the death of the said George Banks, his eldest son the said Edmund George Banks, or the defendants J. Floyer and H. Seymer on his behalf, became entitled in possession to the succession conferred on the said Edmund George Banks by the settlement of 1855, and duty became payable to her Majesty in respect thereof under the provisions of the Succession Duty Act, 1853. And upon the death of the said George Banks his said five younger children became respectively entitled in possession to the portions appointed to them by his said will and codicils, and duty became payable to her Majesty in respect thereof under the Succession Duty Act, 1853; and the defendants J. Floyer and H. Seymer, as the trustees of the settlement of 1855, became and are personally accountable to her Majesty in respect of the duty on all succession to which the eldest son and younger children of the said George Banks became entitled.

18. Application has been made to the three above named defendants, as the executors of the said George Banks, deceased, for payment of one instalment of duty, after the rate of 3*l.* per cent. on the value of that portion of the succession conferred on him by the settlement of 1821, which was derived under the will of the said Henry

Bankes, the testator, and the subsequent bargain and sale of the 28th January, 1810, and the recovery suffered in pursuance thereof; and the Attorney General insists that this is the proper rate of duty, inasmuch as this portion of the succession of the said George Bankes was derived by him from his [250] brother, the said William John Bankes, as predecessor; but the defendants decline to pay duty thereon at that rate, although they admit that duty at some rate is payable in respect thereof.

19. Application has also been made to the defendants J. Floyer and H. Seymer, as such trustees as aforesaid, for payment of duty at the rate of 3l. per cent. in respect of the aforesaid succession of the said Edmund George Bankes; and the Attorney General insists that this is the proper rate of duty, inasmuch as the said settlement of 1855, under which the said Edmund George Bankes takes his succession, was a disposition made by himself, at the date whereof he was entitled to the property comprised therein expectantly on the death of his father, the said George Bankes; and he is therefore chargeable with duty at the same rate as he would have been chargeable with if no such disposition had been made; and the proper rate of duty with which the said Edmund George Bankes would have been chargeable if the said settlement of 1855 had not been made, is 3l. per cent., inasmuch as in that case he would have derived his succession from his father's brother, the said William John Bankes, as predecessor. However, the defendants decline to pay duty thereon at that rate, although they admit that duty at some rate is payable in respect thereof.

20. Application has also been made to the defendants for payment of duty at the like rate of 3l. per cent. in respect of the several portions appointed by the will and codicils of the said George Bankes to his said five younger children; and the Attorney General insists that this is the proper rate of duty, inasmuch as such younger children derive their interests under one or other or both of the instruments by which the several powers of appointment which the said George Bankes assumed to exercise in their favour were respectively created, that is to say, the settlement of 1821, which was a disposition made by their father's brother, the [251] said William John Bankes, and the settlement of 1855, which was a disposition made by their own brother, the said Edmund George Bankes,—so that their interests were derived either from their uncle or from their brother, as predecessor, within the meaning of the 4th section of the Succession Duty Act, 1853. However, the defendants decline to pay duty on these successions at that rate, although they admit that duty at some rate is payable in respect thereof.

The information prayed (*inter alia*) that it might be declared that duty at the rate of 3l. per cent. was payable in respect of the succession of George Bankes, in respect of the succession of Edmund George Bankes, and also in respect of the several successions of the five younger children of George Bankes.

The defendants by their answer admitted the facts stated in the information, but denied their liability to pay duty at the rate of 3l. per cent. in respect of either of the successions.

The Attorney General (with whom were the Solicitor General, Sir Fitzroy Kelly and Hanson) argued for the Crown in Trinity Term, 1860 (June 9th). This case is not distinguishable from *The Attorney General v. Sibthorp* (3 H. & N. 424) and *The Attorney General v. Lord Braybrooke* (5 H. & N. 488). In order to ascertain what duty is payable under the Succession Duty Act (16 & 17 Vict. c. 51), it must first be ascertained who is the "predecessor" and who is the "successor"; and according to the degree of affinity between them the rate of duty is determined. By the 2nd section of the Act, "the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." Therefore a "predecessor" is the owner of that interest which is either transferred to the "successor" or out of which his interest [252] is carved. Where a father tenant for life, and his son tenant in tail in remainder, join in executing a disentailing deed and resettle the property, to the use of the father for life, remainder to the son for life, remainder to his first and other sons in tail male, the father takes back his former estate, and the life estate of the son is derived from his former estate tail. Accordingly this Court held, in *The Attorney General v. Sibthorp*, that the son took a succession under a disposition made by himself, and therefore duty at the rate of 3l. per cent. was payable under the 12th section. Then does it make any difference if the father and son, with a view to a future disposition of the property, reserve to themselves a general power of appointment, and, subject thereto, limit the estate to the uses of the

prior settlement, and after the lapse of some years execute the power and appoint the estate to the use of the father for life, remainder to the son for life, with remainder to his first and other sons in tail male? *The Attorney General v. Lord Braybrooke* (5 H. & N. 488; 9 H. L. Cas. 150) shews that the execution of the power is merely the machinery by which the disposition is effected, and that the estates appointed under the power must be treated as if contained in the deed which created the power. In *The Attorney General v. Sibthorp*, Bramwell, B., said: "If the transaction be divided into two different dispositions, viz., the disentailing deed and the execution of the power of appointment, the case is the same; for it must then be ascertained what duty the defendants would have been liable to pay if the power had not been executed. So that it is only making two steps in the train of causation instead of one."

This case involves three claims to succession duty, which thus arise: In the year 1776, Henry Bankes, the owner in fee, devised the estates in question to his son Henry Bankes for life, with remainder to his first and other [253] sons in tail male. In the year 1810, Henry Bankes, the devisee for life, and his eldest living son William John Bankes, the tenant in tail, suffered a recovery and limited the estates to such uses as they should jointly appoint, and, in default of such appointment, to the use of Henry Bankes (the son) for life, in confirmation of his original estate; with remainder to such uses as William John Bankes should appoint, and in default of such appointment to the uses of the testator's will. So that by that deed no alteration was made in the estates created by the will of Henry Bankes, but only by a joint and several power reserved. In the year 1821, Henry Bankes (the son) and his son William John Bankes, in pursuance of the joint power, executed a deed by which they limited the estates to such uses as they should jointly appoint (which power they never executed); and in default of such appointment to the use of Henry Bankes for life, with remainder to William John Bankes for life, with remainder to his first and other sons in tail male, with remainder to George Bankes, the second son of Henry Bankes, for life, with remainder to his first and other sons in tail male. So that the estate tail of William John Bankes was reduced to an estate for life, and the other limitations were derived from his former estate tail. These estates having been created by the exercise of the power, must be read as if they were contained in the deed of 1810. Henry Bankes, the son of the testator, died in the year 1834, and William John Bankes, his son, died in 1855 without issue; and thereupon the succession devolved on his brother George Bankes.

The first question is, what rate of duty is George Bankes liable to pay? That depends upon who is his "predecessor"; or, in other words, from whom is his estate derived? It is derived from the estate tail of his brother William John Bankes, which, having been converted by the recovery into an estate in fee, was limited (amongst other uses) [254] to the use of George Bankes for life. William John Bankes is therefore the predecessor of George Bankes, and he is chargeable with duty at the rate of 3l. per cent. *Lord Saltoun v. The Advocate General* (3 Macq. Rep. 659) is an authority that the statute must receive a popular construction.

The second claim arises upon the succession of Edmund George Bankes, and in like manner the rate of duty depends upon who is his predecessor. William John Bankes died on the 15th April, 1855; and George Bankes, being then tenant for life, and Edmund George Bankes, his eldest son, tenant in tail in remainder, on the 2nd July, 1855, they executed a disentailing deed, and conveyed the estates to such uses as they should jointly appoint, and, in default of such appointment, to the uses of the settlement of the 2nd June, 1821. On the 3rd July, 1855, they executed a deed of appointment, and thereby conveyed the estates to such uses as they should jointly appoint, and in default of such appointment (subject to a term of 500 years), to the use of George Bankes for life, with remainder (subject to a term of 1000 years) to trustees during the life of Edmund George Bankes, with remainder to the use of Henry John Percival Bankes, his first son, for life, with remainder to his first and other sons in tail male. Then follows a declaration of the trusts of the term of 500 years, by which the trustees were invested with a discretionary power of applying the rents and profits of the estates for the benefit of Edmund George Bankes, his wife and children. George Bankes died on the 6th July, 1856, whereupon his son Edmund George Bankes became tenant for life in possession. The settlement of the 3rd July, 1855, under which he took his succession, is a disposition made by himself of property to which he was then entitled expectantly on the death of his father George Bankes;

and therefore under [255] the 12th section of the Succession Duty Act, he is chargeable with duty at the rate of 3l. per cent., being the rate with which he would have been chargeable if that settlement had not been made, for in such case he would have derived his succession from his father's brother, William George Bankes, who would have been his "predecessor."

With respect to the third claim, the deeds of the 2nd June, 1821, and 3rd July, 1855, contain a power for George Bankes, and the other tenants for life in possession, by deed or will, to charge the estate with portions for their younger children. That power was exercised by George Bankes. Then from whom are these portions derived? They are to take effect on the death of George Bankes, and are secured by a term of 500 years, which is part of the inheritance. At the time of the execution of the settlement of the 2nd June, 1821, William John Bankes, the tenant in tail in remainder under the will of Henry Bankes, the testator, was the owner of the inheritance. By that deed Henry Bankes (the son) took back his former estate, so that nothing could be derived from him. Then, if the interests of the younger children are derived from that deed, they must have derived them from their uncle, William John Bankes, as donor of the power. Or, assuming that their interests are derived from the settlement of the 3rd July, 1855, they could take nothing from their father George Bankes, for he took back his life estate, and consequently they must take under the disposition made by their brother, Edmund George Bankes. In either view, duty at the rate of 3l. per cent. is payable.

Rolt and Montague Smith, for the defendants. If the principle of the decisions in *The Attorney General v. Sibthorp* (3 H. & N. 424) and *The Attorney General v. Lord Braybrooke* (5 H. & N. 488) [256] be applied to this case, duty at the rate of 1l. per cent. only is payable on each of these claims. According to the principle of those decisions, the deeds of 1855, 1821 and 1810 are merely successive re-settlements of the family estates, and it is necessary to go back to the root of the settlements in 1744 to find the disposition from which the successions are derived. The instrument from which George Bankes immediately derived his life estate was the settlement of the 2nd June 1821, by which Henry Bankes (the son), being tenant for life, and William John Bankes, his son, being tenant in tail in remainder, executed the joint power created by the deed of the 28th June, 1810, and conveyed the estates to William John Bankes for life, with remainder to his first and other sons in tail male. Treating that as a mere re-settlement of the property, it is necessary to go back to the deed of the 28th June, 1810; and that being also a mere re-settlement, to go further back to the first settlement in 1744, and, that having been made by the grandfather of George Bankes, the duty payable by him is at the rate of 1l per cent. [Pollock, C. B. If the property had remained subject to the limitations of the will of Henry Bankes, without being resettled, George Bankes, on the death of Henry Bankes (the son) and William John Bankes, would have taken an estate tail in possession; but, in order to prevent the property from going out of the family, a recovery is suffered by which Henry Bankes (the son) and William John Bankes obtain the fee. They then resettle the property, and, under a joint power, they appoint to George Bankes an estate for life only. By the recovery, the estate tail, which he would otherwise have had under the will of Henry Bankes, was gone; and, the persons who suffered the recovery having acquired the absolute ownership of the property, the interests subsequently created were derived from the deed of 1821.] Assuming that the Court [257] will not go back to the first settlement in 1744, and that the interest of George Bankes is derived from the settlement of 1821, it is derived from Henry Bankes (the son), his father, and William John Bankes, his brother. The 12th section can have no application, because George Bankes was not a party to those settlements. If the execution by Henry Bankes (the son), the tenant for life, and William John Bankes, the tenant in tail in remainder, of the joint power of appointment created by the deed of 1810 was a disposition of property which conferred on George Bankes a "succession" within the meaning of the 2nd section, as the proportional interest which he derived from each predecessor is not distinguishable, the case would fall within the 13th section, and he must be deemed to have derived his succession in equal proportions from each predecessor, and is chargeable with duty accordingly. Therefore, as regards one half the property, George Bankes would be chargeable with duty at the rate of 1l. per cent. as upon a succession derived from his father; and, as to the other half, he would be chargeable at the rate of 3l. per cent., as upon a succession derived from his

brother. The power created by the deed of 1810 was not limited to the selection of a particular class, but was a general power of appointment, and therefore the parties who exercised it were joint owners of the property.

The succession of Edmund George Bankes is different, because he was a party to the settlement of 1855, and therefore it is said that duty is payable by him under the 12th section as upon a succession derived from himself. But it is submitted that the duty is only payable by him under the second section. The scheme of the Act is plain. The sections, from 2 to 8, contain definitions of "successions" and "successors," that is, the persons chargeable with duty. Section 9 points out who is to have the management [258] of the duties. The sections, from 10 to 17, relate to the rate of duty imposed; section 18, and those which follow, provide for exemptions. The 12th section has no reference to what shall be deemed to confer a succession, but only to what rate of duty shall be chargeable where a person takes a succession under a disposition made by himself. In such case, if there is a succession within the meaning of the second section, he is chargeable with the same rate of duty as if no such disposition had been made. [Bramwell, B. The 12th section is explanatory of the 2nd. It is true that the 2nd is the section which imposes the duty by reason of a "succession"; but it contemplates one person as "successor" and another person as "predecessor." A difficulty might arise from the same person being both "successor" and "predecessor," unless there was an explanatory clause. The 2nd and 12th sections should be read together thus—"The term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the settlor, disponent," &c., "except in the case where any person shall take a succession under a disposition made by himself, and then he shall be, as regards the duty chargeable, in the same position as if no such disposition had been made by him." It seems to me that the 12th section was required for another reason. The 10th section provides for the case of a successor who is the lineal issue or lineal ancestor, brother, sister or other relation of the predecessor, but it makes no provision for the case of a successor who derives his succession from himself, and is therefore his own predecessor. Pollock, C. B. Under the 12th section, it might happen that a person would be a "successor" and not pay any duty. For instance, if a father, on the marriage of his daughter, settled a large estate upon her and her husband, with remainder to himself on their deaths without issue. In that event, he would be a successor under a disposition made by himself, [259] and the 12th section says that in such case the duty shall be charged as if no such disposition had been made, and, if he had made none, no duty would have been payable.] It was intended by the 12th section to prescribe the rate of duty payable where a person is his own successor, and when, in such case, duty shall not be payable. The 2nd section having imposed the duty, the legislature has used, in the 12th, negative as well as affirmative words; and has said that "a successor shall not, in any other case, be chargeable with duty upon a succession taken under a disposition made by himself." The 13th section provides for the case of a succession derived from joint predecessors, and, if that section applies here, Edmund George Bankes would pay nothing on one half, for, as to that, he would be his own predecessor, and he would pay 11. per cent. upon the other half, of which his father was his predecessor. Then, assuming the 12th section applies: by the settlement of 1855, Edmund George Bankes took half of his succession under a disposition made by his father, and the other half under a disposition made by himself; therefore, as to the latter half, he is chargeable at the same rate as if no such disposition had been made. Now, if no such disposition had been made, he would have derived his succession from the settlement of 1821, made by his grandfather Henry Bankes (the son) and his uncle William John Bankes, and the result would be that, as to one half, he would be chargeable as upon a succession derived from his father, that is at the rate of 11. per cent., and, as to the other half, upon a succession derived from his grandfather and uncle, that is, as to one quarter, at the rate of 11. per cent., and, as to the other quarter, at the rate of 31. per cent.

Then as to the claim to duty in respect of the portions of the younger children. Their interest was derived from their father George Bankes the tenant for life. He pur- [260] chased these portions from his son, Edmund George Bankes, the tenant in tail, in consideration of an annuity paid to him during his father's life: *Re Jenkinson* (24 Beav. 64). The power to charge these portions on the estates was created by the settlement of 1855; and they were given to the children by the will of George

Bankes. He had a limited power of appointment, and therefore, by the latter part of the 4th section, the persons taking the property by the exercise of that power have taken it as a succession derived from the person who created the power. The settlement of 1821 contained a similar power for charging the estates with portions, and if the children be considered as deriving their interest from the exercise of that power, then they took their succession from Henry Bankes (the son), their grandfather, who created the power, so that in either view 11. per cent. only is payable.

The Attorney General, in reply. The successions upon which duty is claimed were created by the exercise of a power. The latter branch of the 4th section is a distinct recognition of the rule of law, that the estate must be considered as derived from the person who created the power, which is the mere *jus disponendi*. Here Henry Bankes (the son) and William John Bankes, having acquired the absolute ownership of the fee simple, by the deed of 1810 created the power from which the subsequent estates were derived. No power having been executed under the deed of 1821, the estates thereby limited must be read as if included in the deed of 1810.

Cur. adv. vult.

The judgment of the Court was now delivered by

BRAMWELL, B. The first question in this case is: What [261] is the rate of succession duty "on so much of the succession of George Bankes in property comprised in an indenture of June 2nd, 1821, as was derived under the will of Henry Bankes, and an indenture of June 28th, 1810, and a recovery suffered thereon?" To determine that, we must determine who is or are the predecessor or predecessors under the second section of the Succession Duty Act, 16 & 17 Vict. c. 51, that is to say, who is or are the person or persons "from whom the interest of George Bankes is derived."

Now his interest was derived thus:—Henry Bankes, being seised in fee, devised the land in question to his son Henry for life, remainder to his first and other sons in tail male, and died. Henry, the son, being tenant for life, and William John, his eldest living son, tenant in tail male in remainder, and of full age, suffered the recovery in question to such uses as they should jointly appoint; in default of appointment to the use of Henry for life, in confirmation of the same estate for life as was given by the will of the testator before mentioned; then to such uses as William John should appoint (if he survived his father) by deed or will; and in default of such appointment to the same uses as in the original will before mentioned. There was afterwards, in 1821, a deed of appointment by Henry and his son William John to such uses as they should jointly appoint; then to Henry for life, then to William John for life, remainder to his first and other sons in tail male; then to the use of George, the person in question, the next son of the second Henry, for life, remainder to his first and other sons in tail male. The joint power of appointment in this deed of 1821, was never executed. The second Henry died in 1834. William John died in 1855, without issue, and thereupon George succeeded to the estates as tenant for life.

[262] Now, if George's predecessor is exclusively his grandfather or his father, the rate of duty is one per cent.; but if his brother William John is his predecessor, in whole or in part, then, in respect of the interest derived from him, three per cent. ought to be paid. The first question, then, is, is any of the interest of George Bankes derived from his brother William John, within the meaning of the second section of the Succession Duty Act? It seems impossible to say there is none. The result of the two dispositions of 1810 and 1821 is, that, Henry being tenant for life, William John tenant in tail male in remainder, with remainder over to George in tail male, Henry and William John, suffering a recovery, acquire a joint power of disposing of the fee, bar all subsequent remainders, and ultimately exercise that power of disposing of the fee by giving an estate for life to Henry, remainder for life to William John, remainder to his first and other sons in tail male, remainder to George for life. If we look at the disposition of 1810, it amounts to this, that Henry gets back what is called the same estate for life, and William John converts his estate tail into a fee simple, out of which is by his act, in part at least, derived the subsequent estates created by the disposition of 1821. If we look at that transaction, it is the joint act of William John and his father which conferred the estate on George. It is from the estate tail of William John, therefore, and at least in part by the act of William John, that George's life estate is derived. If William John had survived his father, suffered a recovery to such uses as he should appoint, and then had appointed to the uses of the

deed of 1821, subsequent to the life estate of the father, it could not be doubted that he would be the predecessor from whom George's interest was derived; so if the recovery had been suffered (without the intermediate power of appointment) directly to such uses. Then does the circum-[263]-stance of the father being a party to these dispositions prevent any of the interest being derived from William John? Let it be tried thus: Suppose the recovery had been to the use of the father, Henry, for life, remainder to William John in fee, or to such uses as he should appoint, and then he had appointed to the uses of the deed of 1821, subsequent to the life estate of the father, would not the interest be derived from him? Clearly. So also if the intermediate power of appointment had been left out. This shews that neither the fact of the father, Henry, being a party to the disposition, nor the fact of the life estate of George not being directly created by the deed to lead the uses of the recovery, nor consequently those two facts combined, prevent the interest being, in part at least, derived from William John.

The next question is: Is the interest wholly derived from William John, the brother, or in part from Henry, the father of George? We think the latter is the case. Henry and William John have a joint power of appointment, and the act of each is necessary to give the estate for life to George. George might, indeed, have had such an estate, or rather an estate tail, had the joint power of appointment not been executed; but still the estate he gets he gets under that power. Henry and William John might have given the same estate to an entire stranger. This is not inconsistent with the decision in *The Attorney General v. Silthorp*. It is true that it was there held that the defendant derived no interest, or no appreciable interest, from his father; that his father took back his life estate, and the defendant's interest then was derived from his own estate tail. He got no more, nay less, than he would have had, had the power of appointment not been executed. So we should say here, had the question been what duty William [264] John should pay, as he would get back only what was his own before; but here George gets not by his own act—not anything out of his own estate, but by the joint act of his father and brother operating on a fee, created indeed out of the brother's estate, but which he alone could not operate on. (See per Lord Chancellor, in *Lord Braybrooke's case* (Dom. Proc., 19 March, 1861, not yet reported).)

We were much pressed by the decision in *The Attorney General v. Lord Braybrooke*; but in truth that case is not inconsistent with our present decision, as was shewn by the Attorney General. It is a convenient expression to speak of the continuation of a family settlement, but the expression is obviously too vague for the enunciation of a proposition of law. Its use is justified by the case of *Lord Saltoun v. The Advocate General* (3 Maq. Rep. 659), which is an authority for our present decision. That case decided that the statute is to have a popular construction. Can it be doubted, popularly speaking, that it was from Henry and William John, jointly, that George's interest was derived? Nor is there any hardship in this. If there is any reason why a succession derived from a brother should pay more than one derived from a father, that reason exists as much in such a case as the present as in any other.

In the result, then, whether we consider half to come from Henry and half from William John, or that the interest derived from each cannot be distinguished, and that sect. 13 applies, the rate of duty is three per cent. on one moiety and one per cent. on the other; in the whole two per cent.

The same considerations determine the next question, the rate of duty in respect of the succession of Edward George Banks.

With respect to the last question, it seems clear that one [265] per cent. is the rate of duty. The settlor, the person from whom the interest of the children is derived, is their father. The decree should be accordingly.

This judgment was prepared before the decision of *Lord Braybrooke's case* in the House of Lords; and though we are glad to find that case sanctions the view we have taken here, it is not so in point as to dispense with our giving our reasons for our decision in this case.

Decree accordingly.

IN THE MATTER OF THE SUCCESSION DUTY ACT AND OF THE ASSESSMENT OF SIR HENRY PEYTON, BART. July 6, 1861.—In 1803 certain estates were settled to the use of P. for life, with remainder to his first son in tail male. In May, 1826, P. and his first son suffered a recovery and conveyed the estates to the use of P. for life, with remainder to the use that the wife of P., in case she should survive him, should yearly receive during her life a rent of 1000l.; with remainder to such uses and subject to such charges as P. and his son should appoint, and in default of appointment to the use of the son for life, with remainder to his first and other sons in tail male. In December, 1826, P. and his son, in execution of the power, appointed the estates to such uses and subject to such charges as they, during their joint lives, should appoint; and in default of appointment to the son for life, with remainders over. Subsequently P. and his son, in exercise of the power, mortgaged the estates for money lent to them, and for the repayment of which they jointly and severally covenanted. They also mortgaged the estate for a debt then due from P., and for the repayment of which he alone covenanted. They also charged the estates with an annuity of 500l. for the grandson of P. during his life and the life of P. and his son, or the survivor.—Held: First, that on the death of P. his son was entitled, on estimating the value of his succession, to an allowance in respect of the rent-charge of 1000l. during the life of the wife of P., inasmuch as she was chargeable with duty in respect of it.—Secondly, that the annuity of 500l. to the grandson of P., and the mortgage debts, were incumbrances on the succession created by the son and not made in execution of a prior special power of appointment, within the 34th section of the Succession Duty Act, 1853, and consequently the son was not entitled to any allowance in respect of either of them: Per Pollock, C. B., Martin, B., and Wilde, B. Dissentiente Bramwell, B.

[S. C. 31 L. J. Ex. 50; 7 Jur. (N. S.) 921; 9 W. R. 838; 5 L. T. 313. Referred to, *Attorney-General v. Cecil*, 1870, L. R. 5 Ex. 273. Discussed, *Lord Wolverton v. Attorney-General*, [1898] A. C. 544.]

This was an appeal by Sir Henry Peyton, Bart., under the Succession Duty Act, 1853, against an assessment of duty on his succession, made by the Commissioners of Inland Revenue. The petition of the appellant (so far as material) was as follows:—

1. By an indenture of release and settlement, dated the 6th day of July, 1803, and made between Sir Henry Peyton, the father of the petitioner, of the first part, Harriet Bradshaw, widow, the mother of the petitioner, of the second [266] part, John Lord Rous and Thomas Kingscote, of the third part, David Pennant and Richard Henry Cox, of the fourth part, Thomas Fitzhugh and John Beauclerk of the fifth part, John Clements and William Henry Pigou and John Drummond, of the sixth part: After reciting the marriage then intended to be, and which was shortly afterwards solemnized between the said Sir Henry Peyton and Harriet Bradshaw, the father and mother of the petitioner, and that the said Sir Henry Peyton was seised in fee simple of the manors and hereditaments thereafter described, and in consideration of such intended marriage had agreed to settle the same as thereafter expressed, the said Sir Henry Peyton conveyed unto the said John Lord Rous and Thomas Kingscote and their heirs, certain manors and estates, therein particularly described, and all other his estates, situate in the counties of Cambridge, Norfolk, Huntingdon and Suffolk, to hold unto the said John Lord Rous and Thomas Kingscote, and their heirs, subject, as to the estates in Norfolk, to a mortgage therein mentioned for 18,000l., and in respect of which an allowance has been made in the assessment hereinafter mentioned, to the use of himself, the said Sir Henry Peyton and his assigns for life, without impeachment of waste, with remainder to the use of the said John Lord Rous and Thomas Kingscote, as trustees to preserve contingent remainders, with remainder to the use, intent and purpose that the said Harriet Bradshaw and her assigns, in case she should survive him, (as was the case) should yearly, during her life, receive out of the said manors and hereditaments the yearly rentcharge of 1000l., free from all deductions whatsoever, for her jointure and in bar of dower, with powers of entry and distress and perception of the rents and profits of the said manors and hereditaments, for the recovery and payment of such rentcharge; with remainder to the use of the said David Pennant and Henry Richard Cox for 100 years, upon trusts [267] thereafter declared

thereof for further securing the said rentcharge, with remainder to the use of the said Thomas Fitzhugh and John Beauclerk, for the term of 500 years, upon trusts, thereby also declared, for raising portions for younger children of the said intended marriage, and with remainder to the use of the first son of the said Sir Henry Peyton by the said Harriet Bradshaw, and of the heirs male of the body of such first son lawfully issuing, with remainders over; and the said trustees, John Lord Rous and Thomas Kingscote, were empowered, with consent of the said Sir Henry Peyton and Harriet Bradshaw, during their joint lives, to sell the said settled estates, or any part of them, and to lay out the money produced by sales in the purchase of other lands to be settled to the same uses as the lands sold.

2. By another indenture of release and settlement, dated the 27th day of May, 1826, and made between the said Sir Henry Peyton and Dame Harriet Peyton his wife, of the first part, the petitioner of the second part, William Fynmore of the third part, Thomas Clarke of the fourth part, John Earl of Stradbroke and the Reverend Algernon Peyton, clerk, of the fifth part, Henry Kingscote and Henry Richard Cox of the sixth part, and the said Thomas Fitzhugh and John Beauclerk of the seventh part: after reciting the before stated settlement of the 6th of July, 1803, and reciting, as the fact was, that the said Thomas Kingscote was since dead, and that the said Algernon Peyton had since been appointed a trustee in his place with the said John Earl of Stradbroke; and, as the fact was, that the said Sir Henry Peyton had issue by the same Dame Harriet, his wife, only one child, viz. the petitioner, who had then lately attained the age of twenty-one years; and also reciting divers conveyances of lands which had been purchased by [268] the trustees of the said settlement of the 6th day of July, 1803, to the uses of that settlement; and that the said Sir Henry Peyton and the petitioner were desirous to suffer common recoveries of the said manors and estates whereof they or either of them were or was seized for an estate of inheritance (except as therein mentioned), for the purpose of barring the estates tail vested in the petitioner under the said recited indentures in such manors and estates, and all remainders and reversions thereupon expectant: It was witnessed that, in order to bar such estates tail and remainders, and for the considerations therein mentioned, the said Sir Henry Peyton and the petitioner conveyed unto the said William Fynmore, his heirs and assigns, the manors and estates comprised in the said settlement of the 6th day of July, 1803, and the other thereinbefore recited conveyances (except the estates in the county of Norfolk and certain lands in March, in Cambridgeshire, and Elm, in the Isle of Ely), to hold unto and to the use of the said William Fynmore, his heirs and assigns, in order that he might become tenant to the precipe, and suffer three recoveries with double voucher, which should enure, subject to the said rentcharge of 1000*l.* by the said settlement of 6th day of July, 1803, limited to the said Harriet Peyton and to the terms of 1000 years and 500 years thereby also limited, to the intent that the petitioner should yearly receive during the joint lives of himself and the said Sir Henry Peyton a certain annuity therein mentioned, and subject thereto to the use of the said Henry Kingscote and Henry Richard Cox, for a term of 99 years, to secure such annuity, with remainder to the use of the said Sir Henry Peyton for his life (sans waste), with remainder to the use of the said John, Earl of Stradbroke, and Algernon Peyton, as trustees, to preserve contingent remainders, with remain-[269]der to the further use, that the said Dame Harriet Peyton, in case she should survive the said Sir Henry Peyton, (as was the case) should, after his decease, yearly receive during her life a clear rent of 1000*l.* (over and above the rentcharge of 1000*l.* limited by the said settlement of 6th July, 1803), and subject thereto after the decease of the said Sir Henry Peyton, with remainder to the use of the said John Beauclerk for a term of 200 years, upon trusts to secure such further rentcharge; and from and after the determination of the said term of 200 years, and in the meantime subject thereto and to the trusts thereof, and subject thereto and charged and chargeable as therein aforesaid, to the use of such person or persons, for such estate or estates, interest or interests, upon such trusts, and to and for such intents and purposes, and with, under and subject to such conditions, powers and provisos, limitations, charges and declarations as they the said Sir Henry Peyton and the petitioner during their joint lives should, by any deed or deeds, instrument or instruments in writing, to be by them respectively sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time jointly direct, limit or appoint; and in default of any such direction, limitation or appointment, and

as to so much and such part and parts of the said manors and hereditaments therein-before mentioned, or intended to be thereby granted and released, whereof no such direction, limitation or appointment should be made or should take effect, and subject to any such direction, limitation or appointment which should not be a complete disposition of the whole of the same manors and premises, or of the whole estate and interest therein, subject and charged and chargeable as therein aforesaid, to the use of the petitioner and his assigns for his life (sans waste), with remainder to the use of the said trustees to preserve contingent remainders, with [270] remainder to the use of the first son of the body of the petitioner in tail male, with remainders over; and in the now stating settlement is also contained a power of sale of the settled estates, to be exercised by the trustees by direction of the said Sir Henry Peyton and the petitioner, or the survivor of them, and directions for laying out the sale monies in the purchase of other lands to be settled to the same uses.

3. Three common recoveries with double voucher were suffered, pursuant to the last stated deed, as of Trinity Term, in the seventh year of His Majesty King George the Fourth.

4. By another indenture of settlement, dated the 1st day of December, 1826, and made between the said Sir Henry Peyton, deceased, of the first part, the petitioner of the second part, the said Earl of Stradbroke and Charles Mills of the third part, and the said Henry Kingscote and Henry Richard Cox of the fourth part, after reciting (inter alia) the before stated settlement of the 27th May, 1826, and that the said Sir Henry Peyton and the petitioner had proposed and agreed, in exercise of the powers limited to them by that settlement, to limit and appoint all the said manors and hereditaments therein comprised, after the decease of the said Sir Henry Peyton (subject, nevertheless, to the rent-charges of 1000*l.* and 1000*l.* by the said settlements of 6th July, 1803, and 27th May, 1826, limited to the use of the said Dame Harriet Peyton), to the several uses hereinafter declared: It is witnessed that, in pursuance of the said agreement on the part of the said Sir Henry Peyton and the petitioner, and for the considerations therein mentioned, they the said Sir Henry Peyton and the petitioner, in pursuance and execution of the power given to them by the said settlement of the 27th May, 1826, and the three common recoveries so suffered, [271] and of every other power or authority to them given and enabling in that behalf, did direct, limit and appoint that all the said manors and estates comprised in the said settlement of the 27th of May, 1826, should, from and immediately after the decease of the said Sir Henry Peyton, go, remain, continue and be, and that the said last-mentioned settlement and the said three common recoveries and all other assurances should, immediately after the decease of the said Sir Henry Peyton, operate and enure, and that the said Thomas Clarke (the demandant in the said recoveries and his heirs) should, immediately after the decease of the said Sir Henry Peyton, stand and be seised of the same estates (subject, nevertheless to the said rent-charges) to the use of such person or persons, for such estate or estates, interest or interests, upon such trusts and for such intents and purposes, and under and subject to such conditions, powers and provisos, limitations, charges and declarations as the said Sir Henry Peyton and the petitioner during their joint lives should, by any deed or deeds, instrument or instruments in writing, to be by them sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time jointly direct, limit or appoint, and in default thereof and as to so much of said estates, whereof no such appointment should be made or should take effect, and subject to any such appointment as should not be a complete disposition of the same or any part thereof, subject as aforesaid to the use of the petitioner for his life (sans waste), with remainders over; and in the now stating settlement are also contained powers of sale similar to those contained in the previous settlements.

5. The Norfolk estates were subsequently sold at different times, and duly appointed and conveyed to the several purchasers, and the purchase monies were applied in the discharge of certain then existing incumbrances thereof.

[272] 6. By indenture of mortgage, dated on the 20th day of December, 1843, and made between the said Sir Henry Peyton and the petitioner of the first part, Charlotte Ann Cox, of the second part, William Bradshaw, Samuel Smith and John Wright of the third part, Stephen Garrard of the fourth part, Sebastian Garrard of the 5th part, and Sir Charles Morgan, Baronet, Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones, of the sixth part, after (inter alia) referring to

the powers of appointment in the before stated settlements, and also reciting certain existing mortgages in favour of the parties of the second, third and fourth parts, and that the said Sir Henry Peyton, and the petitioner had applied to the said Sir Charles Morgan, Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones to advance them 57,500*l.*, which they had agreed to do on having the repayment thereof secured as therein mentioned: It was witnessed, that in consideration of 57,500*l.*, by the said Sir Charles Morgan, Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones, at the request and by direction of the said Sir Henry Peyton and the petitioner (testified thereby), paid to the said prior mortgagees as therein mentioned, or otherwise to the said Sir Henry Peyton and the petitioner, or to their order, they the said Sir Henry Peyton and the petitioner, in exercise and execution of the powers and authorities to them given by the said settlements of 27th of May, 1826, and 1st of December, 1826, or either of them, and of every or any other power or authority vested in them, did direct, limit and appoint the said settled estates unto and to the use of the said Sir Charles Morgan, Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones, their heirs and assigns for ever, subject to the several rent-charges and incumbrances therein referred to, and specified [273] in a schedule to the said deed annexed; and it was further witnessed that for the considerations aforesaid the said Sir Henry Peyton and the petitioner (with their said former mortgagees) absolutely granted, released and confirmed the said settled estates, to hold unto and to the use of the said Sir Charles Morgan, Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones, their heirs and assigns, subject to the said several rent-charges and incumbrances, and subject also to redemption and reconveyance on payment by the said Sir Henry Peyton and the petitioner, or either of them, their or either of their heirs, executors or administrators, unto the said Sir Charles Morgan, Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones, their executors, administrators or assigns, of 57,500*l.* on the 20th day of June then next, together with interest for the same after the rate of 5*l.* per cent. per annum, to such uses, upon such trusts, and with, under and subject to such powers and provisoes as the same stood settled and limited immediately before the execution of the now stating mortgage, or as near thereto as circumstances would admit. And in the now stating mortgage is contained (amongst other covenants on the part of the said Sir Henry Peyton and the petitioner) a joint and several covenant by them with the said mortgagees for payment of the principal and interest of their mortgage money, and likewise the usual powers of sale to the mortgagees, and other usual mortgage provisions.

7. By deed, dated the 20th of December, 1843, and made between the said Sir Henry Peyton of the one part, and the petitioner of the other part, after reciting (inter alia) that it was the intention of the said Sir Henry Peyton and the petitioner that the said sum of 57,500*l.*, and the interest thereof (secured by the hereinbefore stated indenture of even date), except interest accruing during their [274] respective lives, should be charged upon the said settled and mortgaged estates in exoneration of their personal liability to the payment thereof, and in order to avoid any question in relation thereto they had determined to make the appointment thereafter contained: It was witnessed, that the said Sir Henry Peyton and the petitioner, in exercise and execution of the power limited to them by the said settlement of the 1st day of December, 1826, and of every or any other power or authority in anywise enabling them in that behalf, did direct, appoint and declare that the said settled and mortgaged estates should stand and be charged with and subject to the payment of the said sum of 57,500*l.*, and the interest for the same (except the interest to accrue due during their respective lives), in exoneration of and by way of protection to the said Sir Henry Peyton and the petitioner, and each of them, their and each of their heirs, executors and administrators and estates and effects.

8. By a deed of further charge, dated on the 15th day of February, 1847, and made between the said Sir Henry Peyton (deceased) and the petitioner of the one part, and the said Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones of the other part, after reciting (inter alia) the said mortgage of 20th December, 1843, and as the fact was that the said Sir Charles Morgan had died, and that the said 57,500*l.* was then owing on the security of the said mortgage with some interest, and that the said Sir Henry Peyton and the petitioner had applied to the said Richard Twining, Ralph Price, Henry Kemble, and William Samuel Jones, as such

mortgagees for a further loan of 2000l., which they had agreed to advance on having the repayment thereof, with interest, secured as therein contained: It was witnessed, that in consideration of 2000l. paid by them to the said Sir Henry Peyton and the petitioner, [275] they the said Sir Henry Peyton and the petitioner, in pursuance and further exercise of the power limited to them by the said settlements of 27th May, 1826, and 1st of December, 1826, and also in respect of all the estate and interest which they had in the said premises, directed, limited and appointed, charged and made chargeable the said settled estates unto and to the use of the said Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones, their heirs and assigns, with the payment of the said sum of 2000l. and interest thereon at the rate of 5l. per cent. per annum, and thereby also directed and appointed that the said premises should thenceforth remain and be a security to the last named parties, as well for the payment of that sum and interest, as of the said sum of 57,500l. and interest: and the said Sir Henry Peyton and the petitioner thereby also jointly and severally covenanted with the said last named parties for the payments thereof accordingly.

9. By another deed of further charge, dated the 28th May, 1847, and made between the said Sir Henry Peyton and the petitioner of the one part, and the said Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones of the other part, after reciting as the facts were (inter alia) that the said sums of 57,500l. and 2000l. still remained due on the security of the before stated mortgage and further charge, and that the said Sir Henry Peyton and the petitioner had applied to the said Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones for the further loan of 2000l.: It was witnessed, that in consideration of 2000l. paid by them to the said Sir Henry Peyton, deceased, and the petitioner, the said Sir Henry Peyton and the petitioner, in pursuance and further exercise of the powers given or reserved to them by the before stated settlements of the 27th May, 1826, and 1st December, [276] 1826, and also in respect of the estate and interest which they respectively had in the said premises, directed, limited and appointed, and charged and made chargeable, the said settled estates, unto and to the use of the said Richard Twining, Ralph Price, Henry Kemble and William Samuel Jones, their heirs and assigns, with the payment of the said sum of 2000l. and interest thereon, at the rate of 5l. per cent. per annum, in addition to the said sums of 57,500l. and 2000l., and did thereby also direct and appoint that the said premises should thenceforth remain and be a security to the last mentioned parties, their heirs and assigns, for the payment of the said further sum of 2000l., and interest thereon accordingly: and the said Sir Henry Peyton and the petitioner did thereby also jointly and severally covenant with the said last named parties for the payment of the said sum of 2000l. and interest thereon.

10. By another deed of further charge, dated on the 24th day of May, 1848, and made between the same persons as were parties to the last dated deed, after reciting (inter alia) that the said Sir Henry Peyton and the petitioner had applied to the said Ralph Price, Richard Twining, Henry Kemble and William Samuel Jones for a further loan of 7000l., it was witnessed that, in consideration of 7000l. paid to the said Sir Henry Peyton and the petitioner by the said last named parties, the said Sir Henry Peyton and the petitioner jointly and severally covenanted to pay them the said sum of 7000l., with interest thereon at 5l. per cent. per annum, and, in exercise of the powers given or reserved to them by the said settlements of the 27th May, 1826, and 1st December, 1826, and in respect of the estate and interest which they had in the said premises, directed, limited and appointed, charged and made payable the said settled estates, with the payment to the said last named parties of the said sum of 7000l. and the interest thereon.

[277] 11. By an indenture of mortgage, dated on the 31st August, 1848, and made between the said Sir Henry Peyton and the petitioner of the one part, and Henry Beaumont Coles of the other part, after reciting (inter alia) that the said Sir Henry Peyton and the petitioner had applied to the said Henry Beaumont Coles to lend them 1000l., the said Sir Henry Peyton and the petitioner, by virtue and in exercise of the powers of the said settlements of the 27th day of May, 1826, and the 1st December, 1826, directed, limited and appointed that the said settled estates should thenceforth be vested in the said Henry Beaumont Coles, subject only to the hereinbefore stated prior charges thereon, and subject to redemption on payment by the said Sir Henry Peyton and the petitioner, or either of them, to the said Henry Beaumont

Coles of the said sum of 1000l., and interest thereon at 5l. per cent. per annum, and the said Sir Henry Peyton and the petitioner thereby jointly and severally covenanted with the said Henry Beaumont Coles for payment of the said principal sum of 1000l. and interest accordingly.

12. By an indenture of mortgage, dated on the 28th July, 1849, and made between the said Sir Henry Peyton and the petitioner of the one part, and John Drummond, of the other part, after reciting a certain mortgage created by the said Sir Henry Peyton, in favour of John Drummond and William Henry Pigou (both then deceased), by indenture dated on the 2nd of November, 1829, on a leasehold messuage in Grosvenor Place, Middlesex, then belonging to the said Sir Henry Peyton, to secure the sum of 5000l., with interest thereon at 5l. per cent., a certain other mortgage also created by the said Sir Henry Peyton by indentures dated the 17th and 18th of December, 1830, in favour of the said William Henry Pigou and John Drummond, of a certain messuage and lands called Swift's House, [278] in the county of Oxford, to secure 2000l., with interest thereon at 5l. per cent., and a certain bond, dated on the 3rd of February, 1831, from the said Sir Henry Peyton to the said William Henry Pigou and John Drummond, conditioned for payment of the sum of 3000l., with interest thereon at 5l. per cent. per annum, and, as the facts were, that the said William Henry Pigou and John Drummond had both died, the said John Drummond having been survivor and having appointed the said John Drummond (the party to the now stating deed) his executor; and that the said Sir Henry Peyton and the petitioner, in order to further secure the three several sums of 5000l., 2000l. and 3000l., then still owing by virtue of the several securities thereinbefore recited, by virtue of and in exercise of the said powers of appointment given or limited to them by the before stated settlements, also granted and released, directed and appointed the said settled estates to the use of the said John Drummond (party thereto), subject to the several prior charges and incumbrances thereon, and to redemption on payment by the said Sir Henry Peyton and your petitioner, or one of them, of the said three several sums (making together 10,000l.) and the interest thereon.

13. By an indenture of mortgage, dated on the 4th of February, 1852, and made between the said Sir Henry Peyton of the first part, the petitioner of the second part, and the said Henry Beaumont Coles of the third part, after reciting (inter alia) the before stated mortgage of the 31st day of August, 1848, and a certain further mortgage created by the petitioner alone in favour of the said Henry Beaumont Coles by a deed dated on the 9th day of February, 1850, to secure the sum of 1000l. and interest, and that the two several sums of 1000l. secured by those mortgages were both still due thereunder, and that the said Henry [279] Beaumont Coles had agreed to lend the said Sir Henry Peyton and the petitioner the further sum of 8200l. on having the same secured, with interest, in manner thereafter appearing: It was witnessed that in consideration of the two sums of 1000l. then already owing, and then of 2008l. paid by him to them (and making together 10,200l.), they thereby jointly and severally covenanted with him for repayment thereof, with interest thereon at the rate of 5l. per cent. per annum, and by virtue of the power given or limited to them by the said settlement of the 1st day of December, 1826, jointly directed, limited and appointed, and according to their respective estates and interests for life in fee or otherwise respectively, also granted and conveyed the said settled estates to the said Henry Beaumont Coles, subject to the said prior mortgages and incumbrances thereon, in mortgage for securing and subject to redemption on payment by or on direction of them the said Sir Henry Peyton and the petitioner, their heirs, executors, administrators and assigns, or any of them, of the said sum of 10,200l., and the said interest thereon.

14. By a deed, dated on the 18th of February, 1852, and made between the said Sir Henry Peyton of the first part, the petitioner of the second part, Algernon William Peyton (son and heir apparent of the petitioner), of the third part, and the said Henry Richard Cox and Henry Belward Ray of the fourth part, after reciting (inter alia) the said settlements of the 27th May, 1826, and 1st December, 1826, and the several mortgages before stated, and reciting (as the fact was) that the sum of 10,200l., secured by said mortgage of the 4th day of February, 1852, was raised as to 1000l. for the said Sir Henry Peyton, and as to 6940l. for the petitioner, and as to 2260l. for outfit for the said Algernon William Peyton, [280] and that it had been arranged between the said Sir Henry Peyton and the petitioner that all the several monies raised as

aforesaid by the said several mortgages and the now stating deed should be charged upon such of the said settled estates as were charged therewith in exoneration of all personal liability on the part of the said Sir Henry Peyton and the petitioner, or either of them, and that there should be made payable out of the annual income of such of the said settled estates as were thereafter mentioned an annual sum of 500l. during the joint lives of the said Algernon William Peyton, and of both or either of the said Sir Henry Peyton and the petitioner, to be held upon the trusts thereafter declared: It was witnessed that, in pursuance and performance of the said agreement, and in consideration of the premises, the said Sir Henry Peyton granted unto the said Henry Richard Cox and Henry Belward Ray, and their heirs, the said settled estates, to hold unto the said Henry Richard Cox and Henry Belward Ray, and their heirs, during the life of the said Sir Henry Peyton, to the uses thereafter declared. And in pursuance and further performance of the said agreement, and in consideration of the premises, the said Sir Henry Peyton and the petitioner, by virtue and in exercise of the power of appointment in that behalf given or limited to and then vested in them, jointly directed and appointed that the said manors and hereditaments should remain and be to the uses thereafter declared. And it was thereby agreed and declared that the aforesaid grant and appointment should operate to the intent that the said several sums charged and secured upon the said hereditaments and premises might be charged upon the hereditaments charged therewith respectively in exoneration of and by way of indemnity to the said Sir Henry Peyton and the petitioner, and their respective heirs, executors and administrators, and subject and without prejudice [281] to such charge as aforesaid, to the use, intent and purpose that the said Henry Richard Cox, and Henry Belward Ray, their executors, administrators and assigns, should, during the joint lives of the said Algernon William Peyton, and of both or either of the said Sir Henry Peyton and the petitioner, receive a yearly rentcharge of 500l. to be charged upon and payable out of the said hereditaments thereinbefore granted and appointed, payable quarterly, and with powers of entry and distress to recover same, and subject thereto to the use of the said Henry Richard Cox and Henry Belward Ray, their executors, administrators and assigns, for the term of 700 years, to commence from the day of the date of the now stating deed, with remainder to the several uses, upon the several trusts, and to and for the several intents and purposes, and with, under and subject to the several powers, provisions, limitations, declarations and agreements to, upon, for, with, under and subject to which the said hereditaments would have stood limited and settled if the now stating indenture had not been executed, and so as to restore and preserve all powers existing before the now stating indenture, all which powers it was thereby declared should be exercised as if the now stating indenture had not been executed, but so that the execution thereof should be subject to the charges and uses thereinbefore made and limited (except as therein mentioned); and certain trusts were declared of the said annuity of 500l. in favour of the said Algernon William Peyton, his wife and children, as therein mentioned, and that the said Henry Richard Cox and Henry Belward Ray should stand possessed of the hereditaments comprised in the said term of 700 years, and by entry and perception of rents to pay the said rent-charge if in arrear, and upon trust to permit the person for the time being entitled to the same premises in remainder expectant upon the term to take the rents of [282] the premises comprised in the said term, or such part thereof as should not be wanted for the purposes for which the same term was thereby limited, with a proviso for cesser of the said term on satisfaction of the trusts declared of the premises comprised therein.

15. By another indenture of mortgage, dated the 10th day of August, 1853, and made between the said Sir Henry Peyton of the first part, the petitioner of the second part, and Charles Hall, Esquire, of the third part, and, after reciting (*inter alia*) that the said Sir Henry Peyton, being in want of 1000l., had requested the said Charles Hall to advance that sum on having the same, with interest, secured as thereafter mentioned, and that the petitioner had, at the request of the said Sir Henry Peyton, agreed to join in the security thereby intended to be made for the benefit of the said Sir Henry Peyton in order to give effect thereto on the premises intended to be thereby mortgaged: It was witnessed that, in consideration of 1000l. then paid to the said Sir Henry Peyton by the said Charles Hall, the said Sir Henry Peyton covenanted with the said Charles Hall for the repayment thereof, with interest thereon at the rate of 5l. per cent. per annum, as therein mentioned, and by virtue and in

exercise of the power given or limited for that purpose by the hereinbefore stated settlement of the 1st December, 1826, the said Sir Henry Peyton and the petitioner jointly directed, limited and appointed, and, according to their respective interests for life, in fee or otherwise, also granted and conveyed the said settled estates to the use of the said Charles Hall, his heirs and assigns, subject to the prior charges and incumbrances thereon, in mortgage for securing and subject to redemption on payment by the said Sir Henry Peyton and the petitioner, their heirs, executors, administrators or assigns, or any of them, of the said sum of 1000l. and the said interest thereon.

[283] 16. By another indenture of mortgage, dated the 9th day of December, 1853, and made between the said Sir Henry Peyton of the first part, the petitioner of the second part, the said Charles Hall of the third part, and James Jones of the fourth part (the said Charles Hall being and being expressed to be party to this mortgage for the purpose only of giving priority to it over his own before stated mortgage), after reciting (inter alia) that the said Sir Henry Peyton was indebted to the said James Jones in a sum of 2000l., under an award therein mentioned, and payable on the 20th day of July, 1854, and that the said Sir Henry Peyton had requested the said James Jones to extend the time for payment thereof, and to accept payment with interest, by instalments, as thereafter mentioned, which the said James Jones had consented to do on having the same secured by the covenant of the said Sir Henry Peyton, and collaterally by mortgage or charge upon the said settled estates as thereafter contained; and that the petitioner had, at the request of the said Sir Henry Peyton, agreed to join in the now stating deed for the benefit of the said Sir Henry Peyton, in order to give effect to the mortgage or charge on the said premises thereby intended to be created in manner thereafter expressed, but not so in any way as to render himself, his executors or administrators, personally liable for the payment of the money thereby intended to be secured: It was witnessed that, in pursuance of the aforesaid agreement, and for the consideration aforesaid, the said Sir Henry Peyton covenanted with the said James Jones for payment of the said sum of 2000l. by four instalments as therein mentioned, together with interest thereon, until payment, at the rate of 5l. per cent. per annum; and by virtue and in exercise of the power for that purpose given or limited by the said settlement of the 1st day of December, 1826, the said Sir [284] Henry Peyton and the petitioner jointly directed, limited and appointed, and also according to their respective estates for life, in fee, or otherwise, granted and conveyed the said settled estates, subject to the prior mortgages thereon, to the use of the said James Jones, his heirs and assigns, in mortgage for securing and subject to redemption on payment by the said Sir Henry Peyton, deceased, or the petitioner, their heirs, executors, administrators, or assigns, or any of them, of the said sum of 2000l. and the interest thereon.

17. The said Sir Henry Peyton subsequently paid 500l. to the said James Jones on account of the principal secured by the last named mortgage.

18. The said Sir Henry Peyton died on the 24th day of February, 1854, leaving his widow, the petitioner's late mother, Harriet Peyton, him surviving, and who thereupon became entitled to the two several jointure rent-charges of 1000l. created for her life by the two before stated settlements of the 6th of July, 1803, and the 27th of May, 1826.

19. The whole of the several before mentioned mortgage debts of 57,500l., 2000l., 2000l., 7000l., 1000l., 5000l., 2000l., 3000l., 8200l., 1000l. and 1500l., the balance of the last mentioned debt of 2000l., was due and owing under the several before stated mortgages at the time of the death of the said Sir Henry Peyton.

20. The said Algernon William Peyton, the petitioner's son, for whose use the before mentioned rent-charge of 500l. was created by the before stated deed of the 18th of February, 1852, was living at the decease of the petitioner's father.

21. On the decease of the petitioner's father the petitioner became and was tenant for life of the said settled estates, subject however to the said several incumbrances, jointures, mortgages and rent-charges, and became as he [285] is advised liable to certain duties payable by virtue of the Succession Duty Act, 1853.

The petition then proceeded to state that the petitioner gave notice to the Commissioners of Inland Revenue of his liability to such duty: that they made an assessment on his succession: that being dissatisfied with such assessment he appealed, on the ground that the Commissioners, in estimating the value of the succession, had not made any allowance in respect of the incumbrances, including the

jointure rent-charge of the 27th of May, 1826, and the rent-charge of the 18th of February, 1852: that none of such incumbrances were created or incurred by Sir Henry Peyton (as the successor) within the meaning of the Act: and that allowance ought to have been made in respect of all such incumbrances, as provided by the Act.

Prayer. That the allowances and deductions claimed by the petitioner may be made in the said assessment of the said Commissioners, and that the said assessment may be rescinded and altered, so far as the same omits to make the petitioner such allowances and deductions.

Bovill and Karlake appeared for the petitioner, but the Court intimated that it would be more convenient to hear, in the first instance, the argument in support of the claim.

Sir F. Kelly (with whom was Beavan), for the Crown. On this appeal three questions arise: First, whether in estimating the succession duty the petitioner, Sir H. Peyton, is entitled to any deduction in respect of the mortgages charged by him on the estates from which his succession is derived. Secondly, whether he is entitled to any deductions in respect of the annuity of 1000l. a year, also charged on the estates and granted to his mother, Lady Peyton, and which commenced on the death of his father. Thirdly, [286] whether the petitioner is entitled to any deduction in respect of the rent-charge of 500l. a year granted to the petitioner's son during the lives of the petitioner and his father. With regard to the first question, by the 34th section of the Succession Duty Act, 16 & 17 Vict. c. 51, the petitioner is not entitled to any allowance in respect of the mortgages, which were incumbrances created by himself and not made in execution of a prior special power. If it were otherwise, this consequence would follow, that upon a resettlement of entailed estates, if they were mortgaged for their full annual value and the mortgage money invested in the public funds, the tenant in remainder would pay no duty on his succession, although he would substantially enjoy the estates by receiving the dividends. It is said, that as these incumbrances were created by the joint appointment of the tenant for life and tenant in tail, the latter is not chargeable with duty except as to one moiety; but the cases of *The Attorney General v. Lord Braybrooke* (9 H. L. Cas. 150), and *The Attorney General v. Sibthorp* (5 H. & N. 488), are express authorities that where a tenant for life and tenant in remainder concur in executing a power by which they create a charge on their estates, that is the act of the tenant for life as respects his life estate, and the act of the remainderman as respects his interest whether for life or in tail. In those cases this Court laid down the broad principle, that a tenant in tail in remainder cannot vary the succession duty to which he will be liable by joining with the tenant for life in resettling their estates. In *The Attorney General v. Lord Braybrooke*, Lord Campbell, C., observed, that "the object of the 12th section was to prevent any one, with a vested estate tail in remainder from diminishing, by his own act, the rate of succession duty to which he would [287] be liable if he did not deal with the estate." That equally applies to the resettlement of an estate and to incumbrances created thereon. [Wilde, B. If a person, upon whom a succession will devolve on the death of another, by anticipation charges the estate with an annuity for the benefit of a third person, the latter is liable to pay duty in respect of his annuity, and the person who created the charge only pays the duty upon the increased value of his estate when the annuity ceases. Bramwell, B. Suppose the incumbrance is created solely for the benefit of the tenant for life.] Where a tenant for life and the remainderman, in the exercise of a power, mortgage their estate, it is immaterial whether the money is paid to the one or the other, or divided between both: the mortgage operates on the estate of the tenant for life during his life, and after his death on the estate of the remainderman, in the same way as if the incumbrance had been created by himself. His liability to pay duty under the 34th section cannot be varied by his allowing the tenant for life to have the whole of the mortgage money. In *The Attorney General v. Lord Braybrooke*, Lord Campbell, C., said: "The joint power of appointment reserved to the father and son is not intended as a matter of pecuniary value to the father, but only as a check upon the son, that he may not, in his father's lifetime, make any imprudent disposition of the family property. The father had no interest in the estates beyond his own life interest, and to this the power of appointment had no application." These incumbrances were not made in execution of a prior special power of appointment within the meaning of the 34th section. The term "prior power of appointment" means "a power of appointment in some deed or settlement prior to

that under which the charge is created." For instance, if, in the settlement of the 6th July, 1803, a power had been given to the tenant for life [288] or in remainder to charge the estates with portions for younger children, and he had executed the power, that would have been an incumbrance made in execution of a prior special power within the meaning of the 34th section. *The Attorney General v. Lord Lorton* (11 Irish Com. Law Rep. 429) expressly decided that no deduction is to be made in respect of any charge created by a successor, before the estate comes into his possession, out of the estate to which he would have been entitled undiminished when he came into possession.

Then with respect to the annuity to Lady Peyton of 1000l. a-year, the question is, whether that is an incumbrance created by the petitioner as to which he is entitled to an allowance under the 34th section. [Pollock, C. B. It is difficult on principle to distinguish between a mortgage for money and a charge from natural love and affection.] Under the 2nd section, Lady Peyton was liable to pay duty in respect of this annuity, her succession being derived from the petitioner as predecessor. Under the 5th section the petitioner would, on her death, be liable to pay duty in respect of a succession arising from the increased benefit accruing to him upon the determination of the charge. Then, by the 34th section, although a successor is entitled to allowance in respect of incumbrances created anterior to the estate coming into his possession, he is not entitled to any allowance in respect of incumbrances created by himself. [Martin, B. The annuity was a "charge, estate, or interest," within the 5th section, and an "incumbrance" created by the successor within the 34th section. Wilde, B. The 2nd section, read strictly, would shew that, under the indenture of the 2nd December, 1826, the petitioner took a succession upon which he is chargeable with duty; and, reasoning upon that alone, it would seem that he could not escape from the payment of duty because he chose, by [289] anticipation to charge the estates.] Taking the 34th section by itself, no allowance ought to be made in respect of this annuity, which is an "incumbrance" on the succession; but, reading the 34th section together with the 2nd, 5th and 12th, the result is this, that a successor is chargeable with duty upon the whole value of the estate without deduction for any incumbrance created by himself; but if the charge is in favour of another person, for his life, that person must pay the duty on his succession, and upon his death the owner of the estate must pay duty on its increased value.

Then with respect to the annuity of 500l. a year to the son of the petitioner. That annuity was granted by the execution, by the petitioner and his father, of a power contained in the settlement of the 27th May, 1826, and was enjoyed by the grantee during the life of his grandfather, so that he took no succession on his grandfather's death, and consequently is not liable to pay duty. Therefore, unless the petitioner is chargeable, no duty whatever will be paid in respect of this annuity. [Bramwell, B. On the other hand, the result will be, that the petitioner will pay the duty, and, according to the decision in *The Attorney General v. Lord Braybrooke*, the grandson, on succeeding to the estates, will be entitled to an allowance in respect of the 500l. a year which he loses.]

The Court then called on

Bovill and Karlake, for the appellant. In considering these questions, it is material to bear in mind the scope and object of the Act, which is to charge the beneficial interest of a successor, at the time when he succeeds to the property, and in proportion to the value of his interest. First, the petitioner is entitled to a deduction in respect of the annuity of 1000l. a year to Lady Peyton, because [290] he did not succeed to the beneficial enjoyment of the whole value of the property, but his succession was subject to that charge. Upon the death of Lady Peyton the annuity would cease, and the petitioner would then be chargeable upon a new succession arising from the increase of benefit accruing to him from the determination of the charge. [Sir F. Kelly. That is conceded, and the Crown does not claim two duties in respect of the same profits of the estate.]

Secondly, as to the annuity of 500l. to the son of the petitioner. It was granted by the execution of a power by his grandfather and father, and cannot be said to have been the grant of the one more than the other. In this respect the case is not distinguishable in principle from *The Attorney General v. Lord Braybrooke* (5 H. & N. 488; 9 H. L. Cas. 150), where an annuity was granted under similar circumstances, and it was held that the grantee, upon his succession to the estates, was entitled to a deduc-

tion of duty in respect of his annuity which then ceased. Here the value of the succession to the petitioner is less by the amount of this annuity. [Wilde, B. There is a substantial difference between this annuity and that granted to Lady Peyton. The latter created a charge on the estates, payable on the death of her husband; therefore Lady Peyton took a succession, and was liable to pay duty; whereas the grant of this annuity created no liability, on the part of any person, to pay duty. If we were to hold that an allowance ought to be made in respect of this annuity, it would escape duty altogether.] The fact of there having been a disposition of the property, not dependent upon the death of a person, does not entitle the Crown to duty. The object of the legislature was to assimilate the law of succession to that of probate and administration. The 5th section is a declaration by the legis-[291]-lature that the successor to property, charged with an annuity, is not, at the time of his succession, to pay the duty upon the whole value, but only in proportion to the beneficial interest derived by him, and, on the determination of the annuity, he is chargeable in respect of the increased value of the estate. The petitioner was bound to relinquish an interest in the estates, equal to the value of the annuity, and, according to the true construction of the 37th and 38th sections, he is only chargeable with duty upon the value of the property of which he has the beneficial enjoyment: *The Attorney General v. Lord Braybrooke* (9 H. L. Cas. 150). [Martin, B. The 38th section seems to have reference to cases where the entailed property is let on building leases, so that a small income is derived from it, but, on the expiration of the leases, a large income would arise. In such case the successor is only chargeable with duty on the value of the property, or on such benefit as he might have obtained from it. Pollock, C. B. By the 38th section the commissioners are required, upon the computation of the assessable value, to make such allowance as shall be just. That would lead to the inference that there was to be some equitable consideration.] The 18th section provides that "no person shall be charged with duty in respect of any interest surrendered by him, or extinguished before the commencement of this Act." Here a portion of the estates, of the value of 500l. a year, was surrendered by the petitioner before 1853. In *The Attorney General v. Lord Braybrooke* (9 H. L. Cas. 150) Lord Campbell, C. J., said that the defendant was deprived of the annuity by its determination on his succeeding to the entailed estates. Here the petitioner is deprived of the value of this annuity whilst the annuitant lives. [Wilde, B. Getting the benefit of an estate does not mean the enjoyment of the rents and [292] profits. If a person has an estate in possession, or a right to an estate in remainder, he has the benefit of it when he surrenders his interest. So, if he charges it with an annuity for the life of his father, or mother, or son, he disposes of it, and so gets the benefit of it, whether he disposes of it for money, or natural love and affection.] If the petitioner and his father, in execution of the joint power of appointment, had sold the fee simple in the estates, no duty would have been payable; and this charge is, in effect, a sale of a portion of their value.

Thirdly, as to the mortgages. The petitioner and his father join in executing a power of appointment whereby they mortgage the fee simple of the estates for payment of the father's debts. How is that a charge created by the petitioner on his life interest? *The Attorney General v. Lord Braybrooke* is no authority on this point, because there the question was whether the defendant took a succession under a disposition made by himself within the meaning of the 12th section. Here the question depends on the 34th section, which provides that "in estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor," &c. Then what is the petitioner's succession? It is a life interest, but the charge is not on his life interest, but on the fee. [Wilde, B. It includes the life interest.] The petitioner could not have created the charge, unless his father had joined in executing the power. [Martin, B. The petitioner had the inheritance, and therefore no one else could charge the fee.] The 21st section provides that the interest of every successor shall be considered "of the value of an annuity equal to the annual value of such property, after making such allowances as after directed." Now, suppose that, instead of a joint power of appointment, the power had been for the father of the petitioner alone to [293] charge the estates with any amount he thought fit, and he had mortgaged them for more than their value, the petitioner on his death would have taken no succession, because he would have derived no beneficial interest from his life estate. So, if the estates were worth 10,000l.

a year, and the father of the petitioner had mortgaged them to the extent of 9000l. a year, on his death the petitioner would have taken a succession of the value of 1000l. a year. Or suppose the mortgagee had entered into possession and received the rents, which were insufficient to pay the interest; or, suppose the mortgagee had foreclosed and sold the property, in such cases there would be no succession. Therefore in every case it must be ascertained what is the beneficial interest at the time of the succession, not what is the value of the estate without regarding incumbrances. [Martin, B. If a tenant in tail in remainder mortgaged the property for its full value during the existence of the life estate, and on the death of the tenant for life the mortgagee entered into possession, the tenant in tail would derive no beneficial interest; but, if he afterwards paid off the mortgage, he might be chargeable with duty under the 37th section. Wilde, B. The term "beneficially entitled" must mean entitled for the benefit of others as well as himself. Bramwell, B. The term "beneficial interest" is explained by Lord Wensleydale in his judgment in *The Attorney General v. Lord Braybrooke* (9 H. L. Cas. 150).] These were not incumbrances created by the successor within the 34th section. That section only mentions incumbrances created by the successor and not by the successor and another person. [Bramwell, B. Suppose the 34th section is read thus:—"In estimating the value of a succession, allowance shall be made in respect of all incumbrances; except that no allowance shall be made in respect of any incumbrances created [294] or incurred by the successor." This being an incumbrance, the case would be within the general rule. Then would it be within the exception, an incumbrance created by the successor?] He could not do it without the aid of his father. If the charges had been created for his own benefit, they might have been said to be his act, but they were created for the benefit of his father. Suppose, instead of a mortgage, the charge had been an annuity for the life of a younger brother of the petitioner, payable on the death of his father; in that case he would not be chargeable with duty as upon a succession derived exclusively from himself, but from him and his father. [Bramwell, B., referred to *In re Bankes* (ante, p. 238).] It is said that these mortgages are charges created by the petitioner alone, because *The Attorney General v. Sibthorp* (3 H. & N. 424) and *The Attorney General v. Lord Braybrooke* (5 H. & N. 488) decided that the disposition under a disentailing deed is a disposition made by the tenant in tail. But when a disentailing deed is executed, the interest dealt with is that of the tenant for life in his life estate, and that of the remainderman in his estate tail. But after the estate tail is converted into a fee simple, and under the settlement the tenant in tail takes a life estate only, if he joins with the tenant for life in possession in charging the estates, the charge is created by them jointly. [Martin, B. When a tenant for life and tenant in tail join in barring the entail, the operation in law is to create a new fee simple, and the exercise of any power contained in the disentailing deed has the same effect as if the appointment had been in the deed itself.] Suppose the power had been reserved to the father alone and he had executed it, would that have been an incumbrance created by the petitioner? [Wilde, B. If, on the resettlement of the estates, he gave [295] his father an absolute power to incumber the property, would not that be an incumbrance created by the petitioner on his succession?] The 15th, 20th and 21st sections fortify the view that these are not incumbrances created by the successor within the 34th section. [Wilde, B. The first question is, whether the succession is incumbered or free from incumbrances. The very ground of the claim to exemption from duty is that the succession is incumbered, so that the petitioner cannot enjoy the full value of it. Then by whom was it incumbered? By the person who had the power to create the incumbrance, and no one could do that but the petitioner.] The words "prior special power of appointment," in the 34th section, mean prior to the passing of the Act; and if this was a charge made by the successor it was made prior to the passing of the Act. *The Attorney General v. Lord Lorton* proceeded on the assumption that *The Attorney General v. Lord Braybrooke* decided this question.

Sir F. Kelly replied.

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered:—

BRAMWELL, B. This is an appeal against an assessment of duty on a succession, made by the Commissioners of Inland Revenue, and the question is whether certain allowances are to be made for incumbrances. The material facts are:—The petitioner's

father being seised in fee settled the estates, the subject of the succession, to himself for life, remainder to his first son, in tail male. Shortly after the petitioner (the eldest son) attained twenty-one he joined with his father in barring the estate tail, and resettling the property [296] by giving his father an estate for life, remainder to himself for life, remainder to his first and other sons in tail male, with a joint power of appointment to his father and himself. This joint power of appointment has been exercised to create the following incumbrances, the propriety of allowing which is now the question. Joint mortgages by the petitioner and his father, as for money lent to them jointly, with joint and several covenants for repayment. A charge of 20,000l., of which 1500l. remain due, for a debt of the father, with no covenant or obligation on the son for its payment. An annuity of 500l. for the joint lives of the petitioner's eldest son, and the petitioner and his father, or the survivor of the two latter. All these incumbrances have been disallowed by the Commissioners, and we have now to consider if that disallowance was right. It is as well first to notice the topic urged by the petitioner, that it would be a great hardship if a successor paid on a larger value than he succeeded to. Of course the statute must receive its true construction, whatever hardship may follow; but it certainly may be of assistance, in construing a doubtful statute, to shew that one construction involves great hardship, and the opposite none. But, in truth, this argument will not be found favourable to the petitioner. The statute imposes a duty on a succession. Property may escape the tax for ever, as chattels may escape legacy duty, by the property always passing inter vivos. But where there is a succession, on the succession accruing payment must be on the value of the property. If the successor has assigned it, the assignee must pay. So, if the successor anticipates it by raising money on it for his own purposes, he must pay without allowing for the charge. There is no hardship in this; on the contrary, it would be unreasonable to hold that the duty must be paid on the whole, though the successor alienated the whole, but [297] need not be, if he incumbered a part. But, if charging it for his own purposes, he is to pay on the whole value, so must he, equally, if he charges the property for the benefit of another; and it may fairly be observed that, as to the majority of the charges, the petitioner is liable for them, and the succession is a net increase of his means of paying them. If, therefore, the charges here had been created by the petitioner alone, under a power given to him alone, there would be no hardship, but the contrary, in making no allowance in respect of them. How this may be in the present case, where the power is given to the petitioner and his father, it is not necessary to decide, but any observation on it may be more conveniently made presently.

It was argued by the appellant that *Lord Braybrooke's case*, in the House of Lords, deciding that the annuity which ceased on Lord Braybrooke's accession to the estate was to be allowed, was an authority to shew that all these incumbrances ought to be allowed; because that case shewed that the amount of benefit to which a successor succeeds is the amount to be charged. But I think *Lord Braybrooke's case* does not decide that. It turned entirely as to this point on section 38, though, no doubt, that case raises this curious condition of things, that, according to it, the petitioner's son will be allowed this 500l., while it is denied that the petitioner himself shall be allowed it. Nor do I think we can regard the words "beneficial interest" in the second section, as giving any assistance in deciding this case. I think those words mean beneficial as distinguished from mere legal interest, but even if not, the vagueness of that word is restrained by the particularity of the subsequent sections, upon which I think the question turns, and to which I will presently refer. Nor do I think that sect. 5 affects the case; all that section means is, that if, after suc-[298]-cession to property, some charge which ought to be allowed falls in, it shall be deemed a further succession; but it leaves the question open, what is such a charge? This view is confirmed by section 20. I think the question turns on the following sections. By section 21, "the interest of every successor shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed." If the matter stood there, therefore, only the annual value of the property would have to be looked at. But by section 34, "allowance is to be made in respect of all incumbrances, other than those created or incurred by the successor, not made in execution of a prior special power of appointment." These incumbrances are not made in execution of such a prior special power, and the question is reduced to this, are they created or incurred by the successor? If they

are, they are not to be allowed; otherwise they are. The reason and object of this section appear from the remarks above made on the supposed hardship of the case. Undoubtedly, these incumbrances are made or incurred by him in this sense, that he is one of the parties making or incurring them: but, so also they are made or incurred by his father. In truth they are made and incurred by both. Now it is a generally understood rule of construction that when any thing is predicated of a person, it means of him alone; as an allegation that a person was seised, means sole seised. Is there any reason for construing this section as though the words had been, "created or incurred by the successor, or by him and any other or others." I do not like to rely on this being a tax Act, which I think ought to be construed fairly like others. But I think it is for those who appear for the Crown to make out their case, and I think they have not given any reason why the statute should be so read, and many cases of hardship might be suggested if it were.

[299] It still remains to consider, however, if these are in substance created by the petitioner alone. As I said before, it is true the incumbrances could not have been created, except by the petitioner's act, but neither could they except by the father's act. Then it is said they are created so as to affect his estate or succession, which could not have been done but by his consent, and therefore in substance he alone creates them; but suppose, when the settlement was made in 1826, a power had been given to the father alone to make these charges, in that case it could not be said the incumbrances were immediately made or incurred by the petitioner. It is further said they are, because he would have created the power, by virtue of which his father would create those charges, and therefore would have created them. As was observed by Lord Kingsdown, in *Lord Braybrooke's case*, "Limitations created by the execution of a power, must be read as if they were introduced into the deed creating the power." He proceeds to say, "I have already expressed my opinion, that the deed creating the power must be considered as the act and disposition of the son." This seems very adverse to the petitioner; but his lordship is referring to a prior part of his judgment, in which he says, "Though in law a new estate may have been created by this deed, it seems to me," &c., and "It is, I think, a disposition made by the son of an estate which he previously held; and it does not seem to me sufficient, to deprive it of that character, that his father as protector of the settlement consented to it." It is obvious therefore that his lordship's remark must be read in reference to the matter in hand, and that he did not mean to say that, where a power on such a resettlement is given to the protector of the settlement to charge the estate by his sole act for his sole purposes, that would be a charge or incumbrance by the successor; his lordship leaves the pre-[300]-sent case unaffected by his remarks. The question, therefore, is open, and it remains to consider on principle whether the power was substantially created or incurred by the petitioner. Now, I do not propose to go into nice considerations on a head of law with which I am not familiar, but it seems to me difficult to say that this power is the sole creation of the petitioner. The petitioner and his father have jointly a power of dealing with the property and creating a fee simple estate on it; but neither can do it without the other. Each may withhold his consent; each may charge a price for giving it (see *Acraman v. Corbett* (1 J. & H. 410)); and it is hard to say, that one contributes more than the other to the fee they created; for the father's life estate may continue for many years, and the son's estate tail never attach. Further, the charges are charges, not on his estate for life only, but on the inheritance. He could not have created them himself, and the hardship upon him may be shewn thus, that portions of the estate may be sold to realize the charges. He will then have an unincumbered estate for life in what remains; his son will have an unincumbered estate tail in remainder in what remains; the son, however, will be allowed these incumbrances. It might happen that the father's succession would be worthless, and yet he takes the same as his son, and has not had the benefit of anticipating it. Let us suppose that the tenant for life is not the father of the tenant in tail, and in no way of kin to him. Let us suppose the incumbrance is stated expressly to be for his benefit as the price of his consenting. Let us suppose such a tenant for life, under a sole power appointed an annuity to his own son, to take place after his father's death, could it be said that the son took under the disposition of the tenant in tail, and must pay 10l. per cent.? It seems impossible to [301] say that the tenant for life and the tenant in tail in remainder are not joint creators of all the estates and powers. But it is said that *Sibthorp's case*, and *Lord*

Braybrooke's case, both in this Court and in the House of Lords, shew that the tenant in tail takes under his own disposition, and consequently is his own predecessor. I have endeavoured to shew the distinction between the new estate the tenant in tail gets, and the estate taken by others. But what was decided in those cases was, that viewing the matter without reference to the technical rules of English real property law, the tenant in tail, in substance, got back the life estate (which is part of every tenancy in tail in one sense) which he had before. And I may observe that in my judgment in *Sibthorp's case* I declined to say that he took under his own disposition alone, but suggested that, assuming he took under the joint disposition of himself and his father, the interest he derived from each was distinguishable, viz., all came from himself, and none from his father. This view is countenanced by the judgment of the Lord Chancellor in *Lord Braybrooke's case*, and is in no way opposed to anything else there said. The Lord Chancellor expressly says that—"The question has been asked, what would have been the effect of the joint power of appointment being executed in favour of a stranger. That stranger, on taking the succession, would have been in a totally different position from the appellant; and, as he would clearly have taken under the disposition of others, the duty to be paid by him would depend upon wholly different considerations." And Lord Kingsdown says—"He takes no interest whatever from his father." In short, those cases were decided on general and popular views not applicable to this. I have hitherto not noticed the difference between the kinds of charge, but I may observe that, as to the 1500l. remaining due of the 2000l. charged on the estate, that is a sum for [302] which the petitioner is not liable, and there seems no reason or principle why it should not be allowed to him as much as though it had been made at the time the powers were created. But, in truth, I think the other charges are subject to the same considerations, and without saying that provision ought not to be made to the contrary by the legislature, or that it would be unfair to do so, I think the Crown has failed to shew that these charges were created or incurred by the petitioner within the meaning of the statute, and consequently that the appeal should be allowed.

I express this opinion with considerable doubt, but I think our judgment in *The Attorney General v. Floyer* (ante, p. 238) gives countenance to it.

MARTIN, B. The judgment which I am about to deliver is that of the Lord Chief Baron, my brother Wilde and myself.

The question in this case is, what are the deductions to which Sir Henry Peyton is entitled upon a succession, in order to ascertain the amount of duty payable by him under the Succession Duty Act, 16 & 17 Vict. c. 51. He claims four heads of deductions. First, in respect of an annuity of 1000l. a year granted to his mother by the disentailing deed of 27th May, 1826. Secondly, in respect of an annuity of 500l. a year granted to his son Mr. Algernon Peyton, by the exercise by his father and himself of a power contained in the same deed. Thirdly, in respect of certain mortgages, created in like manner, for the sole benefit of his father. And, fourthly, in respect of similar mortgages made for the benefit of himself and his father. The original settlement was a marriage settlement, dated the 6th of July, 1803. It created a jointure of 1000l. a year, by way of rent-charge, to Lady Peyton, Sir Henry [303] Peyton's mother; an estate for life to his father, and an estate tail to the first son of the marriage, which Sir Henry Peyton was. The disentailing deed of the 27th May, 1826, barred the entail and created an estate for life in Sir Henry Peyton's father, an additional rent-charge of 1000l. a year to his mother, after her husband's death; and subject thereto and other charges after the decease of the father, to the use of such persons, for such estates and interests, upon such trusts and for such purposes, as Sir Henry Peyton and his father during their joint lives, should, by instruments duly executed, from time to time jointly appoint, and, subject thereto, to Sir Henry Peyton for life, with the usual remainder over. The annuity to Mr. Algernon Peyton, and all the mortgages were created by the execution by Sir Henry Peyton and his father of their joint power. The question entirely depends upon the true construction of the statute, which, according to the judgment of the Lord Chancellor, in the House of Lords, in *Lord Braybrooke's case* is to be made, not according to the technicalities of the law of real property, but according to the popular use of the language employed; so that such property may be subjected to the succession duty according to the general intention which the legislature has expressed.

As to the first deduction claimed, it was admitted by Sir Fitzroy Kelly (who

argued the case for the Attorney General) that it ought to be allowed. The reason given was, that Lady Peyton herself was liable to succession duty in respect of this annuity, and it was assumed that, upon the true construction of the Succession Duty Act, two duties could not be payable in respect of the same profits or issues of an estate. We express no opinion upon this point. We accede to the view of the learned counsel who argued for the Attorney General.

As to the remaining questions; It is enacted by sec-[304]-tion 12, that where any person shall take by a disposition made by himself, if at the date of this disposition "he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of the Act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession at the same rate as he would have been chargeable with if no such disposition had been made." Now, Sir Henry Peyton is under the circumstances here stated. He has taken a succession under a disposition made by himself; he was entitled at the date of the disposition to the property expectant on the death of his father. His father died after the commencement of the Act and during the continuance of the disposition. He is therefore chargeable with duty as if no such disposition had been made. *Lord Braybrooke's case* is in point. But the property is charged with certain incumbrances, that is to say, the annuity to Mr. Algernon Peyton and the mortgages; and in reality the beneficial interest which Sir Henry Peyton has taken in the property is the annual income, less the annuities and the interest on the mortgage debts. But section 34 enacts:—"That in estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment."

The first question is, were the annuity and the mortgages incumbrances on the succession created by Sir Henry Peyton? We think they were. We can attach no other meaning to the 34th section. They are incumbrances created, it is true, by both Sir Henry Peyton and his father; but, so far as they affect the succession, they are in reality and substance created solely by Sir Henry Peyton. His father could not by any act of his affect the succession. We therefore think the annuity to Mr. Algernon Peyton and the [305] mortgages were incumbrances created by the successor, and his father's consent was necessary to the effectual creation of them; but Sir Henry Peyton was the person who created them. Secondly, we do not think they were made in execution of a prior special power of appointment. We think this means a power existing prior to the disposition made by the successor, that is to say, in the present case prior to the disentailing deed of the 1st December, 1826. The exemption of the incumbrances made in execution of a prior special power was probably introduced to prevent the hardship of a successor being called upon to pay a tax in respect of an incumbrance which it may have been his duty to have created. It was argued that, looking at the Act as a whole, it was the intention of the legislature to compel the successor to pay duty, not only upon that part of the succession which beneficially came to him, but also upon all which might have come but for his own acts. Carrying out this argument to the extreme, it would follow that he was bound to pay duty on the annuity of 1000l. to his mother, for it is an incumbrance upon his succession created by his own act. But this claim was abandoned by Sir Fitzroy Kelly.

We have given much consideration to the 5th section, as regards the deduction claimed in respect of the annuity to Mr. Algernon Peyton; but the result is that we think the words of the 34th section cannot be controlled by it, and that no allowance can be made in respect of this annuity. We are confirmed in this opinion by the 20th section. In our opinion, therefore, the first deduction claimed ought to be allowed, but not the others.

Allowance in respect of the annuity of 1000l. a year granted to Lady Peyton.

No allowance in respect of the annuity of 500l. a year granted to Algernon Peyton; nor any allowance in respect of either of the mortgages.

[306] *THE ATTORNEY GENERAL v. YELVERTON AND TAYLOR*. July 6, 1861.—Under a settlement made in 1812, W. C. became tenant for life of certain freehold estates; with remainder to his first and other sons in tail male, remainder to G. for life; remainder to her first and other sons in tail male; remainder to J. C.

for life, remainder to his son F. C. in tail male. On the 3rd December, 1850, W. C. and F. C. executed a disentailing deed and resettled the estates. By another deed of the same date F. C., for valuable consideration charged the "settled estates" with a sum of 20,000*l.*, for the use of W. C., payable with interest at the expiration of twelve calendar months from the day on which the limitations to W. C. and G. for their lives and their sons in tail male, or the last of such limitations, should fail. On the 31st December, W. C., by a deed of settlement, assigned the 20,000*l.* to trustees in trust as to 14,000*l.* for his adopted son, and as to 6000*l.* for his adopted daughter. W. C. died in February, 1857, without legitimate issue; and G. died in November, 1857, without issue, whereupon the adopted children of W. C. became beneficially entitled to the 14,000*l.* and 6000*l.*—Held, that the disposition of the 20,000*l.* by the deed of settlement created a "succession" within the meaning of the 2nd section of the Succession Duty Act, 16 & 17 Vict. c. 51, and that duty was payable at the rate of 10*l.* per cent.: Per Pollock, C. B., Martin, B., and Channell, B. Bramwell, B., dissentiente.

[S. C. 30 L. J. Ex. 333; 7 Jur. (N. S.) 1250; 5 L. T. 451. Explained, *Attorney-General v. Floyer*, 1862, 9 H. L. Cas. 491. Commented on, *Attorney-General v. Abdy*, 1862, 1 H. & C. 296; *Attorney-General v. Gardner*, 1863, 1 H. & C. 653. Referred to, *Attorney-General v. Gell*, 1865, 3 H. & C. 630; *Lord Wolverton v. Attorney-General*, [1898] A. C. 535.]

Information in equity by the Attorney General (so far as material) as follows:—

1. The object of this information is to obtain from the defendants, who are the trustees of the settlement made by the indenture of the 31st December, 1850, hereinafter stated, payment of the duty in respect of the successions of William Chambers, the younger, and Emma Maria Biddulph, in the sum of 20,000*l.*, thereby settled, to which they respectively became beneficially entitled in possession on the death of Eliza Gulston, when the right to receive the above sum became absolute.

2. Under the will of Sir John Stepney, deceased, dated the 9th August, 1802, and under certain indentures of lease and release, dated the 13th and 14th days of July, 1812, and made between Lord Robert Seymour, Roger Wilbraham, &c., the trustees named in the said will, of the one part, and Charles Ranken of the other part (which said indenture of release was a settlement in pursuance of certain directions in the said will contained of the hereditaments hereinafter referred to) William Chambers, the elder, had, at the time of the execution of [307] the two indentures of the 23rd December, next hereinafter stated, become tenant for life of various freehold lands in the counties of Carmarthen and Glamorgan, hereinafter referred to as the "settled estates," with remainder to the use of the first and other sons of the said William Chambers (who was then of the age of 77 years, and had no male issue) in tail male, with remainder to the use of Eliza Gulston (who was then a spinster of the age of 50 years) during her life, with remainder to the use of her first and other sons in tail male, with remainder to the use of John Cowell during his life, with remainder to the use of William F. R. Cowell, the first son of the said John Cowell, in tail male, with remainders over.

3. By a disentailing deed, dated the 23rd December, 1850, and made between the said William F. R. Cowell of the first part, the said William Chambers, the elder, of the second part, and the defendants W. Yelverton and John Taylor of the third part; after reciting (amongst other things) that the said William F. R. Cowell, being desirous that his aforesaid estate tail in remainder in all the said "settled estates" should be enlarged into a corresponding estate in fee simple; and, having applied to the said William Chambers, the elder, as the protector of the settlement of the same estates, to consent to the dispositions requisite for effecting such enlargement, he, the said William Chambers, had accordingly agreed so to consent, in consideration of certain terms of arrangement having been entered into between him and the said William F. R. Cowell, and which were intended to be carried into effect by a separate deed (meaning the indenture next hereinafter stated): he, the said William Chambers, the elder, in pursuance and part performance of the said agreement, and as protector of the settlement did, in manner prescribed by the statute for the abolition of fines and recoveries, consent to the grants, con-[308]-veyances, assignments, and dispositions thereafter made by the said William F. R. Cowell, for the respective purposes

thereinafter mentioned ; and the said William F. R. Cowell, in further pursuance and performance of the said agreement, and in consideration &c., did, in the manner prescribed by the said statute, grant, release, convey, and dispose of, unto the said W. Yelverton and F. Taylor, their heirs and assigns for ever, all the said "settled estates" : to hold the same unto the said W. Yelverton and J. Taylor, their heirs and assigns for ever, for an estate in fee simple absolute, freed and discharged of the estate in tail male therein of the said William F. R. Cowell, and all estates, rights, and interests to take effect on the determination thereof, and subject to, and in remainder expectant upon the determination or failure of the aforesaid limitations for life and in tail male of the said William Chambers, the elder, and Eliza Gulston, and his and her first and other sons, and the limitations for life of the said John Cowell, and also subject to such charges or incumbrances as had been theretofore created by the said William F. R. Cowell, and so freed and discharged and subject respectively, to the use of the said W. Yelverton and J. Taylor, their heirs and assigns for ever ; but nevertheless, upon the trusts declared concerning the same settled estates by an indenture intended to bear even date with the indenture now being stated ; thereby meaning the indenture next hereinafter stated.

4. By another indenture, also dated the 23rd December, 1850, and made between the said William F. R. Cowell, of the first part ; the said William Chambers, the elder, of the second part ; the defendants, W. Yelverton and J. Taylor, of the third part ; William Chambers, the younger, of the fourth part ; the said William Chambers, the younger, and G. Tyrrell, of the fifth part ; and T. Morris and B. Coombe, [309] of the sixth part : after reciting the said disentailing deed ; and also reciting that, by an indenture dated the 25th September, 1840, and made between the said John Cowell of the first part, the said William Chambers, the elder, of the second part, and the said William Chambers, the younger, of the third part, the said John Cowell, in consideration of an annuity therein mentioned to have been secured by the said William Chambers, the elder, to the said John Cowell for the period therein expressed, did, by the direction of the said William Chambers, the elder, grant unto the said William Chambers, the younger, an annuity of 3000l. during the life of the said John Cowell, to commence on the day of the decease of the survivor of the said William Chambers, the elder, and Eliza Gulston : to hold the same unto the said William Chambers, the younger, during the life of John Cowell, but upon trust for the said William Chambers, the elder, and subject to a power reserved to the said John Cowell of repurchasing such annuity of 3000l. within twelve months after the time appointed for the commencement of the same, on payment to the executors, &c., of the said William Chambers, the elder, of the sum of 18,515l. And also reciting that it formed part of the terms of arrangement between the said William F. R. Cowell and William Chambers, the elder, which are referred to in the said indenture of even date with the indenture now in statement, that, in consideration of the consent so given by the said William Chambers, the elder, as such protector of the settlement, to the respective disentailing assurances by the said William F. R. Cowell ; and also in consideration of the said contingent and deferred annuity or yearly rent-charge of 3000l., and the eventual repurchase money for the same being, by the said William Chambers, agreed to be vested in the said T. Morris and B. Coombe, upon the trusts thereafter expressed, he, the [310] said William F. R. Cowell, should, by the indenture now in statement and in manner thereafter appearing, secure the payment unto the said W. Yelverton and J. Taylor, upon the trusts thereafter declared, for the benefit of the said William Chambers, the elder, of a deferred sum of 20,000l., payable, with such interest thereon as is thereafter mentioned, at the time and otherwise in the manner appointed in that behalf. And also reciting that the said William Chambers, the elder, also agreed to make an immediate advance unto the said William F. R. Cowell, of the sum of 5600l., and to enter into certain engagements for the advance from time to time of other sums to a limited amount, and subject to certain conditions and stipulations, upon the terms that the repayment of the said sum of 5600l., and of such further advances, with interest thereon respectively at the rate of 5l. per cent. per annum, should, subject to the security to be therein contained for the said sum of 20,000l. and the interest thereof, be secured by a further mortgage, for the benefit of the said William Chambers, of the aforesaid hereditaments and premises so vested, or expressed to be vested in the said W. Yelverton and J. Taylor by the said indenture of even date with the indenture now in statement. And also reciting that it was also part of the aforesaid arrangement between the said

William Chambers, the elder, and William F. R. Cowell, that the said deferred and contingent annuity or rent-charge of 3000l., and the said eventual repurchase money for the same, should, by the indenture now in statement, be made a fund for the satisfaction from the time at which the same annuity or rent-charge might become payable, of the interest to accrue upon or in respect of the aforesaid sum of 20,000l., and that subject to the trusts and provisions for that purpose thereafter contained the same should be also made a fund for the satisfaction from time to time of the interest to [311] accrue due upon or in respect of the said sum of 5600l., and the further sum or sums to be advanced by the said William Chambers, the elder, and that, subject to the trusts and provisions for those respective purposes, the same annuity or rent-charge, and such eventual repurchase money thereof, should be applicable upon and for certain other trusts and purposes directed by the said William F. R. Cowell: It is by the said indenture now in statement witnessed, that in further pursuance and performance of the said recited arrangement and agreements between the said William Chambers, the elder, and William F. R. Cowell, and in consideration of the aforesaid consent so given by the said William Chambers, as such protector of the aforesaid settlement, to the said grants, conveyances, assignments and dispositions by the said William F. R. Cowell, contained in the said disentailing deed, and also in consideration of the revocation, appointment and other assurances thereafter expressed and contained concerning the aforesaid deferred and contingent annuity or yearly rent-charge of 3000l., and the eventual repurchase money for the same, and the trusts thereafter declared expressly and by reference concerning the same, it was thereby declared and agreed by and between the said William Chambers, the elder, William F. R. Cowell and W. Yelverton and J. Taylor, according to their several and respective estates, rights and interests, and they the said William Chambers, the elder, and William F. R. Cowell, did thereby direct, and the said W. Yelverton and J. Taylor did thereby admit that they the said W. Yelverton and J. Taylor, their heirs, &c., should stand possessed of and interested in the said settled estates, which by the said disentailing deed had been granted, conveyed, &c., unto them, &c., upon trust, that in case the said William F. R. Cowell, his heirs, &c., should upon the day of the expira-[312]-tion of twelve calendar months, to be computed from the day on which the several limitations to the said William Chambers, the elder, and Eliza Gulston for their respective lives, and to the sons of each of them respectively in tail male, contained in the said will of the said Sir John Stepney and in the said indenture of settlement of the 14th July, 1812, respectively, or the last of such limitations for the time being subsisting should determine or fail, pay or cause to be paid unto the said W. Yelverton and J. Taylor, or their assigns, &c., the sum of 20,000l. and interest for the same at the rate of 5l. per cent., to be computed from the day on which the said limitations to the said William Chambers, the elder, and Eliza Gulston, and to their respective sons, or the last of such limitations, for the time being subsisting, should determine or fail, then the said W. Yelverton and J. Taylor, their heirs, &c., should immediately, or at any time thereafter, at the request, costs, and charges of the said William F. R. Cowell, his heirs, &c., reconvey, reassign, or otherwise assure, all, and singular, the hereditaments and premises comprised in the said disentailing deed, unto and to the use of the said William F. R. Cowell, his heirs, &c. And it is thereby also further witnessed, that in further pursuance and performance of the said recited agreements, and in consideration of the premises, and particularly of the security therein contained for the payment of the said sum of 20,000l. and interest, he, the said William Chambers, the elder, by virtue and in exercise of the said power or authority in that behalf contained in the said recited indenture of the 6th July, 1848, did thereby absolutely revoke, determine, and make void all, and singular, the trusts, purposes, powers, provisions and covenants which, in and by the same indenture of the 6th July, 1848, were declared, expressed, and contained, concerning the aforesaid deferred and contingent annuity [313] or rent-charge of 3000l., secured by, or which might become payable under the aforesaid indenture of the 25th September, 1840, and of, and concerning, the aforesaid sum of 18,515l.; and did direct and appoint that the said William Chambers, the younger, and the said G. Tyrrell, as such trustees, should convey, assign, and assure the same annuity or rent-charge unto the said T. Morris and B. Coombe, upon such trusts as were thereafter declared. (The indenture then proceeded to state the assignment of the annuity of 3000l. to T. Morris and B. Coombe, upon trust as a security for the payment of interest on the 20,000l., or of so much of

the principal sum as should remain unpaid.) And it is thereby also witnessed, and the said William Chambers, the elder, and William F. R. Cowell, did thereby respectively direct, and the said W. Yelverton and J. Taylor did thereby admit, that the said W. Yelverton and J. Taylor should be possessed of, and interested in, the said sum of 20,000l., and the interest thereof, and the securities for the same, &c., upon trust for such person or persons, for such interest or interests, and in such parts, shares, and proportions, and upon and for such trusts and purposes, and with and subject to such provisos, conditions, and agreements, as the said William Chambers, the elder, should at any time, or from time to time, thereafter by any deed, &c., direct, limit, or appoint, and, in default of any such direction, &c., upon trust for the said William Chambers, the elder, his executors, &c., for his and their absolute use and benefit.

5. By indenture of settlement, dated the 31st December, 1850, and made between the said William Chambers, the elder, of the one part, and the defendants W. Yelverton and J. Taylor, of the other part, after reciting (amongst other things) the said two indentures of the 23rd December, 1850; and also reciting that the said William Chambers, [314] the elder, in consideration of his affection for his reputed and adopted children, the said William Chambers, the younger, and Emma Biddulph, the wife of John Biddulph, and for their advancement and benefit, was desirous and had determined to settle and assure, upon the trusts and subject to the powers and provisions thereafter declared, the aforesaid principal sum of 20,000l., and the securities for the same: It is witnessed that, for the consideration thereinbefore expressed, and in pursuance and performance of the said recited desire and determination, he, the said William Chambers, the elder, by virtue and in exercise and execution of the power in that behalf to him limited and reserved by the said indenture of the 23rd December then instant, did direct, limit, appoint and declare, and they, the said W. Yelverton and J. Taylor, did thereby admit and declare, that they, the said W. Yelverton and J. Taylor, their heirs, &c., should thenceforth stand possessed of and interested in the said principal sum of 20,000l., and the interest which should thereafter accrue due thereon, upon trust that they, the said W. Yelverton and J. Taylor should, when the said principal sum of 20,000l. should become due, apply for, and receive, &c., the same, and the interest payable in respect thereof, upon trust that the said W. Yelverton and J. Taylor should, so soon as conveniently could be after the said principal sum of 20,000l. should have become payable, raise or appropriate the sum of 6000l., with interest at 5l. per cent., and, as concerning such parts of the aforesaid sum of 20,000l., and the interest thereof, as should remain after the said sum of 6000l. and interest should have been raised or satisfied, upon trust for the said William Chambers, the younger, his executors, &c., for his and their own absolute use and benefit, and to be paid, assigned, and transferred to him and them accordingly: and, upon trust that the said W. Yelverton and J. Taylor should, with the [315] consent in writing of the said Emma Biddulph, lay out and invest, in their names, the sum of 6000l., and when the interest should become due, during the life of the said Emma Biddulph, pay and apply the same as the said Emma Biddulph, notwithstanding her coverture, should appoint, and subject to such appointment should pay such interest to the said Emma Biddulph for her separate use; and after her decease, then, as concerning the principal sum of 6000l., and the interest therefrom, upon trust for all and every of her child and children, in such manner as the said Emma Biddulph by deed or will should appoint, and, in default of such appointment, upon trust for such child or children who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age, or marry; with an ultimate limitation, in default of children, upon trust for the said William Chambers, the younger, his executors, &c., for his and their own absolute use and benefit.

6. The said William Chambers, the elder, died on the 9th day of February, 1855, without having had any male issue capable of taking the said "settled estates," under the limitations contained in Sir John Stepney's will, and in the settlement made in pursuance thereof, as before mentioned. The said Eliza Gulston died on the 24th November, 1857, without having ever been married; and, upon her death, the said principal sum of 20,000l., made payable out of the said "settled estates," under the secondly hereinbefore stated indenture of the 23rd December, 1850, became raisable, and the right to receive the same, and the interest thereof, became vested in the defendants under the disposition thereof made by the hereinbefore stated indenture of the 31st December, 1850, upon the trusts nevertheless, and for the purposes

therein mentioned, by virtue whereof the said William Chambers, the younger, became, absolutely, beneficially entitled in possession to so much of the said [316] sum of 20,000*l.*, and the interest thereof, as was not thereby directed for the said Emma Biddulph and her children; and the said Emma Biddulph became entitled in possession to the receipt of the income and profits of the other portion of the same sum. And the defendants have since received the said principal sum of 20,000*l.*, and the interest to the time of the payment thereof, and have appropriated and disposed of the same in the manner directed by the said lastly stated indenture.

7. The said William Chambers, the younger, and Emma Biddulph, are respectively in a degree of collateral consanguinity to the said William Chambers, the elder, other than those described in the 10th section of the Succession Duty Act, 1853, and therefore duty, at the rate of 10*l.* per cent., is payable upon the value of the succession of each of them in the aforesaid principal sum of 20,000*l.*; and the defendants, as the trustees of the property, are personally accountable for such duty.

The information prayed (*inter alia*) that it might be declared that duty, at the rate of 10*l.* per cent., was payable accordingly.

The defendants, by their answer, admitted that the statements in the information were true, but refused to pay any duty because they said that under the circumstances set forth in the information, there has not been any "succession," within the terms of the Succession Duty Act, upon which duty has become payable.

The Attorney General and Hanson argued for the Crown, in last Trinity Term (June 8th). The Crown is entitled to duty at the rate of 10*l.* per cent. on 20,000*l.*, as upon a succession derived from William Chambers, the elder, who is predecessor. The transaction is in effect a mortgage of the estates for that amount. William Chambers, being tenant [317] for life and protector of the settlement under the will of Sir John Stepney, joined with William F. R. Cowell, the tenant in tail, in executing a disentailing deed; and they charged the estates with the payment of 20,000*l.* at the expiration of twelve months after the determination or failure of the limitations to William Chambers and Eliza Gulston, and their sons in tail male. This sum of 20,000*l.* was for the use of William Chambers, and he settled 14,000*l.* on his adopted son, and 6000*l.* on his adopted daughter. There was good consideration for the purchase of this 20,000*l.*, viz., the execution of the disentailing deed and the surrender of a contingent annuity of 3000*l.* a year, charged on the estates and payable by John Cowell during his life. The case falls within the 2d section of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). On the death of Eliza Gulston, the two adopted children of William Chambers became absolutely entitled to this sum of 20,000*l.*, so that it was a disposition of property by him, by reason whereof they became beneficially entitled to it upon the death of a person dying after the commencement of the Act. If a person creates a mortgage on his estate, he has the benefit of the money, and therefore is not entitled to any reduction of succession duty in respect of that charge; but where a person takes an estate subject to a charge created by another, that is a diminution of the value of the estate, and an allowance ought to be made in respect of it. William Chambers bargained for this charge of 20,000*l.*; he had the *jus disponendi* of the money, and from him alone could any interest in it be derived. *In re Jenkinson* (24 Beav. 64) is an authority in point. There the tenant for life contracted with the tenant in tail to grant him an immediate annuity during the life of the former; and, in consideration thereof, the tenant in tail joined with the tenant for life in disentailing the property [318] and limiting it to the tenant for life, with remainder to trustees for a term of 3000 years, upon trust (amongst others) after the death of the tenant for life to raise 25,000*l.*; 20,000*l.* of which the tenant for life settled upon his daughters. It was conceded, that succession duty was payable on the 20,000*l.*, and the only question was, from whom was the succession derived? Sir J. Romilly, M. R., held that it was derived, not from the tenant in tail, but from the tenant for life.

Bovill and Welsby, for the defendants. The Crown is not entitled to any succession duty in respect of this 20,000*l.*, for it was money payable under a contract. The transaction is in effect an insurance. W. Chambers, in consideration of his assent, as protector of the settlement, to disentail the estates, and of his relinquishing the contingent annuity, assures to himself the sum of 20,000*l.*, payable on the death without issue of himself and Eliza Gulston; and which, for security, is charged on the settled estates. The person who created the charge was the tenant in tail, William F. R.

Cowell; and it took effect when he came into possession of the estates. He was the "successor," and he is liable under the 34th section, to pay duty upon the whole value of the succession without any allowance in respect of this 20,000l. The settlement by William Chambers of the 20,000l. on his adopted children was, in effect, an assignment of a policy of insurance. Now the 17th section provides, that "no policy of insurance on the life of any person shall create the relation of predecessor or successor between the insurers and the assured, or between the insurers and any assignee of the assured; and no bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth, after the death of any other person, shall create the relation of predecessor and [319] successor between the parties making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the monies payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession." This transaction being in effect an assurance and a *bonâ fide* contract for valuable consideration for payment of money after the death of another person, no duty is payable, unless the case falls within the latter part of the 17th section. That, however, means a new disposition of the money payable under the policy or contract, whereby some person becomes beneficially entitled to it on the death of another person. Here William Chambers being entitled to a reversionary payment of 20,000l., before it became part of his property assigned it to his adopted children, so that on his death no succession could be created between him and them. [Pollock, C. B. How is the transaction an insurance: whose life was insured?] William Chambers, in consideration of the surrender of a contingent annuity of 3000l., assures to himself 20,000l. payable twelve months after the failure of the limitations to himself and Eliza Gulston. [Martin B. All that is insured is the payment of the money after his and her death without issue. Channell, B. The transaction is nothing more than a contract.] The money being payable, under the contract, upon the death of a person, the relation of "successor" and "predecessor" cannot exist, unless there is such a new disposition of the property as will create a succession. *In re Jenkinson* (24 Beav. 64) is an authority in favour of the defendants. There the tenant for life and tenant in tail joined in executing a disentailing deed, and resettling the estates, when a sum of 25,000l. was charged upon their estate on the death of the tenant [320] for life. This sum was vested in trustees upon trust, as to 5000l., for such uses as the tenant for life should appoint, and as to the 20,000l. for such uses as were declared by another deed. The tenant for life died without having made any appointment of the 5000l., and Sir J. Romilly, M. R., held, that no succession duty was payable upon it. So here, if William Chambers had made no assignment of the 20,000l., his executors would not have been chargeable with succession duty. [Martin, B. In that case, it would have been nothing more than a mortgage for 20,000l.: but he settled it by the deed of the 31st December, 1850. Bramwell, B. Suppose William Chambers had granted an estate for life in this 20,000l., would the tenant for life be chargeable with succession duty?] He would not. [Pollock, C. B. Suppose the 17th section was not in the Act, would succession duty have been payable on this 20,000l.?] If William Chambers had sold the 20,000l., that would not have been a disposition within the latter part of the section, so as to render the purchaser liable to succession duty; and there is no difference in this respect between a sale and an assignment for natural love and affection. [Pollock, C. B. The 17th section, in speaking of a policy of insurance, uses the word "assignee," but in speaking of a contract that word is omitted.] This is a mere gift by William Chambers to his adopted children of a sum of money which he purchased. If, indeed, he had assigned the 20,000l. to trustees to pay to his adopted children on the death of another person, that would have been a disposition which in itself would have created a succession within the 17th section. The 14th and 15th sections, which relate to transmitted and transferred interests, support the view contended for. [Channell, B. The 17th section seems to me to introduce an exemption and a proviso. The language of the 2nd section is large enough to [321] include a class of cases which were intended to be exempt from duty. But if the exemption in the 17th section had stood alone, it might have created a difficulty, and therefore is added a proviso, that if the disposition or devolution under the exempted cases is such as would otherwise in itself create a succession, it shall be deemed to confer a succession. Martin, B. The difficulty I have is whether, unde

the 2nd section, the person upon whose death another becomes beneficially entitled to the property, must not be either the disponent himself, or some one taking an interest under the disposition, and not a mere stranger as in this case.] This was a mortgage under circumstances which, upon the execution of the deed of the 23rd December, 1850, would have created a succession but for the exemption of the 17th section. Then, inasmuch as it would be unjust that the parties, by further dealing with the property, should create fresh successions without being liable to duty, it is provided that, although the contract shall not create the relation of predecessor and successor, yet, if there is such a subsequent disposition or devolution of the money payable under it as would create a succession, that shall confer a succession. Therefore, any such disposition or devolution of this 20,000l., after it became payable under the contract, would have rendered it chargeable with succession duty. Such a construction of the 17th section gives a sensible meaning to the whole of it, and makes it consistent with the 2nd and 15th sections. [Bramwell, B. Suppose an insurance company lent 20,000l. to a person, on the terms that the money should be repaid upon the death of A.; it is clear that upon his death the insurance company would not be chargeable with succession duty. Then, suppose that before the death of A., the insurance company gave up business and assigned the 20,000l. to some other company, upon an [322] undertaking to accept their responsibility, would the latter be chargeable with duty? They clearly would not; and the present case only differs from that in this respect, that the one is a sale of the money, the other a gift of it.

The Attorney General, in reply. This sum of 20,000l., being payable on the death of two persons, would have been a "succession" within the 2nd section, although William Chambers contracted for it, if it had not been exempted from the operation of the 2nd by the 17th section. Now by the 17th section a contract for value, which would otherwise create a succession, shall not, as between the parties to it, create the relation of predecessor and successor. Therefore, if a person contracts with another to buy his estate, which is subject to a life interest, upon the termination of the life no succession is created between the vendor and vendee. Beyond that, the transaction would be within the operation of the 2nd section; so that when William Chambers divested himself of the subject-matter of the contract, the defendants, who acquired it on the death of Eliza Gulston, became chargeable with duty, as successors. The 17th section goes on to provide that, although the subject-matter of the contract shall not, as between the parties to it, create the relation of successor and predecessor, yet, if there is such a disposition or devolution, that is, change of ownership by the act of the party or the act of law, of the monies payable under the contract as would otherwise create a succession, that shall be a succession. The 15th section has no application to this case. It is confined to cases in which some duty is payable; and it provides for the event of a successor, who may be the son or nephew or other relative of the predecessor, transferring his interest in the property to a stranger in blood, who in such case is not to pay as a stranger, but is chargeable with the same duty as the successor would have [323] paid if he had retained the property. [Pollock, C. B. Suppose William Chambers had become bankrupt.] There would have been a "disposition" or "devolution" of the property, which, upon the death of Eliza Gulston, would have created a succession in the assignees.

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered.

BRAMWELL, B. I am of opinion that the defendant is entitled to our judgment. The facts are shortly these:—Chambers, the elder, for valuable consideration in money's worth, purchased of Cowell 20,000l., secured on a contingent estate in remainder of Cowell, to become an estate in possession on the death without issue of two persons, of whom Chambers was one. This 20,000l. Chambers immediately transferred to the defendants on certain trusts. The estate has become an estate in possession, the 20,000l. payable, and the question is whether any succession duty is payable. The case is just the same as though A. had purchased 20,000l. of B., secured on B.'s remainder in fee expectant on a tenancy for life, and then A. had assigned to C. Section 17 was much referred to, but it seems to me to have no direct bearing on this question. It provides that no policy of insurance shall create the relation of predecessor and successor between the insurers and any assignee of the assured; and that no contract made by any person *bonâ fide* for valuable consideration in

money or money's worth, for the payment of money after the death of any other person, shall create that relation between the parties to the contract. The assignee is not mentioned in the latter part of the clause, but that can make no difference, for it cannot be supposed that a policy of insurance [324] is on a different footing from the subjects of the second member of the sentence. Moreover, the assignment to A. by B., of a debt due from C., cannot create the relation of predecessor and successor between A. and C. as the predecessor or the settlor: sect. 2. Accordingly, it was not contended by the Attorney General that any relation of predecessor and successor was created between Cowell and the defendants, but he relied on the concluding clause of section 17, as shewing that the relation of predecessor and successor was created between Chambers and the defendants, by the assignment from him to them. But that clause is in truth an exception from or qualification of the former part of the section, which is itself an exception. It does not impose a duty on anything not otherwise liable, but is introduced, *ex majori cautela*, to prevent any suggestion that, because a policy of insurance or contract for payment of money was not a succession, so neither could be any assignment thereof; and indeed it says, any disposition of money payable under such policy or contract shall be deemed to confer a succession, "if otherwise such as in itself to create a succession within the provisions of this Act." The question therefore is, whether the assignment from Chambers to the defendants is such as "in itself" to create a succession; in other words, is the case within section 2? I think it is not. The question is, are assignments which do not create but merely transfer interests, within section 2? It cannot be said that transfers of interests create successions in those cases only where the original creation of the interest did not, because there is no such distinction between such and other cases in section 2. If the transfer of an interest previously created does not create a succession between the parties to the transfer of it, where a succession exists between the parties to its creation, neither does such transfer where no such relation was created at the time [325] of the creation of the interest transferred. The question then is, whether transfers of estates or interests previously created are within section 2. Now it is clear to my mind they are not. The words of the section are the other way. It is not a disposition of property, but a transfer of property before disposed of. But I think section 15 is decisive: it speaks of alienation and derivative titles. It supposes that the alienee, or person with the derivative title, is not liable to a succession duty, as between him and the alienor; for it makes him liable to the same duty as the alienor would have been, and in lieu of the alienor; and it supposes that the alienation may confer a new succession. Again, it seems contrary to the general tenor of the Act, that the defendants should be liable to this claim; for it is clear that Cowell must pay on the whole value of his succession without any abatement for the 20,000*l.* (section 34); and though I am far from saying that two duties cannot be so payable, yet the general intent of the Act is the other way. Besides I cannot suppose it was intended that such a condition of things should exist as would here. It is certain that such an interest as this is not subject to succession duty as long as it belonged to the original grantee. Suppose he survived the grantor, he would receive his 20,000*l.* without being liable to any succession duty. Can he not sell it without creating a succession and becoming a predecessor to his vendee? Was it meant it should be worth more to keep than to sell, or that he should be able to sell it for a larger value if he found a purchaser of kin to him. Suppose he became bankrupt. It seems to me then section 2 does not comprise this case, and that section 17 goes no farther than section 2.

MARTIN, B. The judgment which I am about to deliver is that of the Lord Chief Baron, my brother Channell and myself.

[326] This is an information by the Attorney General for succession duty. The facts are these:—Under the will of Sir John Stepney, made in 1802, Mr. William Chambers was tenant for life of certain estates in Wales, remainder to his first and other sons in tail; remainder to Miss Eliza Gulston for life; remainder to her first and other sons in tail; remainder to Mr. John Stepney Cowell for life; remainder to his son, Mr. William Frederick Ross Cowell in tail; with divers remainders over. In December, 1850, a disentailing deed was executed and the estates resettled. By another deed, dated the 23rd of the same month, Mr. William Frederick Ross Cowell, for valuable consideration, charged his estate with a sum of 20,000*l.* in favour of William Chambers, payable upon the day of the expiration of twelve calendar months to be computed from the day upon which the limitations

to Mr. William Chambers and Miss Gulston for their lives, and to their sons in tail, or the last of such limitations, should fail, with interest at 5l. per cent. from the day of the determination of the last of such limitations. Upon the 31st of the same month, Mr. William Chambers by a deed of settlement assigned the charge of 20,000l. to trustees in trust, as to 14,000l. for his adopted son, Mr. William Chambers, the younger, and as to the remaining 6000l. for his adopted daughter, Mrs. Biddulph. Mr. William Chambers, the elder, died without legitimate male issue, in February, 1855, and Miss Gulston died without issue in November, 1857. Thereupon Mr. William Chambers, the younger, and Mrs. Biddulph respectively became entitled to the sums of 14,000l. and 6000l. above mentioned. The question is whether they, or their trustees, are liable to pay succession duty. This depends upon the 2nd and 17th sections of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). By the 17th section, it is enacted that no contract by any person for valuable consideration for the payment of [327] money after the death of any other person shall create the relation of predecessor and successor between the person making such contract and the person with whom it shall be made; but any disposition of the money payable under such contract, if otherwise such as in itself to create a succession within the provisions of the Act, shall be deemed to confer a succession. The contract in the deed of the 23rd December was one for the payment of money after the deaths of Mr. William Chambers and Miss Gulston, and their male issue; and the point in controversy is therefore reduced to this, whether the disposition by the deed of the 31st December of itself created a succession within the provisions of the 2nd section, for none other seems applicable. The interest transferred by the deed of the 31st December was a sum of 20,000l., payable contingently in the event of Mr. William Frederick Ross Cowell attaining the estate tail, or, in other words, in the event of the death of all the persons entitled to the prior estates. If the word "succession" is to be understood according to its ordinary acceptation, Mr. William Chambers, the younger, and Mrs. Biddulph, upon the interest in the charge of 20,000l. becoming vested in them, would not seem to succeed any one. If a reversioner in fee expectant upon an estate per autre vie, on which no rent was reserved, assigned the reversion, it would seem the assignee is liable to succession duty upon the death of the cestui que vie: see section 20. If we were to speculate upon the intention of the legislature, we should probably think that the person dying contemplated by the Act was the disponent himself, or some person taking an interest in the property by virtue of the disposition, and not a mere stranger upon whose death the property became beneficially vested; but it seems to us impossible to get over the express words of the 2nd section. It enacts, that every disposition of property by reason whereof any person shall become bene-[328]-ficially entitled to property upon the death of any person dying after the time appointed for the commencement of the Act, either immediately or after any interval, shall be deemed to confer on the person entitled by reason of such disposition a succession. The deed of 31st December was a disposition of property. Mr. William Chambers, the younger, and Mrs. Biddulph have become beneficially entitled to the property by reason of it, and they have become so entitled upon the death of a person dying after the appointed time; if so, the words of the section expressly declare that the disposition shall confer a succession. We adhere to the rule of construction to be found in *Becke v. Smith* (2 M. & W. 195), viz., to adhere to the ordinary meaning of the words used in the statute and their grammatical construction, unless it be at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance. We cannot say that there is any intention to the contrary to be collected from the statute, or any absurdity or repugnance in the construction contended for by the late Attorney General, which is the ordinary meaning of the words used. We, therefore, are of opinion that the succession duty, as claimed, is payable. A case was referred to, *In re Jenkinson* (24 Beav. 64). The circumstances were similar to the present, and the Master of the Rolls held succession duty to be payable; and we must overrule his judgment if we decide in favour of the defendants; but we concur with his view.

It was argued that Mr. William Frederick Ross Cowell was subject to duty by virtue of the 34th section. It may possibly be that two duties are payable, but upon this point we give no opinion; we merely decide that the claim in the information is well founded in law against the present de-[329]-fendants. The 15th section has been referred to: we cannot appreciate its application. It seems to us to refer to a species

of property different from that on which the duty is claimed in the present case, that is to say, a reversionary property in respect of which the assignor would have been liable to duty, but which he has assigned. The result is, that after much consideration and some doubt, we have arrived at the conclusion that the settlement of the 31st of December, 1850, was a disposition of property within the 2nd section.

Decree accordingly.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

THE MERSEY DOCKS AND HARBOUR BOARD *v.* PENHALLOW AND OTHERS. June 18, 1861.—Trustees incorporated by statute for the purpose of constructing a dock, and who receive rates and have funds which they are bound to apply in maintaining and cleansing the dock, so that it may be in a fit state for vessels to enter, are liable for injury to a vessel caused by an accumulation of mud in the dock, of which by their servants they had the means of knowing, and were negligently ignorant.

[S. C. 9 W. R. 812: affirmed 1862, L. R. 1 H. L. 93. See *Gibbs v. Trustees of Liverpool Docks*, 1858, 3 H. & N. 164; 157 E. R. 429 (with note).]

Error on a bill of exceptions. The declaration stated that the defendants (the plaintiffs in error) are the Mersey Docks and Harbour Board mentioned in a certain act of parliament, &c. (the Mersey Dock Acts Consolidation Act, 1858, 21 & 22 Vict. c. xcii.); and the trustees of the Liverpool Docks, in the declaration afterwards mentioned, are the trustees of the Liverpool Docks mentioned in the said act of parliament; and all and singular the matters and things hereinafter alleged to have been done, and to have taken place, and to have existed, were done, and took place, [330] and existed before the passing of the said act of parliament. And the plaintiffs aver that, before and at the time of the committing of the grievances, &c., the plaintiffs were the owners of a ship, called the "Sierra Nevada," which said ship had arrived at the port of Liverpool from parts beyond the seas, and was then lawfully navigating in the said port: and the trustees of the Liverpool Docks, long before and at the same time, were the owners and proprietors of a certain dock in the said port of Liverpool, called the Wellington Half Tide Dock, made and constructed by the said trustees under and by virtue of the powers and provisions of a certain act of parliament, &c. (7 & 8 Vict. c. lxxx.), and under and by virtue of the said acts of parliament, before and at the time of the committing of the said grievances, were entitled to receive and did receive divers port dues, rates and charges from and in respect of vessels navigating the said port and otherwise; which said port duties, rates and charges the said trustees of the Liverpool Docks were, under and by virtue of the said acts of parliament, to apply and dispose of, and it was their duty under the same acts of parliament to apply and dispose of, in and about (amongst other things) the maintaining, cleansing, supporting and preserving the said dock; to wit, so as to be in a fit and proper state for vessels entering into and navigating the same: nevertheless although before and at the time of the committing of the said grievances, the sums of money and funds in the hands of the trustees of the Liverpool Docks, arising from and produced by the said duties, rates and charges, were fully sufficient and adequate for the maintaining, cleansing, supporting and preserving the said docks as aforesaid, in addition to the satisfaction and discharge of all other charges, liabilities and incumbrances in and about the same, of all which the said trustees of the Liverpool Docks, before and at the time of the committing of the said griev-[331]-ances, had notice: yet that the trustees of the Liverpool Docks neglected their duty and did not take due and reasonable or any care in or about the maintaining, cleansing, supporting or preserving the said dock as aforesaid, and so negligently conducted themselves in and about the maintaining, cleansing, supporting and preserving the said dock as aforesaid, that, by and through the carelessness, default and improper conduct of the said trustees of the Liverpool Docks, the said vessel, in duly endeavouring to enter into and navigate the said dock, struck against and became embedded in a large bank or mass of mud then being and

remaining, by and through the said negligence, and default, and improper conduct of the said trustees of the Liverpool Docks, in and about the entrance to the said dock, and in consequence thereof was greatly damaged. Second breach: And the said trustees of the Liverpool Docks also neglected their duty in this, that, well knowing that the said Wellington Half Tide Dock and the entrance thereto was, by reason of certain great accumulations of mud therein, in an unfit state to be navigated and used by vessels then used and accustomed to navigate and use the same, they did not take due and reasonable care, or any care, to put the same in a fit state for that purpose, but on the contrary thereof negligently suffered and permitted the said dock and the entrance thereto to be and continue, while the same was, as they well knew, and by their permission, navigated and used by such vessels, in an unfit state to be so navigated and used, by reason of such accumulations of mud, for want of necessary and reasonable cleansing; insomuch that the said vessel, the "Sierra Nevada," being such vessel as was used and accustomed to navigate and use the said dock, in lawfully endeavouring, by the permission of the said trustees of the Liverpool Docks, to enter into and navigate the same, struck against and became embedded in the last mentioned [332] accumulations of mud, and in consequence thereof was greatly damaged, &c. (alleging special damage). The declaration then stated, that the liability of the trustees of the Liverpool Docks to the plaintiffs, in respect of the matter aforesaid, was, at the time of the passing of the said first mentioned act of parliament, wholly unsatisfied, and was, by virtue of the said Act, transferred to the now defendants, &c.

Plea: Not guilty. Issue thereon.

The cause was tried, before Pollock, C. B., at the Middlesex Sittings after Michaelmas Term, 1859, when the plaintiff gave in evidence that the said ship belonging to the plaintiff set sail in ballast on her first voyage to the Chincha Islands in July, 1854, and there took in a cargo of guano to the amount of about 2400 tons: that the said ship then sailed thence for Liverpool, and arrived in the river Mersey on the 12th April, 1855, with the said cargo on board: that, on the 16th April, 1855, an order was given by the dock master, appointed by and one of the servants of the defendants, for the said vessel to enter the said Wellington Half Tide Dock: that the said ship was taken in tow by a steam tug about the time of high water the same night, and was towed round the pier of the west entrance and pointed into the gateway; that then the steam tug having given the ship way left her: that when the ship's bow had entered well into the dock, the bow sheered quickly to starboard, and the starboard forechannels of the ship took against the west or pier side of the entrance of the dock, and the ship then stopped and resisted all efforts afterwards to move her backwards or forwards: that as the tide fell the ship broke upon the sill, first between the main mast and the mizen mast, and afterwards forward in several places. And the plaintiffs further gave evidence of the existence of a bank of mud in the Wellington Half Tide [333] Dock at the entrance thereof, and that it was sufficient to cause and did cause the stoppage of the ship: that accumulations of mud were formed in the said Wellington Half Tide Dock from time to time; and that, in order to ascertain the state of the dock, soundings were taken by the servants of the defendants once every fortnight, in different parts of the dock, for the purpose of ascertaining what mud might be in the dock from time to time; that soundings were taken in the Wellington Half Tide Dock on and just before the 12th April, 1855, and a report of the state of the dock, as regards mud, furnished on that day by the dock master to the harbour master, who was also appointed by and a servant of the defendants.

And thereupon the defendants gave evidence that the said Wellington Half Tide Dock was a wet dock, and that any mud at the bottom thereof could not be seen, unless the said dock was run dry: that it was usually run dry once in about fourteen months, when the gates were repaired and any accumulations of mud removed: that the usual mode of cleansing the dock was by dredging with a dredging machine, and that the dock had been thoroughly cleansed by the means of the dredging machine on the 28th January, 1855; and that it was some time before that that the dock was run dry the last time; that soundings were taken every fortnight by the servants of the defendants for the purpose of ascertaining what mud might be in the dock from time to time; and that soundings were taken on or immediately before the 12th April, 1855; and they further gave evidence, by calling the persons who took such soundings and other witnesses, that there was no mud or mud bank above the level of the sill which could have stopped the ship, and they accounted for the accident by stating

that the ship had "sagged," or drew more water amidships than the marks on her bows indicated.

And thereupon the Lord Chief Baron summed up, and [334] did then and there deliver his opinion to and direct the jury, with respect to the liability of the defendants upon the issue joined between the parties aforesaid, that if in the opinion of the jury the cause of the misfortune was a bank of mud at the entrance of the said Wellington Half Tide Dock, and the defendants, by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, then in the judgment of him, the Lord Chief Baron, the defendants were liable. Whereupon the counsel for the defendants, conceiving that by law the direction aforesaid so given by the Lord Chief Baron was not correct, made their exceptions to the said opinion and direction of the Lord Chief Baron, and contended that the Lord Chief Baron ought to have directed the jury, that if, in the opinion of the jury, the cause of the misfortune was a bank of mud at the entrance of the said dock, yet that the defendants were not liable in this action unless they or their servants in that behalf knew that the said dock and entrance, or either of them, were or was, by reason of the said mud bank, or otherwise, in an unfit state to be navigated or used by ships used and accustomed to navigate or use the same, or knew that the same were or was otherwise in a dangerous condition for ships navigating the same.

The jury found that the loss was occasioned by a bank of mud in the dock; that the defendants, by their servants, had the means of knowing the state of the dock; and were negligently ignorant of it.

Sir F. Kelly (with whom was Forsyth and Quain) argued for the defendants. (a) The ruling of the Lord Chief Baron was wrong in law. He told the jury that, if the [335] defendants by their servants had the means of knowing the state of the dock, and were negligently ignorant of it, they were liable. According to the authority of *Anderson v. Fitzgerald* (4 H. L. 484) the second part of the exception ought to be rejected, for the Court cannot take into consideration what counsel said the Judge ought to have told the jury. A bill of exceptions should state what directions the Judge gave, as it is misdirection, not non-direction, which is the subject of an exception. But, assuming that the second part of the exception is admissible, it is immaterial because the question is, not whether the defendants or their servants had actual knowledge of the state of the dock, but whether the means of knowledge is equivalent to knowledge. [Crompton, J. This is not like the case of *Anderson v. Fitzgerald*. The latter part of the exception is explanatory of the ground on which the direction is complained of.] Then what is the real meaning of the direction of the Lord Chief Baron? Were the jury to understand that if the defendants had the means of knowing the state of the dock, and were negligently ignorant of it, they were liable, or if their servants had the means of knowledge and neglected to use them, the defendants were liable. The jury must have understood that the liability of the defendants depended, not on their means of knowledge, but that, acting in the management of the dock by their servants, if the servants had the means of knowing the state of the dock and failed to acquire that knowledge, the defendants were liable. But persons acting gratuitously in the execution of acts of parliament, or the performance of a public duty, are not liable for the negligence of their servants, but only for a personal breach of duty: *Holliday v. The Vestry of St. Leonard, Shoreditch* (11 C. B. N. S. 192). [Crompton, J. There seems to me a considerable difference between the case of a corporation and that of commissioners [336] sued as individuals. I do not see why the corporate funds should not be liable. Blackburn, J. It is difficult to understand how a corporation can act except by their servants; then, if they are not liable for the acts of their servants, they are not liable at all.] Trustees for public purposes, whether a corporation or not, are not responsible for the negligence of those whom they employ: *Hall v. Smith* (2 Bing. 156); *Sutton v. Clarke* (6 Taunt. 29); *Harris v. Baker* (4 M. & Sel. 27); *Duncan v. Findlater* (6 Cl. & F. 894). *Metcalf v. Hetherington* (11 Exch. 257), is an express authority that trustees of a harbour are not liable for the negligence of the harbour-master, or for injury occasioned to a vessel by an accumulation of rubbish in the harbour. [Crompton, J. I have always understood that *Gibbs v. The Trustees of the Liverpool Docks* was intended to correct *Metcalf*

(a) In Hilary Vacation (Feb. 5) and in the present Vacation (June 18). Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

v. *Hetherington*.] It was distinguished, not overruled. *Gibbs v. The Trustees of the Liverpool Docks* (3 H. & N. 164) proceeded on the ground that the defendants had actual knowledge that the dock was in a dangerous condition, and nevertheless invited vessels to enter it, so that there was personal misconduct on the part of the trustees; but to hold that the means of knowledge is equivalent to knowledge is to impose a different liability. There was no obligation on the defendants to ascertain from day to day and from hour to hour the state of the dock. It appears that soundings were taken three days before the accident, and a report made by the dock-master to the harbour-master, but he neglected to report it to the defendants. There was no absolute duty on the defendants to keep the dock in a fit state for the navigation of vessels, as alleged in the first count. [Blackburn, J. In *Parnaby v. The Lancaster Canal Company* (11 A. & E. 223) it was held that the common law imposes a duty on the proprietors of [337] a canal to take reasonable care that persons might navigate it without danger to their lives or property. If there is no distinction between a board of trustees and a trading company, that case is an authority in point.] The second breach is, that the trustees, knowing that the dock was unfit to be navigated, neglected their duty by negligently allowing it to remain in that state. They had, however, no personal knowledge of the state of the dock, but only the means of knowledge, and they are not liable for omitting to resort to it, unless some duty was imposed upon them in that respect. The distinction between knowledge and the means of knowledge is pointed out in several cases: *Taylor v. Ashton* (11 M. & W. 401); *May v. Chapman* (16 M. & W. 355); *Kelly v. Solari* (9 M. & W. 54); *Bell v. Gardiner* (4 Man. & G. 11); *Raphael v. The Bank of England* (17 C. B. 161). He also referred to the 6 Geo. 4, c. clxxxvii., s. 134.

Cleasby appeared for the plaintiff, but was not called upon to argue.

WILLIAMS, J.(f) I see no reason why the Court should decline to give to the bill of exceptions, and the history of what took place at Nisi Prius between the counsel for the defendants and the learned Judge, that meaning to which the ordinary interpretation of the language employed would inevitably lead. Now, looking at the language of this bill of exceptions it appears, that the Lord Chief Baron directed the jury, that if in their opinion "the cause of the misfortune was a bank of mud at the entrance of the Wellington Half Tide Dock, and the defendants, by their servants, had the means of knowing the state of the dock, and [338] were negligently ignorant of it, then, in the judgment of him (the Lord Chief Baron), the defendants were liable." Then comes the exception:—"Whereupon the counsel for the defendants, conceiving that by law the direction aforesaid so given was not correct, made their exception to the said opinion and direction of the Lord Chief Baron, and contended that the Lord Chief Baron ought to have directed the jury," &c.,—and we are of opinion that, according to the ordinary meaning of the words, the expression "contended that," means "on the ground that." Then the exception proceeds—"The Lord Chief Baron ought to have directed the jury, that, if in the opinion of the jury the cause of the misfortune was the bank of mud at the entrance of the said dock, yet that the defendants were not liable in this action unless they or their servants in that behalf knew that the said dock and entrance, or either of them, were or was, by reason of the said mud bank, or otherwise, in an unfit state to be navigated and used by ships." It appears to us that the bill of exceptions thus read and taken altogether discloses this, that it was assumed by the defendants' counsel that the knowledge and negligence of the defendants' servants were equivalent to the knowledge and negligence of the defendants; and that the objection to the direction was, that the Lord Chief Baron told the jury that the action could be maintained whether the defendants actually knew of the existence of the mud bank or negligently failed to avail themselves of the means of knowledge.

The question then is, whether the Lord Chief Baron was right in thus directing the jury. We are of opinion that he was; because we think that the doctrine laid down in *Gibbs v. The Trustees of the Liverpool Docks* (3 H. & N. 164), necessarily leads to the conclusion that his view of the law was correct. In the judgment in that case, the Court, after disposing of another matter, point out the ratio decidendi—"that the [339] duty in our opinion is equally cast upon those who have the receipt of the tolls and the possession and management of the dock vested in them, to refrain from

keeping it open for the public use of every one who chooses to navigate it on payment of the tolls when they know it cannot be navigated without danger, whether the tolls are received for a beneficial or for a fiduciary purpose; and for the consequence of this breach of duty we think they are responsible in an action." It appears to us that, in effect, the decision in the case of *Gibbs v. The Trustees of the Liverpool Docks* is grounded on a disregard of any distinction between the cases where tolls are received, by those who have the receipt of them and the possession and management of the subject-matter which produces them, for a beneficial or a fiduciary purpose. The not shutting up the dock when the trustees knew of its dangerous condition is there put as an example of neglect of duty, and as an illustration of the general principle that for any neglect of that kind trustees will be liable. The doctrine there laid down is the same in principle as that enunciated in the case of *Parnaby v. The Lancaster Canal Company* (11 A. & E. 223). In the judgment of the Court of Exchequer Chamber we find it thus laid down, that "the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal or absolutely to free it from obstruction, but to take reasonable care, so long as they kept it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property." Now, applying that doctrine to the direction of the Lord Chief Baron, it amounts to this: that, he told the jury that, if they were satisfied that the defendants had failed to take reasonable care so long as they kept the dock open for the public use, that the public might navigate it without danger to their [340] lives and property, he considered that the same as if they had neglected their duty when they knew of the existence of the mud bank. It was equally a neglect of duty if they were negligently ignorant when they had the means of knowledge as it was if they had actual knowledge.

Then it was said that, looking to the form of the pleadings, it is impossible to avoid coming to the conclusion that the Lord Chief Baron was wrong in saying that the averment of actual knowledge could be supported by proof of the means of knowledge. But when the pleadings are closely looked at, even that technical view fails, because in the first count there is a distinct averment that by and through the carelessness, default and improper conduct of the said trustees of the Liverpool Docks, the said vessel in duly endeavouring to enter into and navigate the said dock, struck against and became embedded in a large bank or mass of mud, there being and remaining, by and through the said negligence and default, and improper conduct of the said trustees. Now if the law is, that negligence and default are constituted equally by a wrongful neglect to avail themselves of the means of knowledge, as by having actual knowledge and not acting upon it, then it is obvious that this averment would be proved, as well by the one state of facts as the other.

With respect to the second breach, it is true that knowledge is there distinctly averred; but, if that averment be struck out, it leaves as a breach that the trustees neglected their duty in this, that they "negligently suffered and permitted the said dock and the entrance thereto to be and continue, while the same was as they well knew and by their permission navigated and used by such vessels, in an unfit state to be so navigated and used by reason of such accumulations of mud, for want of necessary and reasonable cleansing, inasmuch that the said vessel, &c., struck [341] and was injured." Therefore, with respect to this count also, it appears to us that, upon the authority of *Gibbs v. The Trustees of the Liverpool Dock* the averment of negligence is equally established by proof of neglect of duty by the defendants in not availing themselves of the means of knowledge in their power, as by proof of actual knowledge.

For these reasons we think that the direction of the Lord Chief Baron was right, and the judgment must be affirmed.

Judgment affirmed.(a)

(a) The Court in *Banc* has no jurisdiction to inquire into the propriety of an amendment made by the Judge at *Nisi Prius* in a bill of exceptions after he has sealed it.

The bill of exceptions, at the time it was sealed by Pollock, C. B., was as above stated, p. 334. After the record had been carried to the Court of Exchequer Chamber, Pollock, C. B., upon summons at Chambers and on hearing counsel, ordered that the bill of exceptions be amended as follows:—"And the defendants had by

themselves or their servants the means of knowing the state of the dock, and were negligently ignorant of it."

Sir F. Kelly moved (May 2) the Court of Exchequer for a rule calling on the plaintiffs to shew cause why the order of Pollock, C. B., should not be rescinded. He submitted that the learned Judge had no power to alter the bill of exceptions after it was sealed and the record removed to the Court of Exchequer Chamber.

Per Curiam.(a) This Court has no power whatever to interfere. There is no appeal to this Court against the order of the Judge who tried the cause and sealed the bill of exceptions. The proper course is to take out a summons at Chambers to rescind the order, returnable before the Judge who made it.

Quære, whether the Judge at Nisi Prius has any power, except by consent, to amend a bill of exceptions after he has sealed it.

Sir F. Kelly moved (May 14) the Court of Exchequer Chamber to expunge the amendment made by Pollock, C. B., in the bill of exceptions. The learned Judge had no power to make the amendment. At the trial, the bill of exceptions was reduced to writing and the draft signed by counsel and the Judge. It was afterwards formally drawn up and sealed, and when that was done the Judge was functus officio. [342] [Cockburn, C. J. If a Judge is at liberty to amend a bill of exceptions after he has sealed it, it might happen that the bill of exceptions when sealed contained the real direction given to the jury, and any misdirection might be avoided by altering the bill of exceptions and inserting the direction which ought to have been given.] In *Culley v. Doe d. Taylerson* (11 A. & E. 1008), the record stated the exceptions to have been made after the verdict was found, and the Court of error amended the record in that respect, upon the statement of the Judge who tried the cause and the admission of counsel. Here the amendment was made against the will of the defendants. In *The Earl of Glasgow v. The Hurler and Campsie Alum Company* (3 H. L. Cas. 25), the bill of exceptions was signed by the Judge at the time of the trial. The draft thus prepared was some months afterwards more formally drawn up and tendered to him for signature. He refused to sign it, unless a sentence explaining his direction was introduced into the bill, and the party excepting finally consented to its introduction; it was held that the introduction of this explanation was highly irregular. [Crompton, J. If no amendment of a bill of exceptions is allowed, recourse must be had to the old practice of tendering the bill exact in form, but it is usual and more convenient for counsel to tender a draft, which is afterwards settled by the Judge.] In *Bridgman v. Holt* (Show. Par. Ca. 120) it was laid down that, after the bill is sealed, the adverse party is concluded from averring the contrary, or supplying an omission to it. In *Wright v. Sharp* (1 Salk. 288), Holt, C. J., said that the substance of a bill of exceptions "must be reduced to writing" while the thing is transacting, because it is to become a record. This amendment, having been made without any authority, is no more than an alteration made by a clerk.

Cleasby, contra. The course of modern legislation has been to allow amendments to be made in furtherance of justice. [Cockburn, C. J. This is not the correction of a mistake. The Lord Chief Baron sealed the bill of exceptions in accordance with the paper drawn up at the trial, and that has been altered.] Suppose a passage in a bill of exceptions is so ambiguous, that counsel on one side read certain words as governing the sentence, and counsel on the other side read the same words as governing what follows, could not the Judge put it in the form in which it ought to be read? The 222nd section of the Common Law Procedure Act, 1852, not only empowers the Judges of the superior Courts, at all times to amend all defects and errors in any proceeding in civil causes, but requires all such amendments to be [343] made as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties. [Cockburn, C. J. Suppose, for the purpose of avoiding an arrest of the judgment, a Judge at Nisi Prius made, after the trial, an amendment which he might have made at the trial, would he not be functus officio? Or suppose a bill of exceptions drawn up on the trial of a cause at an assize, could the Judge amend the bill after the commission was at an end. The object of the Statute of Westminster, 13 Edw. 1, c. 31, was to protect the public against judicial misconduct; and the difficulty is this, that if a party tenders exceptions according to

(a) Pollock, C. B., Martin, B., Bramwell, B., and Wilde, B.

what he believes to be the truth of the matter, and the Judge refuses to seal it unless some alteration is made, the alternative course is either to submit to the alteration or bring an action against the Judge. Willes, J. When at the bar, I was instructed to draw a declaration against a Judge for refusing to seal a bill of exceptions, and I advised that the action would not lie unless the bill was tendered in form at the trial. Crompton, J. My difficulty is to see how, after the case of *Mellish v. Richardson* (1 Cl. & F. 224, 235), we can inquire into the propriety of the amendment.] Suppose the word "not" had either been omitted or improperly inserted in the bill of exceptions, could not the Judge correct the mistake?

Sir F. Kelly, in reply, referred to *Gardener v. Baillie* (1 Bos. & P. 32).

COCKBURN, C. J. Since the members of the Court are not unanimous in the view which they take of this matter, which involves considerations of great importance, the case must stand over for the present. At the same time I feel assured that if the Lord Chief Baron could have foreseen the difficulty in which the Court is placed by the question now raised, the alteration being of so trifling a nature, in all probability he would not have made it. If, upon application to the Lord Chief Baron, he should restore the record, there will be an end of the objection; if he should not, we will on a future occasion pronounce judgment as to the law.

Cur. adv. vult.

Subsequently the Lord Chief Baron made an order by consent whereby the bill of exceptions was restored to its original state; consequently no judgment was pronounced.

[344] IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

THOMAS JOHNSON v. SIMCOCK AND JACKSON. July 8, 1861.—A testator devised as follows:—"As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real property to my brother J. and D. H., equal between them. But in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs, assigns and executors for ever." The daughter attained the age of twenty-one and died without issue. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the testator's daughter on attaining the age of twenty-one took an estate in fee: Per Williams, J., Crompton, J., Willes, J., and Blackburn, J. Dissidentibus Wightman, J., and Byles, J.

[S. C. 31 L. J. Ex. 38; 8 Jur. (N. S.) 284; 9 W. R. 895; 4 L. T. 836.]

This was an appeal from the judgment of the Court of Exchequer in making absolute a rule to enter a nonsuit. The facts sufficiently appear in the report of the case in the Court below. (6 H. & N. 6.)

McMahon (with whom was Godson) argued for the plaintiff.^(a) The intention of the testator was, that the bulk of his property, both real and personal, should go to his brother, John Johnson, and Dorothy Harris, in the event of his daughter dying without lawful issue. The majority of the Court of Exchequer considered that the testator meant his daughter to have the real estate in fee if she attained the age of twenty-one, though she died without issue; as "it would be a greater benefit to her and enable her to place herself better in life." But, construing the language of the will according to its ordinary meaning, the manifest intention of the testator was, that if his daughter did not attain the age of twenty-one, or, having attained that age, died without issue, his property, both real and personal, should [345] return to his relations. The rule, as stated by Lord St. Leonards, in *Eden v. Wilson* (4 H. L. Cas. 284) and *Abbott v. Middleton* (7 H. L. Cas. 68), is, that "you are not at liberty to transpose, to add, to subtract, to substitute one word for another, or to take a confined expression and enlarge it without necessity. You must find an intention upon the face of the will to authorize you to do so." The ground for changing "or" into

(a) June 19. Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

"and" is, that the testator, by making the event of the devisee leaving issue a condition of his retaining the estate, evidently intends that a benefit shall accrue to such issue: per Parke, B., in *Morrall v. Sutton* (1 Phil. 533, 543); Jarman on Wills, vol. 1, p. 472, 3rd ed. Another rule is that, where there is a clear gift in a will, it cannot be cut down except by something which plainly indicates the intention of the testator to that effect: *Randfield v. Randfield* (2 De G. & J. 57). In all the cases where "or" has been construed "and," the object has been to effectuate the intention of the testator: *Soule v. Gerrard* (Cro. Eliz. 525; Moor. 422, pl. 590); *Price v. Hunt* (Pollex. 645); *Barker v. Suretees* (2 Str. 1175); *Walsh v. Peterton* (3 Atk. 193); *Doe v. Bornsall* (6 T. R. 30); *Fairfield v. Morgan* (2 N. R. 38); *Eastman v. Baker* (1 Taunt. 174); *Right v. Day* (16 East, 67); *Doe v. Selby* (2 B. & C. 926); *Grey v. Pearson* (6 H. L. Cas. 61, 80). *Gardiner v. Shelden* (Freeman, 11) is no authority on this point. The word "and" is construed "or" where one member of the compound sentence is included in the other, and would be superfluous unless disjoined, and that construction has been adopted in order to favour the vesting of a previous gift, not to defeat it: *Day v. Day* (Kay, 703). Where a testator devised a house to his sons, James and Thomas, [346] and the heirs of their bodies, in equal moieties, and devised other houses to his other children in like manner; and provided that if any of his said children should die under twenty-one or unmarried, the part or share of him or her so dying should go to the survivors, Holt, C. J., held that the shares of two of the children dying unmarried, though they attained twenty-one, went over to the survivors: *Woodward v. Glasbrook* (2 Vern. 388). Again, in *Hilliard v. Gennings* (12 Mod. 276), Holt, C. J., refused to construe "or" as "and," the intention of the testator not requiring it. In *Brownsword v. Edwards* (2 Ves. sen. 243, 247), Lord Hardwicke changed "and" into "or," in order to give effect to the devise over in the alternative of the devisee dying either under twenty-one or without issue. In *Mortimer v. Hartley* (6 Exch. 47; 3 De Gex & S. 316), the Court of Exchequer refused to read "or" as "and," because such a construction would defeat the intention of the testator to give a remainder over on failure of issue.

Phipson (Wheateley with him), for the defendants. The principles are conceded, that a will must be construed according to the whole context, and that its words ought not be changed unless to effectuate the intention of the testator. Here manifest intention of the testator requires that the word "or" should be read "and." He meant that, if his daughter died under age without issue, his real property should go over to his brother and Dorothy Harris; but if his daughter arrived at full age she should take an estate in fee, whether she had issue or not. Upon the death of the testator his daughter would take an estate in fee by descent, but that would be transferred to the devisees in the event of her dying under age without issue. The testator makes several conditional gifts of his personalty; [347] but, in the event of his daughter having issue, he leaves her the whole of his property, both real and personal. Unless the word "or" be read "and," the testator's daughter would not have taken the property if she died under age although she had issue, which is contradictory to the latter clause of the will. According to the plaintiff's construction, the words "dies before she arrives at lawful age, or," must be struck out, and the will must be read, "if my daughter have no lawful issue." The testator evidently intended that a benefit should accrue to the issue of his daughter through their parent, and therefore there is ground for changing the testator's expression according to the principle of the rule laid down in Jarman on Wills, vol. 1, p. 472, 3rd ed. In *Grey v. Pearson* (6 H. L. Cas. 61, 80), Lord Cranworth, C., treats it as settled doctrine "that where a testator devises an estate so as to give the control of the fee simple to his son, or to any other person, but if he dies under the age of twenty-one years, or without issue, then over, in that case the word 'or' must have meant 'and'; and though it is improperly used, must be taken to have been used conjunctively and not disjunctively, because it never could have been the testator's intention, in giving an estate to a person and his heirs, to give it away from that person's issue if he should happen to die under twenty-one leaving issue." Here, unless the words be read in the conjunctive, the issue would not have taken if the mother had died under twenty-one. The decision of Lord Hardwicke in *Brownsword v. Edwards* (2 Ves. sen. 243) is commented on in Jarman on Wills, vol. 1, p. 477, 3rd ed., where it is said that "it is evident that Lord Hardwicke would not have listened for a moment to the suggestion of changing the testator's language, when it would have been attended with the consequence of excluding the issue; and

yet, in allowing any weight to the accidental state of cir-[348]-cumstances, his lordship lost sight of the rule which teaches that, in construing wills, possible as well as actual events are to be regarded.

McMahon replied.

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered :—

BYLES, J. The question arises on the construction of these words in a devise of real estate; the testator's heir at law being his only child, the daughter mentioned in the will. "As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to my brother John Johnson and Dorothy Harris. But in case my daughter shall have lawful issue, I leave the whole of my property real and personal to her and her heirs."

The daughter lived to full age, married, executed a disentailing deed and then died without issue. The plaintiff claims under the devisees, Johnson and Harris. The defendant claims under the daughter.

The daughter died without lawful issue; therefore, according to the literal construction of the will, the devisees, Johnson and Harris, take.

But it is said that the disjunctive participle "or" must be read "and," because otherwise had the daughter died under age leaving issue, that issue would have been disinherited. And it must be conceded that the cases shew that violence will be done to the language and that *or* will be read *and*, sooner than admit such a construction where its necessary effect would have been to disinherit the issue of the devisee dying under twenty-one, had that event hap-[349]-pened: *Fairfield v. Morgan* (2 New Rep. 83); *Eastman v. Baker* (1 Taunt. 174); *Right v. Day* (16 East, 67).

But here, it seems to me that the necessity could not arise, and therefore that those authorities do not govern this case, for the subsequent clause, "in case my daughter shall have lawful issue I leave my property to her and her heirs," applies according to the literal import of the words whether the daughter, having had issue, dies before or after attaining her full age. It is not on every hypothesis inconsistent with the first condition "if my daughter dies without arriving at lawful age," but only on the hypothesis that she dies under age leaving issue. It is in effect but an inartificial and clumsy way of splitting the first condition of dying under age into two parts; that is to say, first, a dying under age without issue; and, secondly, a dying under age with issue, leaving the first alternative to be disposed of by the condition precedent creating the estate of Johnson and Harris; and the second alternative by the after mentioned condition preventing that estate in the event of the daughter ever having had issue.

This construction, indicating a preference by the testator of his own relations over the alienees, devisees, or husband of his daughter, if she have no children, is confirmed by the circumstance that, in other passages of the will, the testator manifests an intention that, in the event of his daughter having no issue, the testator's personal property is to go neither to the husband nor to the husband's relations, but is to return to the testator's relations.

And the particular frame of the first condition is perhaps to be accounted for by the testator's deeming it improbable that his daughter would marry and have children during her minority.

[350] At all events, this construction in favour of the plaintiff carries out what the other construction assumes to be the intention of the testator in the event of his daughter having had lawful issue and dying during her minority; yet in so doing it violates no single word in the will.

It is objected that the plaintiff's construction makes the first clause in this part of the will inoperative and useless. But the first answer is (as has been already observed), that its effect is to divide that clause into two parts, leaving one of them to operate in one way and making the other operate in a different way. And, secondly, even if this objection were well founded, a similar objection applies to the defendant's construction. For, according to the defendant's construction, the last words of the will, "in case my daughter has lawful issue to her and her heirs," are almost as useless. For the daughter had, in that event, a fee simple already by the provisions of the will coupled with her position as heir at law. Thirdly, even assuming that, on both the plaintiff's and defendants' construction, it had been necessary to treat some

portion of the devise as unnecessary, yet the defendants' construction requires a further violence to be done to the language by reading *or* as *and*, which violence is not necessary according to the plaintiff's construction.

Lastly, I agree with the learned Baron, who formed the minority in the Court below, that, as a general principle, technical rules of construction violating the ordinary meaning of words are subordinate to the great canon of interpretation of all written instruments, which is to read the whole document and to construe the words, if possible, in their ordinary sense, yet so as to give effect to the writer's intention as collected from the whole instrument. Applying this rule, I think the plaintiff's construction is correct; and that it is moreover, for the reasons above assigned, consistent with the authorities.

[351] I have my brother Wightman's authority for saying, that he agrees with me in this judgment.

WILLES, J. I am of opinion that the judgment ought to be affirmed.

Nothing can be clearer, in point of construction, than that the limitation over to the testator's brother and Dorothy Harris, if the will had stopped at that limitation, could only have taken effect in the event of the testator's daughter dying under age without issue. The authorities are collected in the 3rd edition of Jarman on Wills, by Wolstenholme and S. Vincent, vol. 1, pp. 471, 472. The nearest to the present case is *Doe v. Day* (16 East, 67).

The question is, whether the subsequent expressions in the will are so strong as to establish the opposite intention, viz., that the limitation over is to take effect in the event of the daughter dying at any age without issue, no regard being had to the words, "if my daughter dies before she arrives at lawful age;" or rather, those words being rejected as idle and inoperative.

The expression which raises this question, viz., "but in case my daughter shall have lawful issue," to her in fee, seems to me to have no such effect. It expresses affirmatively that if the daughter has issue she is to take. It does not necessarily negative that she is to take if she lives to be of full age. The choice is presented to us, of reading those words as limiting the event upon which the brother and Dorothy are to take on death without issue, whether before or after twenty-one, which, as already observed, would make the words "if my daughter dies before she arrives at lawful age" meaningless; or of reading them as expressive of that intention which, when only presumed, led (in the numerous [352] cases referred to) to the construction of the word "or," in this sort of context, as conjunctive. I prefer the latter as giving meaning to the whole will; and I read the will as expressing this, thus: "if my daughter dies under age, and has no issue, my brother and Dorothy shall take; but in order that there may be no mistake as to my intention I declare that to be, that at all events my daughter is to have the property if she has issue, whether she lives to be of age or not." This gives a consistent effect to all the words of the testator.

The opposite construction does not, as supposed, give to the word "or" an alternative or any meaning. It is not a question between reading "or" as conjunctive or as disjunctive. It is a question whether that word is to have any meaning. To test this, let "or" be read as disjunctive. Now, if the daughter died either under age, whether she had issue or not, or (disjunctively) over age without issue, the limitation over would take effect. But this is plainly inconsistent with the expression "but in case my daughter shall have lawful issue," &c. I repeat, therefore, that this is not a question whether "or" is to be read as conjunctive or as disjunctive, and all that was said in argument about giving the "natural meaning" to the word "or" is thus proved to be irrelevant.

I think that the reading "or" as conjunctive in such limitations as the present is so firmly established, if not so founded in good sense, that the construction which I adopt could not be more imperative upon us if, in the will under consideration, the word "and" had stood intentionally in the place of "or."

The respect which I entertain for the opinion of my dissentient brothers, here and in the Exchequer, has induced me to give the case my most anxious consideration, and the [353] result of that consideration is, that in my opinion the judgment ought to be affirmed.

WILLIAMS, J., CROMPTON, J., and BLACKBURN, J., concurred with the above judgment.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

WATTS v. SHUTTLEWORTH. July 8, 1861.—By articles of agreement H. agreed with W. (the plaintiff) to complete certain fittings for a warehouse for 3450l., to be paid by instalments during the progress of the work. The contract contained a stipulation, "That W. (the plaintiff) shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract." By agreement, reciting in part the contract, the defendant agreed with the plaintiff to guarantee the due performance of the works by H. The plaintiff advanced 1800l. to H. during the progress of the works; after which the fittings to the value of 2300l., while still unfinished, were destroyed by accidental fire in the workshop of H. The plaintiff had not insured the fittings. H. became insolvent and never repaid the 1800l. or any part of it. The plaintiff was compelled to pay a sum greater by 340l. than the original contract price to complete the work contracted for. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plaintiff was bound to insure the fittings, and that his omission to do so, in equity, discharged the defendant's liability, not merely to the extent of the benefit he would have derived from the insurance if effected, but in toto.

[S. C. 29 L. J. Ex. 229; 7 Jur. (N. S.) 945; 10 W. R. 132; 5 L. T. 58. Adopted, *Lawrence v. Walmsley*, 1862, 31 L. J. C. P. 143; 5 L. T. 798. Distinguished, *In re Barber*; *Ex parte Agra Bank*, 1870, L. R. 9 Eq. 732; *Grant v. Budd*, 1874, 30 L. T. 319. Referred to, *Mansfield Union v. Wright*, 1882, 9 Q. B. D. 688; *Alliance Gas Consumers' Company v. Blott*, 1886, 3 T. L. R. 111.]

This was an appeal from the decision of the Court of Exchequer in making absolute a rule to enter the verdict for the defendant on an equitable plea. The pleadings (a)¹ and facts sufficiently appear in the report of the case in the Court below. (5 H. & N. 235.)

[354] Manisty (with whom was Aspland) argued (a)² for the plaintiff, in substance the same as in the Court below, and also contended that, even if the omission of the plaintiff to insure discharged the defendant, it did not discharge him in toto, but only to the extent of the benefit which he would have derived from the insurance if it had been effected; that the defendant was only in the position of a surety whom a creditor had deprived of the benefit of a security which he held. On this point he cited *Tudor's Lead. Cas. in Equity*, p. 832.

J. J. H. Humphreys (with whom was Milward) appeared for the defendant, and argued that the defendant was altogether discharged. He referred to the authorities cited in the Court below.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILLIAMS, J. In this case the Court, at the close of the argument, was unanimous in thinking that the defendant, as surety, was discharged by the plaintiff's omission to insure. But some doubts were felt whether the discharge ought to be regarded as total, or only to the extent of the damage which could be shewn to have been sustained by the surety in respect of that omission. In support of the latter view, it was contended, on behalf of the plaintiff, that the present case is analogous to that

(a)¹ The amendment in the plea mentioned by the Court at the conclusion of their judgment (5 H. & N. 249) was made by inserting in the following passages the words within brackets:—"Through and by reason of the plaintiff agreeing with [the said G. Harrop and representing to the defendant that he had so agreed, and also agreeing with] the defendant;"—"and that but for the plaintiff so agreeing [and representing] and the full confidence that the same would be carried out and performed by the plaintiff."

(a)² In last Hilary Vacation (Feb. 4). Before Cockburn, C. J., Wightman, J., Williams, J., Willes, J., Byles, J., and Hill, J.

of a creditor who has lost or given up to his debtor a security which he has in his hands, where the surety is held to be thereby discharged, because of the rule that a surety is entitled to the benefit of all the securities which the creditor has against the principal; not however in toto, but only to the extent of the security so lost or given up.

[355] But on consideration we are all of opinion that, in the present instance, the discharge of the surety, being effected by reason of his position having been deteriorated in respect of having been made responsible for an uninsured principal, in lieu of an insured one, the case is analogous to those where a surety has been held discharged by time having been given to the debtor, as in *Samuel v. Howorth* (3 Meriv. 272, 278) and other cases, such as *Eyre v. Bartrop* (3 Madd. 221), *Calvert v. The London Dock Company* (2 Keen, 638), and *The General Steam Navigation Company v. Rolt* (6 C. B. N. S. 550), where the creditor had so conducted himself as to alter the situation of surety, and the surety was held to be thereby totally discharged. We are therefore of opinion that the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

SEYMOUR v. GREENWOOD. June 19, 1861.—A master is liable for injury caused by the wanton and violent conduct of his servant in the performance of an act within the course of his employment. Therefore where the guard of the defendant's omnibus, in removing therefrom a passenger whom he deemed to be drunk, forcibly dragged him out and threw him upon the ground whereby he was seriously injured: Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the defendant was liable.

[S. C. 30 L. J. Ex. 327; 9 W. R. 785; 4 L. T. 833. Distinguished, *Poulton v. London and South Western Railway*, 1867, L. R. 2 Q. B. 534; 8 B. & S. 616; *Lucas v. Mason*, 1875, L. R. 10 Ex. 253. Adopted, *Walker v. South Eastern Railway*, 1870, L. R. 5 C. P. 643; *Bayley v. Manchester, Sheffield, and Lincolnshire Railway*, 1873, L. R. 8 C. P. 154. Applied, *Dyer v. Munday*, [1895] 1 Q. B. 742.]

This was an appeal from the decision of the Court of Exchequer in discharging a rule obtained by the defendant to enter a nonsuit. The pleadings and facts sufficiently [356] appeared in the report of the case in the Court below. (6 H. & N. 359.)

T. Jones argued for the defendant. (a) The question resolves itself into this, whether a master is liable for an assault committed by his servant. There is nothing in the relation of master and servant, nor was there any direction given by the defendant which renders him responsible. The Court below considered that, inasmuch as the act of the servant was within the scope of his employment, and was done in his master's service, the master was liable, even though he did not direct the servant to commit the wrong. But it is submitted that, in order to render a master liable for the act of his servant, the authority to do the act must either be necessarily implied from the relation of master and servant, or the act must have been done by command of the master. In *Sharrod v. The London and North Western Railway Company* (4 Exch. 580, 586), Parke, B., in delivering the judgment of the Court, said:—"Our opinion is, that in all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible, in an action on the case, for want of skill or care of the agent—no more. In *Roe v. The Birkenhead, Lancashire and Cheshire Junction Railway Company* (7 Exch. 36, 40), Pollock, C. B., said that "the general rule is, that a master is not liable for the tortious act of his servant unless that act be done either by an authority, express or implied, given him for that purpose by the master." The law is thus laid down in Hilliard on Torts, vol. 2, p. 524: "In general a master is liable for the fault or negligence of his servant; but not for his wilful wrong or trespass. The injury must [357] arise in the course of his execution of some service lawful in itself, but negli-

(a) Before Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

gently and unskilfully performed; and not be a wanton violation of law by the servant, although occupied about the business of his employer." [Williams, J. Here the guard had authority from the defendant to remove offensive passengers from the omnibus, and in the exercise of that authority he committed an excess.] According to the plaintiff's case, he had not misconducted himself; and therefore the guard had no authority to remove him. [Blackburn, J. If a guard has authority to remove offensive passengers from an omnibus, and he turns out one whom he supposes to be offensive, but who in fact is not, the master would be liable.] If the injury to the plaintiff had been caused by the negligence of the guard in removing him from the omnibus the defendant might be liable; but it was the result of a deliberate and wanton outrage, and therefore the defendant is not responsible unless he sanctioned it: *McManus v. Cricket* (1 East, 106). [Willes, J., referred to *Goff v. The Great Northern Railway Company* (3 El. & El. 672).] That was not the case of a wanton assault; and the only question was, whether the defendant had authorized the trespass.

Wheeler, Serjt., appeared for the plaintiff, but was not called upon to argue.

WILLIAMS, J. We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. We think there was evidence for the jury, that the guard, acting in the course of his service as guard of the defendant's omnibus, and in pursuance of that employment, was guilty of excess and violence not justified by the occasion; or, in [358] other words, misconducted himself in the course of his master's employment, and therefore the master is responsible. In *Croft v. Alison* (4 B. & Ald. 590) it was laid down that "the distinction is this; if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment." It is said that, although it cannot be denied that the defendant authorized the guard to superintend the conduct of the omnibus generally, and that such authority must be taken to include an authority to remove any passenger who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibus, and he puts the guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible.

Judgment affirmed.

[359] MEMORANDA.

In this vacation, John Baron Campbell, Lord High Chancellor, died suddenly on the morning of Sunday, the 23rd June, at his residence Stratheden House, Knightsbridge.

Thereupon the Great Seal was delivered to Sir Richard Bethell, Knt., her Majesty's Attorney General, who was raised to the peerage by the title of Baron Westbury, of Westbury, in the county of Wilts.

Sir William Atherton, Knt., her Majesty's Solicitor General, succeeded to the office of Attorney General; and Roundell Palmer, Esq., Q. C., was appointed her Majesty's Solicitor General, and afterwards received the honour of knighthood.

[360] EXCHEQUER REPORTS. MICHAELMAS TERM, 25 VICT.

SAMUEL MADEN AND SARAH his Wife v. ALEXANDER CATANACH. Nov. 11, 1861.—

A plaintiff in a cause was about to be sworn as a witness, when she was objected to as incompetent, on the ground of want of religious belief. The judge then swore her on the voir dire, and, in answer to questions by defendant's counsel, she said that she did not believe in a God, and that she did not believe in the obligation of an oath any more than in that of her word; nor did she believe in a future state of rewards and punishments, but that she was morally bound, by

the solemn declaration she had taken, to speak the truth. Held, that the witness was properly examined on the voir dire, and rejected as incompetent.

[S. C. 31 L. J. Ex. 118; 7 Jur. (N. S.) 1107; 10 W. R. 112; 5 L. T. 288.]

The following case was stated on appeal from the County Court of Lancashire, holden at Rochdale.

This is a plaint tried before the judge on the 24th day of April, 1861, in which the plaintiffs claimed 25l., being the value of a pianoforte of the plaintiffs which the defendant wrongfully detained.

At the trial Sarah Maden, one of the plaintiffs, was called as the first witness, her evidence in the opinion of the plaintiffs' counsel being essential to the establishment of the plaintiffs' claim. As she was about to be sworn, and before being sworn, the defendant's advocate proposed to interrogate the witness as to her religious belief before she was sworn. The plaintiffs' counsel objected, and contended: first, that defective religious belief ought not to be treated as a ground of incompetency, so as to deprive the plaintiffs of their just civil rights, although it might be very properly urged as a matter of observation affecting the credibility of [361] the witness. Secondly, that, if such defect should be held to render the witness incompetent, it ought to be proved like any other fact by independent evidence, and not by interrogating the witness; and thirdly, that in any case, as the witness did not object to take the oath, she was not compellable to answer any questions until she had been sworn.

The judge overruled the first two objections; he refused, however, to swear the witness in the cause, but swore her on the voir dire and himself administered the oath. The defendant's advocate then asked the witness the following question:—"Do you believe in a God?" It was objected on the part of the plaintiffs, that now the witness had been sworn the question could not be put, and that she could only be asked whether the oath she had taken was binding on her conscience. The objection was overruled by the judge, and the following questions and answers were severally put and given.

The defendant's advocate. Do you believe in a God?

I do not.

Do you believe in the obligation of an oath?

I believe my word is my bond.

Do you believe in the obligation of an oath?

I do not understand you.

Do you believe that the oath you have taken is binding on your conscience?

Do you mean because I have kissed this book? I do not understand you.

Do you believe that there is an obligation attached to the oath?

I do not believe in an obligation of an oath any more than on that of my word.

Do you believe in the future state of rewards and punishments?

I do not.

[362] Do you believe you are bound to speak the truth?

I do.

Do you believe you are responsible if you tell a falsehood?

I do, to my fellow men and to my own conscience.

Do you believe in a moral obligation to speak the truth?

I do.

Do you believe that you are morally bound to speak the truth by the solemn declaration you have taken?

I do.

The plaintiffs' counsel then submitted that the witness was admissible to give evidence for the plaintiffs, and that at any rate, the Court having accepted her testimony on oath on the voir dire, could not decline to swear her in the cause. The judge, however, refused to admit her to be examined in the cause for the plaintiffs, and, her evidence being material to the issue, they were thereupon compelled to submit to a nonsuit.

The questions for the opinion of the Court of Exchequer are:—First: whether defect of religious faith be an absolute bar to the competency, on a matter merely affecting the credibility of a witness.

Second: whether, if defect of religious faith be held to render a witness incom-

petent, such defect is to be ascertained, and to what extent, by independent evidence, or by interrogating the witness himself as to his religious belief.

Third : whether, in the latter case, a witness who does not object to take the oath can be compelled to answer any, and if any, what questions before being sworn.

Fourth : whether, after being sworn on the *voir dire*, a witness can be interrogated as to his religious belief for the purpose of excluding his testimony, and, if so, what are the questions that can be asked.

Fifth : whether, after a witness has been required or permitted to give evidence on oath as to the state of his reli-^[363]-gious belief, it be competent to the Court to refuse to swear him in the cause.

Sixth : whether, under the circumstances set forth in the above case, the judge was entitled to refuse to admit Sarah Maden to give evidence for the plaintiffs.

Craufurd, for the appellant. The first question is whether, the witness not having herself objected to take an oath, her testimony is to be excluded by an objection raised by the defendant's counsel to her religious belief. There are a number of dicta in the text books that, if a person does not believe in a God and in rewards and punishments, he is incompetent as a witness. All the cases on this subject are founded on *Omichund v. Barker*,^(a) which was decided in the year 1774. According to the report of that case, in 1 Atk. 21, Willes, C. J., held that a witness must believe "in God and future rewards and punishments." But the judgment of Willes, C. J., is more fully reported from his manuscript in Willes, p. 538; and there it appears that the Chief Justice considered it sufficient if a witness believe in God and in rewards and punishments in this world. There, however, it was not necessary to determine the point, for the question was as to the form of the oath. There being no express decision on the subject it is competent for the Court to declare the law, and hold that defective religious belief is not a ground of incompetency, but only matter affecting the credibility of the witness. [Pollock, C. B. The law requires a certain form of oath which imports a belief in the existence of a God; and if a person has no such belief, how can an oath be administered to him?] Statutes^(b) have been passed to relieve Quakers and ^[364] Moravians: and by the Common Law Procedure Amendment Act, 1854, sect. 20, any person who may, from conscientious motives, be unwilling to be sworn, may make a solemn affirmation or declaration, which has the same force and effect as if he had taken an oath in the usual form. But this witness is not within those provisions, and if she cannot be sworn she cannot give evidence. Wilde, B. The question is, whether a person who states that she does not believe in a God, is to be allowed to take an oath which involves the belief in a God. How can the Court, which has no power to administer the oath in any other form, call upon such a party to say, "I will speak the truth, so help me God"? Here the witness stated that she considered she was bound to speak the truth from the solemn declaration she had taken. [Pollock, C. B., referred to the 24th & 25th Vict. c. 66.] That statute merely extends to criminal proceedings the provisions of the 20th section of the Common Law Procedure Act, 1854; and those enactments only apply to cases where the witness objects to be sworn. In *Omichund v. Barker*, Lee, C. J., in his judgment, guards himself against fully concurring with Willes, C. J., and would by no means say that atheists might not in some cases be admitted as witnesses. Suppose an indictment for murder, is the prisoner to be acquitted because a material and necessary witness does not believe in a God? In a recent case in Scotland, *Sutter v. The Aberdeen Arctic Company*,^(a) an Esquimaux was allowed to give evidence on making a declaration. [Bramwell, B. A singular state of things arises in cases of this description. The presumption of law is, that a man is qualified by his religious belief to take an oath. Then what are the materials by which his incapacity is judged? His own statement. Then by the ^[365] hypothesis he is made incredible by a statement which is not to be believed. Wilde, B. It may, perhaps, be put on the ground of an admission against his own interest; for, in this country, unbelief acts prejudicially against a man. Bramwell, B. If it be a statement against his interest, the fact that he would

^(a) 1 Willes, 538; 1 Atk. 21; 1 Wils. 84; 1 Smith's Lead. Cas. 381, 5th ed.

^(b) 9 Geo. 4, c. 15, s. 1; 3 & 4 Wm. 4, c. 49; 1 & 2 Vict. c. 77; 3 & 4 Wm. 4, c. 82.

^(a) Cases in the Court of Session, vol. 23. It does not appear by this report what was his religious belief.

rather incur the displeasure of his neighbours than tell an untruth, tends to shew that his evidence would be trustworthy.] By the 6 & 7 Vict. c. 22, it is declared that no law or ordinance made by the legislatures of British Colonies for the admission of the evidence of people destitute of the knowledge of God and of any religious belief, shall be deemed null and void by reason of any repugnancy to the law of England. [Wilde, B. In *Rex v. White* (1 Leach, C. C. 430), a witness examined on the voir dire, said that he had heard there was a God, and believed that those persons who tell lies would come to the gallows; but acknowledged that he had never learned the Catechism, was altogether ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, or what became of wicked people after death; and the Court rejected him as incompetent to be sworn.] Secondly, the witness ought not to have been questioned as to her disbelief, but the fact should have been proved by independent evidence. In Taylor on Evidence, vol. 2, § 1253, p. 1121, 3rd ed., it is said:—"A witness is *prima facie* presumed to hold the common faith of the country; and the ordinary mode of disproving that fact is, by furnishing evidence of his declarations previously made to others, the person himself not being interrogated; for the object of interrogating a witness before he is sworn is, not to obtain the knowledge of facts, but to ascertain from his answers the extent of his capacity, and whether he has sufficient understanding to take an oath." Again, at vol. 2, p. 1122, n., it is said:—[366] "The witness himself is never questioned, in modern practice, as to his religious belief; though formerly it was otherwise.(a) . . . It should be further noticed, that the question, whether a person about to be sworn is an atheist or not, can never be raised by any one but an adverse party. No stranger or volunteer has a right to object. . . . Neither is the question permitted to be raised against the atheist, where he is himself the adverse party, and offers his own oath in the ordinary course of proceeding." [Wilde, B. That is merely a quotation from the 1 Law Reporter, p. 347. Bramwell, B. The only objection to questioning the witness is, that he is not competent to prove his incompetency, but the invariable practice is to take the evidence of the witness himself.] In Black. Com., by Christian, vol. 3, p. 369, n. 14, it is said that "the Judges had resolved not to permit adult witnesses to be interrogated respecting their belief of the Deity and a future state." Thirdly, as the witness did not object to take the oath, she was not bound to answer any questions until she had been sworn. [Wilde, B., referred to *The Queen's case* (2 Brod. & B. 284).]

Gray appeared for the respondent, but was not called upon to argue. He referred to *Jackson v. Gridley* (18 Johns. Amer. Rep. 98).

POLLOCK, C. B. We are all of opinion that the course of proceeding adopted by the judge of the County Court was in accordance with the law and practice of the Courts in this country. It is unnecessary to say more than that the authorities cited abundantly shew that such is the law and practice. Whether or no it ought to be is another question. We are not here to make the law, as we have been invited to do, but to administer it; and by the law [367] every witness must be sworn according to some religious ceremony; or, if that is to be dispensed with, it can only be done by the authority of an act of parliament, and in this case there is no such authority.

Appeal dismissed.

HATCH v. LEWIS AND ANOTHER. Nov. 4, 1861.—Where a plaintiff in an action in a superior Court recovers a sum not exceeding 20l. in contract or 5l. in tort, and the Judge who tried the cause refuses to certify, under the 13 & 14 Vict. c. 61, s. 12, that it appeared to him at the trial that there was a sufficient reason for bringing the action in the Court in which it was brought, the Court will not, upon facts substantially the same as those before the Judge, exercise the power, conferred on them by the 15 & 16 Vict. c. 54, s. 4, to order that the plaintiff recover his costs.

[S. C. 31 L. J. Ex. 26; 7 Jur. (N. S.) 1085; 10 W. R. 58; 5 L. T. 254; at Nisi Prius, 2 F. & F. 467. Distinguished, *Hinde v. Sheppard*, 1871, L. R. 7 Ex. 21. Adopted, *Struchey v. Lord Osborne*, 1874, L. R. 10 C. P. 96.]

This was a rule calling on the defendants to shew cause why the plaintiff should

not have judgment to recover his costs, pursuant to the statute 15 & 16 Vict. c. 54, s. 4, on the ground that there was sufficient reason for bringing the action in this Court: both parties to be at liberty on shewing cause to refer to the notes of evidence of the Judge.

The rule was obtained on an affidavit of the plaintiff's attorney, the material paragraphs of which are as follows:—

1. This action was brought by the plaintiff to recover damages against the defendants for not using proper care, skill and diligence in the preparation and conduct of his, the plaintiff's, defence preparatory to, and on the occasion of, his trial for certain indecent assaults on Mary Eugenia Plummer, and Stephanie Augusta Plummer, which took place at the Central Criminal Court, on the 1st day of December, 1859, and the damages in the declaration were laid at 5000l.

2. The object of the plaintiff in bringing this action was not merely to obtain compensation for the large expenses which he had incurred, and the loss of professional income and position which he has sustained, mainly, if not entirely, in consequence of the defendants' breach of contract, but also to re-establish his character in the eyes of the public, and to give a public explanation of the circumstances which led [368] to his conviction, and of the reasons why the witnesses who were examined at the subsequent trial of Eugenia Plummer for perjury, were not called at the plaintiff's said trial in 1859.(a)

4. The cause came on for trial on the 10th of May last, and lasted four days. It was treated by the counsel on both sides as a matter, not only of the most serious importance to the parties concerned, but also to the general public. His lordship occupied several hours in summing up the case to the jury, and characterized it as one of extreme importance, and as the first action, as far as he believed, which had been brought against an attorney under such circumstances.

5. The cause was made a special jury, at the instance of the defendants; and in an affidavit made by one of the defendants for the purpose of changing the venue from Hertfordshire to Middlesex, he stated that the cause was of great importance to them, and that it would be necessary in the conduct of the case to call several barristers and other professional persons, and also two of the Judges of this Honourable Court, as witnesses on behalf of the defendants.

6. The jury found a verdict for the plaintiff, with 40s. damages; and an application was subsequently made to the Lord Chief Baron, at his Chambers, to certify that there was sufficient reason for trying the cause in a superior Court. His lordship heard that application, and inquired whether either of the parties was about to move for a new trial, and he declined to decide on the subject-matter of the application until the expiration of the first four days of term.

7. In consequence of his lordship suspending his decision as aforesaid, an application for a new trial was made on behalf of the plaintiff, to this Honourable Court, but refused.

[369] 8. Prior to the commencement of the examination of the first witness on the part of the plaintiff, on the said 10th May last, his lordship expressed a wish that, considering the importance and probable duration of the cause, the parties should employ a shorthand writer to take the evidence, and furnish his lordship, on the evening of each day, with a manuscript of the evidence taken.

9. This was done at the joint expense of the plaintiff and the defendants, and at a cost of 33l. 14s. 8d.

The affidavit then proceeded to state that, after the rule for a new trial was refused, counsel attended before the Lord Chief Baron to receive his decision upon the application to certify that there was sufficient reason for trying the cause in a superior Court, which application was refused.

Shee, Serjt., Lush and C. Pollock now shewed cause. This is in effect an appeal from the decision of the learned Judge who refused to certify that the action was fit to be brought in a superior Court. By the 9 & 10 Vict. c. 95, s. 129, if any action shall be commenced in a superior Court for any cause (with certain exceptions) for which a plaint might have been entered in a County Court, and a verdict shall be found for the plaintiff for a sum less than 20l. in contract and 5l. in tort, the plaintiff

(a) The plaintiff was convicted, but afterwards indicted Eugenia Plummer for perjury, of which she was found guilty, and then the plaintiff received a free pardon.

shall have judgment to recover such sum only and no costs, unless the Judge who tried the cause shall certify on the back of the record that the action was fit to be brought in such superior Court. The 13 & 14 Vict. c. 61, s. 11, provides that if in any action commenced in any superior Court, in covenant, debt, detinue or assumpsit, the plaintiff shall recover a sum not exceeding 20l., or in trespass, trover or case, a sum not exceeding 5l., he shall have judgment for that sum only, and no costs, except in certain cases thereafter provided. By section 12, if the Judge before whom the verdict was obtained shall certify that it appeared to him at the trial [370] that the cause of action was one for which a plaint could not have been entered in a County Court, or that there was a sufficient reason for bringing the action in the Court in which it was brought, the plaintiff shall have judgment for his costs. The 13th section, which enabled the Court or a Judge in the excepted cases to direct that the plaintiff shall recover his costs, has been repealed by the 15 & 16 Vict. c. 54, s. 4, which enacts that in any action in which the plaintiff shall not be entitled to recover his costs by reason of the 11th section of the 13 & 14 Vict. c. 61, "if the plaintiff shall make it appear to the satisfaction of the Court in which such action was brought, or to the satisfaction of a Judge at Chambers upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior Courts by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any such County Court, or that such action was removed from a County Court by certiorari, or that there was sufficient reason for bringing such action in the Court in which such action was brought, then and in any of such cases the Court in which such action is brought, or the said Judge at Chambers, shall thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if the before mentioned Act of the 13 & 14 Vict. c. 61 had not been passed." Then, by the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 4, "When the plaintiff in any action for an alleged wrong in any of the superior Courts, recovers by the verdict of a jury less than 5l., he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried or judgment passed by default, in case the Judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on [371] the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought." That enactment includes actions not within the operation of the previous statutes, and unfit to be brought in any Court. Then, assuming that this action was fit to be brought, was it fit to be brought in a superior Court? That depends on the construction of the 4th section of the 15 & 16 Vict. c. 54. Previously to the County Court Acts every cause was fit to be brought in a superior Court. A cause not fit to be brought in a superior Court was the creation of the County Court Acts, and therefore the meaning of the term is, "causes which under these Acts are unfit to be brought in a superior Court." It follows, that no cause is fit to be brought in a superior Court where the damages in tort are less than 5l., unless the Judge who tried the cause is of opinion that it involved some considerations of law or fact which rendered it fit to be tried in a superior Court. Here, in addition to the refusal of the Judge to certify, the Court has refused to set aside the verdict on the ground that the jury have come to an improper conclusion as to the amount of damage. The plaintiff might have recovered 50l. in the County Court. [Channell, B. The 9 & 10 Vict. c. 129 enabled the Judge who tried the cause to certify that the action was fit to be brought in a superior Court, but it gave no power to the Court or a Judge at Chambers. Then came the 13 & 14 Vict. c. 61, s. 13, which enabled the Court or a Judge to certify in certain cases. That section was repealed by the 15 & 16 Vict. c. 54, s. 4, which enabled the Court or a Judge to certify, not only in the cases mentioned in the repealed section, but also if they were satisfied that there was sufficient reason for bringing the action in the superior Court. When the application is made to the Judge [372] who tried the cause, it is made upon the materials before him, and it may be that the effect of the 4th section of the 15 & 16 Vict. c. 54 is to give a right of appeal from the decision of the Judge who tried the cause upon some matter brought before the Court by affidavit and which was not before the Judge. Wilde, B. The 15 & 16 Vict. c. 54 does not give a power of

appeal, the power to certify is given to the Judge who tried the cause, and also to the Court and a Judge at Chambers.] This is in effect an appeal from the decision of the Judge who tried the cause: *Orchard v. Mossy* (2 E. & B. 206), *Meredith v. Gittins* (18 Q. B. 257), *Warman v. Halahan* (30 L. J. Q. B. 48). There might be circumstances which did not appear before the Judge, and which would afford sufficient ground for bringing the action in a superior Court; but in this case there is no fact before the Court which was not before the Judge, and therefore the Court ought not to overrule his discretion except upon very strong grounds: *Dunston v. Paterson* (5 C. B. N. S. 267). Though the Court has the power to review the decision of the Judge, they will not exercise it upon the same state of facts as those before the Judge: *Barber v. Hollier* (8 M. & W. 513), *Palmer v. Richards* (6 Exch. 335). Having tried the cause, he is best able to determine whether it was fit to be brought in a superior Court. In some cases there is sufficient reason for suing in a superior Court, such as actions against joint stock Companies, in which the plaintiff, if he had sued in a County Court, could not have obtained satisfaction of his judgment by proceeding against the individual shareholders: (g) *Taylor v. The Crowland Gas Company* (11 Exch. 1). But [373] in that case Parke, B., said:—"The plaintiff ought to lay sufficient ground for the exercise of that jurisdiction." Analogous cases are actions against the registered officer of a banking copartnership. The affidavit states that the plaintiff brought the action to re-establish his character in the eyes of the public; but, however desirable that may be for the plaintiff, there is no reason why the defendant should pay the costs of it. There must be a reason which influences both parties. The fact that the defendant obtained a special jury affords no ground for giving the plaintiff his costs.

Montagu Chambers and Garth, in support of the rule. The question as to the effect of the 15 & 16 Vict. c. 54, s. 4, has never been before the Courts: the cases cited were decided upon the 13 & 14 Vict. c. 61. Unless the 4th section of the 15 & 16 Vict. c. 54, is to be a dead letter, the Court are bound to investigate the matter. The intention was that a plaintiff should not be concluded by the exercise of the discretion of the Judge who tried the cause, but that he should have an opportunity of appealing to the Court. It is said that the plaintiff had no right to bring the action in a superior Court, because it was not fit to be brought at all; but every person who has a cause of action for 40s. has a right to bring an action for it. The plaintiff claimed 5000l. damages, but the jury reduced them to 40s., and it never could have been intended that in such a case the Judge should refuse to give the plaintiff his costs because from some cause or other he considered that the action was not fit to be brought. Every action that will lie is fit to be brought. [Wilde, B. Then what does the legislature mean by the expression in the 23 & 24 Vict. c. 12, s. 4, "not fit to be brought?" The legislature discriminates between classes of actions, and alludes to some [374] that will lie, but are nevertheless not fit to be brought.] The expression does not mean "not fit to be brought at all," but not fit to be brought in a superior Court. [Pollock, C. B. The legislature speaks in sympathy with the general feeling of mankind, that there are some legal rights, which, socially, it would be disgraceful to exercise.] The object of these enactments was to compel persons who had small claims to sue for them in the County Courts, and all that the Judge or the Court has to decide is whether there was sufficient reason for bringing the action in a superior Court, not whether it was fit to be brought. A person may have sufficient reason for bringing an action in a superior Court, although he only recovers 40s. The sufficiency of the reason does not depend solely on difficult questions of law: difficult questions of fact may afford an equally good reason. In a late case in the Court of Common Pleas, where the plaintiff brought an action for an assault, which in the opinion of several physicians had caused an injury to his spine, but the jury gave only nominal damages for the assault, the Judge certified for costs, because the plaintiff, having acted on the statements of his medical attendants, had sufficient ground for bringing the action in a superior Court. The question does not depend on the amount claimed or recovered, but whether the cause, by reason of its importance or difficulty in point of law or fact was fit to be tried in a superior Court. The

(g) This reason would seem to be no longer applicable, because, if a joint stock Company is unable to meet its engagements, the remedy is by winding up the Company under the Joint Stock Companies Acts, 1856, 1857 and 1858.

circumstances disclosed in the affidavit shew that this cause could not have been satisfactorily disposed of in a County Court. In *Turner v. Berry* (5 Exch. 858), Parke, B. said:—"Where the plaintiff's demand is reduced below 20l., and he brings his action in the superior Court, he ought in general to pay the costs; but if, as undoubtedly might be the case, the proof of those payments involve difficult investigations, the Judge will set the matter right [375] by granting his certificate." In *McCollam v. Carr* (1 Bos. & P. 223), the Court refused to allow a suggestion for double costs under the Middlesex County Court Act, 23 Geo. 2, c. 33, where the debt was originally above 40s., but had been reduced below that sum by a balance. Eyre, C. J., there said:—"Is there any case where the ultimate balance of account only being under 40s., the Court has allowed a suggestion? I should pause upon such a case, since the most intricate point in accounts between merchant and merchant might by this means come to be decided before a County Court." And in *Harsant v. Larkin* (7 Moore, 68), Dallas, C. J., said:—"The plaintiff's original debt was not to be referred to the verdict of the jury, but whether he had a fair, reasonable and probable cause for litigating the question whether his demand amounted to more than 40s. or not."

BRAMWELL, B. I am of opinion that this rule should be discharged. It is an application to the Court to order that the plaintiff, who has recovered only 40s. in an action against an attorney for negligence, shall recover his costs, on the ground that there was sufficient reason for bringing the action in this Court. The application is made under the 4th section of the 15 & 16 Vict. c. 54. A similar application has been to the Lord Chief Baron who tried the cause, under the 12th section of the 13 & 14 Vict. c. 51, which enables the Judge at the trial to give the plaintiff his costs by certifying that there was a sufficient reason for bringing the action in a superior Court. That application was made upon the same materials substantially as the present application, and was refused. This, therefore, is practically an appeal from my lord's decision. I say practically, because it is not legally or formally an appeal, for my lord would have had to certify that it appeared to him, [376] at the trial, that there was sufficient reason, whereas we should certify that it now appears to us that there was sufficient reason. Therefore it is competent to the plaintiff to make this application to the Court, though it has been refused by the Judge, at the trial. But it seems to me, that although the legislature has given us the power, it never could have been intended that we should exercise it on the same materials as those before the Judge at Nisi Prius. I will not say that the matter is altogether one of discretion, but it is undoubtedly one of opinion, no rule being laid down by which the Judge at Nisi Prius is to be guided in saying whether there is sufficient reason for bringing the action in the superior Court. It never could have been intended that there should be an appeal from the Judge who had the best opportunity of seeing, and being the most competent person to decide, whether the action was fit to be brought in a superior Court. In the majority of cases a great deal of time would be wasted and money expended, if such appeals were allowed. How could the Court, with confidence in its judgment, reverse the decision of the Judge at Nisi Prius upon a question, not of logical reason and demonstration, but of matter of opinion? I am fortified in this view by seeing that the power which is given to us is also given to a Judge at Chambers; and therefore, after my lord refused this application, the plaintiff might have gone to any single Judge, and asked him to certify. The legislature never could have intended to make the one tribunal practically a Court of appeal from the other, such Court being without sufficient means of coming to a correct conclusion. It may be said then, why is the power given? The answer is this. The 4th section of the 15 & 16 Vict. c. 54, applies as well to cases where the action has been tried as where it has not, and therefore the legislature, whilst making regulations with reference to the one class of cases, might properly make them with reference to the [377] other. It would not introduce an exception or qualification, and say, "Provided that no application shall be made to the Court where an application has been made to the Judge at Nisi Prius." It may well be, that the application might be made on materials not before the Judge at Nisi Prius, or on some matters extrinsic to the evidence which may be properly brought forward, for I do not say there is no case in which the Court ought to interfere where the Judge at Nisi Prius has expressed an opinion that there was not sufficient reason for bringing the action in the superior Court. Suppose the Judge said "I am of opinion upon such a matter in point of law, and, being of that

opinion, I think there is no sufficient cause for my interference,"—he might be mistaken in point of law. Therefore I can well understand, that in some cases the Court might exercise the power of reviewing the decision of the Judge at Nisi Prius; but it would be most mischievous for us to do so, we having no other materials before us than the evidence at the trial, and consequently not being so competent as the Judge himself to form a correct opinion on the matter. The inevitable result is this—that there is a power, practically, of appeal to the Court, but it ought not in this case to be exercised, because there is no substantial difference between the materials before us, and those before my lord.

It was said, and it appears by the affidavits, that the plaintiff brought this action, not merely to recover damages, but to vindicate his character; that, however, makes no difference; because, suppose the claim had been for 40s. only, and the plaintiff had said, "I want to establish my character;" the defendant might say "your character is no concern of mine." What the statute in my judgment means is, sufficient reason as between the plaintiff and defendant. The matter may be illustrated in this way. Suppose a [378] claim for 20s. for a baker's bill, and that the defence was payment to a late partner, the question whether he received the money or denied the payment might be all important to the baker, and many hundred pounds might depend upon it, but that would not be sufficient reason for bringing the action in a superior Court. I decide this case on the ground that although the Court has the power we ought never to exercise it, except in the cases which I have mentioned; but at the same time it must not be supposed that I should have formed a different opinion from my lord at the trial. I am inclined to think that the true criterion whether there was sufficient reason for bringing the action in a superior Court, is the amount recovered. I do not say there may not be other reasons, as, for instance, if a defendant fraudulently suppressed all notice of a receipt for money, or was guilty of some gross misconduct, or had invited the plaintiff to bring the action in a superior Court. Those might be sufficient reasons irrespective of the sum recovered; but I am of opinion, no matter whether the cause is difficult in point of law or fact, if the verdict is for a sum so small that the cause will not bear the expense of the more competent tribunal it was not fit to be brought in a superior Court.

CHANNELL, B. I am also of opinion that the rule ought to be discharged. The application is made under the 4th section of the 15 & 16 Vict. c. 54, and its object is to obtain from the Court a rule giving the plaintiff his costs. Now, to entitle the plaintiff to this rule he must satisfy the Court that there was sufficient reason for bringing the action in a superior Court. He takes on himself the onus of satisfying the Court on that point; and if he fails he is not entitled to the rule. On the argument, many observations were addressed to the Court which are applicable to the case of a new trial. It appears that the jury found a verdict for 40s. only, that an application was made for a new trial on the ground of misdirection, and that the damages were disproportionate to the nature of the injury sustained. The Court has refused a rule on either of these grounds, and I see no reason to doubt the propriety of their decision. Therefore it must be assumed that the Court are satisfied with the verdict and that the questions brought before them have been properly disposed of. Moreover, an application has been made to the Lord Chief Baron for a certificate under the 12th section of the 13 & 14 Vict. c. 61. He was applied to, as the Judge who tried the cause, when all the circumstances were fresh in his memory. I agree that the 15 & 16 Vict. c. 54, which we are now called upon to interpret, does not give an appellate, but an original jurisdiction. The words of the 4th section of that Act are, for the most part, similar to those of the 13th section of the 13 & 14 Vict. c. 61, which is repealed, and the only alteration is to give the Court or a Judge at Chambers the power of ordering costs if they are satisfied that there was sufficient reason for bringing the action in a superior Court. By the 12th section of the 13 & 14 Vict. c. 61, power to certify is given in the first instance to the Judge at the trial, and though the 4th section of the 15 & 16 Vict. c. 54 gives the Court and a Judge at Chambers a jurisdiction, which is original and not appellate, it seems to me that it was never intended that the jurisdiction should be exercised where the case was identically or substantially the same as that before the Judge at Nisi Prius. I agree, it was not intended to make the refusal of the Judge conclusive as to the right to costs; but to give the plaintiff power to apply to the Court. I can conceive many cases in which the Court might properly exercise the jurisdiction. Suppose an action was brought in

the County Court, and the defendant said to the plaintiff, "This is not a case to [380] be tried in a County Court, I intend to apply for a certiorari to remove it: will you put me to that trouble, or abandon the proceedings and bring the action in the superior Court?" There the plaintiff would be in a situation to shew that the action had been brought in the superior Court at the request of the defendant himself. Or suppose the application was made on facts not before the Judge at Nisi Prius, but brought before the Court by affidavit. There, again, the Court might reasonably exercise its jurisdiction. But I cannot think, however large the words may be, that it was the intention of the legislature that the Court should exercise the jurisdiction in a case identically the same in all its important elements as the case before the Judge at Nisi Prius; because the power which is given to the Court is also given to a Judge, and so one Judge would be reviewing the decision of another without having the same opportunity of coming to a correct conclusion. There are some cases in which the very nature of the action might give rise to the exercise of the power, where the Court taking a legal view of the action might think it a fit course to take proceedings in the superior Court, and regarding that, might with propriety differ from the Judge who tried the cause. Those are cases such as were cited on the argument of actions against joint stock companies, in which, if the plaintiff sued in a County Court, he could not have the benefit of proceeding against the individual shareholders (see ante, p. 372, note (g)). I carefully guard myself against the supposition that I am holding that this is an appellate jurisdiction: it is an original jurisdiction, but though it is so, I agree with the view expressed by the Court of Common Pleas, in the case of *Dunston v. Paterson* (5 C. B. N. S. 267); that although the Court has the right, they will not exercise it, except on very strong grounds. "If we were satisfied," says Wilde, J., [381] who delivered the judgment of the Court, "that the learned Judge had acted upon an erroneous view of the facts or law of the case, we might review this exercise of his discretion. But, generally speaking, the Judge who has tried the cause is best able to appreciate its character and fitness for a superior Court; and we, ought not to overrule his discretion, except upon much stronger grounds than have been brought forward here." I lay no stress on the argument as to the time that would be occupied in applications of this kind. It would be unbecoming in a Judge to decline a jurisdiction on the ground that the exercise of it would lead to considerable loss of time. I agree that it is not a discretion to be lightly thrown away or capriciously refused to be exercised: it is a judicial discretion which the legislature has thought fit to repose in the Judges, but which I think we should best exercise by refusing this application, and the ground of my judgment is, that the case now before us seems to me substantially the same as that before the Judge at Nisi Prius, who, in the exercise of his discretion, refused the application, and therefore we ought not to interfere, unless we are satisfied that the action was properly brought in this Court, in other words, that it was fit to be brought in a superior Court.

Then is this case substantially the same as that before the Judge at Nisi Prius? I think it is, and that there is no material difference between the aspect of the case now before us, and that which was presented when the Lord Chief Baron was called upon to interfere. Two or three circumstances have been adverted to in the argument. The affidavit states that the action was brought to clear the plaintiff's character; and nobody can doubt that point was propounded for the consideration of the jury. Then it is said, the defendants have made the cause a special jury; but there is nothing in that fact which was not apparent at Nisi Prius. It might have [382] been important to them that the cause should be tried by a special jury, and they obtained one at the peril of paying the costs of it if the cause was not fit to be tried by such a jury. Another fact relied on is that the defendants changed the venue from Hertford to Middlesex; but that is not material. The defendants appear to have been under the impression that they required the attendance of two of the Judges of this Court, who, in the ordinary course of events, might have been in different parts of the country, and that their attendance would be best secured by changing the venue to Middlesex instead of having the cause tried at the assizes. Then we are asked, if any one of us, when at the bar, would have advised the plaintiff to bring this action in a County Court. My answer is, that counsel advise with reference to the facts laid before them, and, for the purpose of giving an opinion, assume those facts to be true. Here many of the facts must have been repudiated by the jury when they found a verdict for 40s. only. Therefore, that is an observation which ought not to weigh with the Court.

We must regard the facts as they have been estimated by the jury, and they have a verdict establishing negligence, but estimating the damages at 40s. only. Upon these grounds I have come to the conclusion that the rule ought to be discharged. Though the legislature has given us this jurisdiction, I think it ought not to be exercised when we must determine upon the same state of facts as those before the Judge at Nisi Prius; and in my judgment the facts before us are substantially the same as before the Lord Chief Baron.

WILDE, B. I agree that the rule ought to be discharged. The meaning of the 4th section of the 15 & 16 Vict. c. 54 is in some measure to be gathered by looking at the general nature of the provisions of the County Court Acts. By the [383] first Act, 9 & 10 Vict. c. 95, s. 129, if an action was commenced in a superior Court, and the plaintiff recovered less than 20l. in contract, and 5l. in tort, he was deprived of his costs absolutely; and the exception was, if the Judge who tried the cause certified that the action was fit to be brought in a superior Court. No power to certify was confided to a Judge at Chambers or the Court. That power was first given to them by the 13 & 14 Vict. c. 61, s. 13. Then came the 15 & 16 Vict. c. 54, the 4th section of which, after repealing the 13th section of the 13 & 14 Vict. c. 61, gave to the Court and a Judge at Chambers the same power to certify as had been previously given to the judge at the trial. It was argued that that enactment gave the Court jurisdiction to review the decision of the Judge at Nisi Prius. I think it did not: and that seems to me manifest since there is no power whatever in the Court to reverse the decision of the Judge at Nisi Prius, if he decided that the plaintiff was entitled to costs. Where there is an appeal it is not for one party only, but for both parties. If this were to be looked upon as an appeal the plaintiff might appeal to a superior Court, but the defendant, if the decision of the Judge was against him, would have no appeal. Therefore this is not an appeal; it is an original jurisdiction given to the Court and a Judge at Chambers. The question is, how ought we to exercise it? The power given to the Judge at Nisi Prius is necessarily confined to the case at the trial; and, without interfering with that power, cases might occur in which it would be proper that the Court or a Judge should decide whether the plaintiff is entitled to costs. That is ample reason for conferring the jurisdiction; and no doubt there are cases in which it might be very properly exercised, independently of what was done by the Judge at Nisi Prius,—cases in which fresh matter has arisen or come to the knowledge of the plaintiff since [384] the trial. But, in my opinion, when the question is raised upon similar materials to those before the Judge at Nisi Prius, we ought not to give the plaintiff his costs, unless we see a very strong and cogent reason for it. I am, therefore, quite prepared to agree with the rest of the Court in the view which they have taken. Then, as to what constitutes a sufficient reason for bringing the action in a superior Court. A great deal has been said in argument which I can in no way sanction. If an action is not fit to be brought,—and by that I do not mean an action that will not lie, but an action brought for collateral purposes, brought collusively, or (of which there are many instances) brought as an advertisement, in short, actions brought for any other than the fair and ostensible object of recovering a debt or damages,—I cannot agree that the Judge at Nisi Prius ought not to consider whether the action was fit to be brought in a superior Court, but ought to assume it, because of the number and position of the witnesses, and the respectability of the parties. It seems to me that the Judge, in exercising the power conferred by the legislature, has the fullest discretion, upon a review of the action and all its attendant circumstances, to consider whether there was sufficient reason for bringing it in the superior Court. I have said thus much as to what constitutes sufficient reason; but the foundation of my judgment is, that the Judge who tried this cause has expressed his opinion, and I am not satisfied that he was wrong.

POLLOCK, C. B. I abstained from giving judgment in this case until my learned brothers had expressed their opinion, because, although not actually an appeal from my judgment, substantially it is so; and, in such cases, it is right that the Judge appealed from should not first deliver his opinion. I am, however, entirely of the same opinion as that expressed by my learned brothers, and I [385] think it would be mischievous to come to any other conclusion. No argument has been advanced on the part of the plaintiff that would not be quite as forcible for the purpose of calling on us to decide in his favour, if the damages, instead of being 40s., had been 1s. or one farthing. The argument was, that the plaintiff had a right to 40s., and therefore, he

had a right to sue for it in this Court. That would apply to a farthing,—he had a right to a farthing, therefore he had a right to recover that farthing in this Court, at the expense of several hundred pounds. That, in my judgment is so contrary to all sense of equity, and natural sense of justice, of which no lawyer, in spite of technicalities, can entirely divest himself, that it never can be the rule by which the Judges should exercise the power given by this act of parliament.

It has been urged that this is a case which, from its novelty and importance, ought to be tried in this Court,—a case which was considered by the defendants so important, that they moved for a special jury, and to change the venue. But the distinction that occurs to my mind is this,—you must look, not merely to the novelty of the case, or the amount claimed, because any unheard of demand might possibly require the attention of the learned Judges, or the intelligence of a special jury, but you must look at the particular instance and the kind of action before the Court. It is not because a plaintiff claims 10,000l., he is to have his costs if he recovers 40s. or one farthing. It must be seen whether the real ground of claim is such as justified the bringing the action in a superior Court. Here that is settled, and conclusively settled, by the verdict of the jury. For these reasons, I concur with my learned brothers that the rule ought to be discharged.

Rule discharged.

[386] KEARON v. PEARSON AND ANOTHER. Nov. 2, 1861.—The defendants, by charter-party, engaged to load on board the plaintiff's ship a cargo of coals: "To be loaded with usual dispatch." The defendants commenced loading by bringing the coal in boats along a canal to the dock where the plaintiff's ship was, but before the cargo was completed a severe frost rendered the canal unnavigable, and the ship was detained thirty-four days. Held, that the expression "usual dispatch" meant "usual dispatch of persons who have a cargo ready for loading," and that the defendants were responsible for the delay.

[S. C. 31 L. J. Ex. 1; 10 W. R. 12. Adopted, *Ford v. Cotesworth*, 1868, L. R. 4 Q. B. 135; affirmed 1870, L. R. 5 Q. B. 544; *Jackson v. Union Marine Insurance Company*, 1873, L. R. 8 C. P. 587; affirmed 1874, L. R. 10 C. P. 125; *Grant v. Coverdale*, 1884, 9 A. C. 475; 5 Asp. M. C. 353. Explained, *Ashcroft v. Crow Orchard Colliery Company*, 1873, L. R. 9 Q. B. 543; 2 Asp. M. C. 397. Distinguished, *Postlethwaite v. Freeland*, 1880, 5 A. C. 619; 4 Asp. M. C. 302; *Nickoll v. Ashton*, [1901] 2 K. B. 126. Not applied, *Kay v. Field*, 1882, 8 Q. B. D. 599. Referred to, *Jones v. Green*, [1904] 2 K. B. 280.]

The declaration stated that the plaintiff, as owner of the ship "Active," agreed with the defendants, by charter-party, as follows:—

"Liverpool, Dec. 17, 1860.

"I hereby engage with Messrs. Pearson and Knowles, to receive and load on board my vessel, the 'Active,' of Dublin, being tight, strong, &c., a full and complete cargo of coals, about 110 tons, and proceed to Dublin, or so near as she can safely get, and deliver same per bills of lading on being paid freight at the rate of 6s. 6d. per ton of 20 cwt., and 21s. gratuity, and allow 20 tons per working day for discharging, or if longer detained, to be paid 40s. per day demurrage. (The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage, always excepted.) To be loaded with usual dispatch. Penalty for non-performance of this agreement estimated amount of freight." (Signed) "W. KEARON."

"We hereby engage to load said vessel on the above terms. Vessel to load in Nelson Dock." (Signed) "PEARSON, KNOWLES & Co."

Averments. That the plaintiff was always ready and willing to receive and load on board the said ship the said cargo of coal, and that all conditions had been performed, and things happened, and times elapsed to entitle the plaintiff to have the said ship loaded with the usual dispatch, according to the said charter-party. Breach:

that the said [387] ship was not loaded by the defendants with the usual dispatch, according to the said charter-party, but, on the contrary thereof, was detained by the defendants for two months beyond the usual time for loading.

Plea (inter alia). That the said ship was loaded by the defendants with usual dispatch, according to the said charter-party. Issue thereon.

At the trial, before Martin, B., at the last Liverpool Summer Assizes, it appeared that the charter-party mentioned in the declaration was signed on the 17th of December. On the 21st the plaintiff's vessel, the "Active," was in the Nelson Dock ready to receive her cargo, and on that day 25 tons of coal were loaded on board. The coal was brought from a colliery at Wigan down a canal in broad boats, called "flats." In consequence of a severe frost which then occurred the canal was frozen, and no more coal could be brought by it alongside the plaintiff's vessel. The defendants then informed the plaintiff that if he would take his vessel to Garston, a port a few miles up the Mersey, they could complete the cargo by coal obtained by railway. The plaintiff refused to do so, and his vessel was detained in the Nelson Dock, waiting for the coal, until the 30th January. Evidence was adduced on behalf of the plaintiff to prove that the loading, if done with usual dispatch, would have occupied five days and a half: that, assuming the coal was alongside the vessel, the usual rate of loading was twenty tons a day, and that the expression "usual dispatch" was well known and so understood in the trade.

The learned Judge, in summing up, told the jury that the defendants having undertaken to load the plaintiff's vessel with "usual dispatch," it was for him to say what was the meaning of that expression, and in his opinion it meant that the vessel should be loaded with the usual [388] dispatch of persons who have a cargo ready at Liverpool for loading: that it was for the jury to say, as a fact, what was the rate of such loading with "usual dispatch," and there was evidence that it meant loading at the rate of twenty tons a day. If they believed the evidence the vessel ought to have been loaded by the 27th of December, instead of which the loading was not completed until the 30th of January, making a period of thirty-four days during which the vessel was detained: that the circumstance of the frost having set in, and prevented the coal being brought up the canal from Wigan, did not discharge the defendants from their obligation to load the vessel in proper time, nor deprive the plaintiff of his right to compensation for the detention.

The jury found that the vessel was not loaded with "usual dispatch," and a verdict was entered for the plaintiff, with 66l. damages.

Brett now moved for a new trial, on the ground of misdirection. The question is, what is the meaning of the expression in the charter-party "to be loaded with usual dispatch"? The learned Judge ruled that it meant the usual dispatch of persons who have a cargo ready at Liverpool for loading, which would be at the rate of twenty tons a day. But the charter-party must be construed with reference to the circumstances under which it was made, and the intention of the parties at the time they entered into it. Now, both parties knew that the vessel was to be loaded in the Nelson Dock, and that the usual course was to bring coal from the Wigan Colliery along a canal; they also knew that the navigation of the canal might be impeded by frost. Under those circumstances the defendants undertook to load with the usual dispatch of persons who got coal from Wigan. [Wilde, B. The charter-party makes no mention of the place from which [389] the coal is to come, or how the vessel is to be loaded.] There is an express stipulation to "allow twenty tons per working day for discharging," but the defendants do not undertake to load twenty tons a day; they only undertake to load with "usual dispatch," that is, to use all diligence which persons loading in that manner usually use. The delay was in some measure caused by the plaintiff, who refused to take his ship to Garston, where the cargo might have been completed. The defendants ought not to be responsible for delay, which on their part was unavoidable: *Harris v. Dressman* (9 Exch. 485).

POLLOCK, C. B. We are all of opinion that there ought to be no rule. The question is, what did the parties mean by the expressions they have used? It is contended that they meant something different from the natural and obvious meaning of the words. But it would lead to endless confusion, if, where the language is plain, we should put a different interpretation upon it according to the presumed intention of one or other of the parties. The only occasion on which words receive a meaning different from their natural import is where, by usage, they have acquired a particular

meaning in a certain trade, or where a well known established custom controls or is embodied in a particular expression. As my brother Wilde pointed out, the time of loading has no reference to the place from which the cargo is to come. The coals were to be brought to the Nelson Dock and loaded there, and the plaintiff was under no obligation to receive them elsewhere.

BRAMWELL, B. I am of the same opinion. I think the summing up of my brother Martin was perfectly correct. As my brother Wilde observed, the stipulation is simply as [390] to loading the ship, without reference to the mode of doing it. For aught I know the mode of loading may be by bringing the coal in flats alongside the vessel, or it may be by bringing it by railway or in carts; but inasmuch as the charterers must be allowed a reasonable time for bringing the coal alongside the vessel, whether it be up the river in flats, or in carts from a yard, it is agreed that they shall load "with usual dispatch," and therefore, whatever the mode of loading, they must do it within the usual time. If the frost intervenes and prevents them, or the roads are broken up so that their cart cannot get to the dock, they must bear the loss. "Usual dispatch" includes the ordinary time for bringing the cargo to the place of landing and loading. In this case that time has been exceeded—by no fault, it is true, of the charterers, but still it has been exceeded, and they are responsible.

WILDE, B. I am of the same opinion. The stipulation that the vessel shall "be loaded with usual dispatch" does not relate to the facilities which the charterers may have in their trade of getting the coal alongside the vessel, but to the putting it on board. But even supposing that stipulation has reference to circumstances attending the bringing the coal, it is clear that the vessel was not loaded with "usual dispatch." The question then is, who is to sustain the loss? It has been long ago decided that, in cases of this kind, the misfortune must fall upon the person who contracted to do the act. The argument for the defendants amounts to this, that the words "usual diligence" should be substituted in the charter-party for the words "usual dispatch."

MARTIN, B. I am of the same opinion. It seems to me that the vessel was not loaded with "usual dispatch" within the meaning of the charter-party, and the loss must fall on [391] the charterers, not on the shipowner. The word "usual" shews that the cargo was to be put on board in the ordinary way. If the argument for the defendants were correct, this consequence would follow, that there would be one time for loading the vessel when the coal was brought from Newcastle, another when brought from Derbyshire, and another when brought from Wigan, and so a different time for every place from which, by possibility, the coal might come.

Rule refused.

BISSILL v. WILLIAMSON. Nov. 11, 1861.—It is no answer to an action of ejectment in a County Court, that another ejectment for the same cause is pending in a superior Court.

[S. C. 31 L. J. Ex. 131; 8 Jur (N. S.) 42; 9 W. R. 109; 5 L. T. 321.]

The following case was stated on appeal, from the decision of the judge of the County Court at Nottingham.

This is an action, under 19 & 20 Vict. c. 108, s. 50, to recover from the defendant possession of two closes of land situate at Arnold, in the county of Nottingham, and was commenced by plaintiff, entered in the County Court of Nottinghamshire, holden at Nottingham, on the 1st day of May, 1861.

On the 11th day of April, 1861, the plaintiff commenced an action of ejectment against the defendant, in the Court of Exchequer, under the Common Law Procedure Act, 1852, ss. 168, 169, to recover possession of the same two closes of land. On the 25th day of April, 1861, the defendant appeared to the writ of ejectment, to defend for the whole of the land therein mentioned, and the said action of ejectment was pending on the 21st day of May, 1861, on which day the said plaintiff was brought on for hearing, in the said County Court at Nottingham, and the defendant and his attorney attended the hearing of the said cause in the County Court, and pleaded, or offered as a defence, and proved, the pendency of the said action of ejectment [392] in the Court of Exchequer of Pleas; and the judge of the County Court then called upon the plaintiff's attorney and counsel to give an undertaking to discontinue the said action in the Exchequer of Pleas, and to pay the defendant any costs incurred, or

to be incurred, by defendant in pursuance of such last mentioned action. The defendant's attorney objected to receive any such undertaking; but, notwithstanding (the plaintiff's counsel and attorney having given such undertaking), the judge disallowed the defendant's said plea or defence, and made an order that the defendant should give to the plaintiff possession of the said two closes of land and pay the costs.

The plaintiff has since discontinued the action in the Exchequer of Pleas, and paid defendant his costs, pursuant to the undertaking.

The following is the defendant's ground of appeal, as stated in his notice of appeal.

That on the defendant's plea or defence, that an action for the same cause had, before the commencement of the said action in the County Court, been commenced and was then pending in the Court of Exchequer of Pleas, further proceedings in the said cause in the County Court ought to have been stayed, or the plaintiff ought to have been nonsuited in the County Court, or the verdict ought to have been entered for the defendant.

The question for the opinion of the Court of Exchequer is—Was the defendant's plea or defence of the pendency of the action of ejectment in the Exchequer of Pleas a good plea or defence in bar to, or in abatement of, the action in the County Court; and thereon ought further proceedings to have been stayed in the County Court, or ought the plaintiff to have been nonsuited, or ought a verdict to have been entered for the defendant, notwithstanding such undertaking as aforesaid?

[393] Cave, for the appellant. The judge of the County Court ought to have nonsuited the plaintiff, on the ground that another action was depending in this Court for the same cause: Com. Dig. tit. "Abatement" (H. 24). In an action of trover in the Exchequer for a quantity of cotton, the defendant pleaded that the plaintiff had another action depending in the King's Bench, for the same trover and conversion of the same goods, and the plea was held good, although the first action was pending in another Court: *Sperry's case* (5 Rep. 61 a.). [Channell, B. Can a defence which is only available in a superior Court by plea in abatement, be set up in a County Court, where there are no pleadings?] The maxim of law, "nemo debet bis vexari, si constet curiæ quod sit pro una et eadem causa," applies equally to a County Court as a superior Court. By the 9 & 10 Vict. c. 95, s. 89, the judge has "power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or the defendant to the judgment of the Court," and in this case that power ought to have been exercised. [Channell, B. Each Court, in its discretion, may stay proceedings if another action for the same cause is pending in another Court.] The defendant was not bound to apply to stay the proceedings, but had a right to avail himself of the objection as a defence to the action in the County Court. It is true that the pendency of an action in an inferior Court is no answer to an action in a superior Court: *Sperry's case* (5 Rep. 61 a.); but that is in consequence of the antiquity and dignity of the superior Courts. The judge of the County Court required an undertaking to discontinue the action in this Court, and pay the defendant's costs. [Pollock, C. B. That was an irregular proceeding.] The undertaking was of no avail, as there was no means of enforcing it. [Pollock, C. B. The judge [394] might have adjourned the hearing of the cause until the action in this Court was discontinued.] The test is, not whether an action is pending at the time of hearing, but at the time when the plaint issued. In *Haigh v. Paris* (16 M. & W. 144) this Court stayed the proceedings in an action on a special contract, until a prior action of debt for the same cause had been discontinued or otherwise determined. There Rolfe, B., in his judgment, referred to *Thrustout d. Park v. Troublesome* (Andr. 297), where Chapple, J., said that "the reason of staying proceedings in one ejectment where another is brought, is because the first cannot be pleaded in bar to the other." He also referred to *The Earl of Bedford v. Bishop of Exeter* (Hob. 137; 1 Brownl. 163).

C. G. Merewether appeared for the respondent, but was not called upon to argue.

POLLOCK, C. B. I am of opinion that this appeal must be dismissed. The plaintiff in the County Court was entitled to recover possession of the premises; he established his title, and, having done so, the judge of the County Court was right in giving him judgment. It is said that the defendant had a good answer to the action; because if it had been brought in one of the superior Courts, he might have pleaded in abatement the pendency of another action for the same cause. But we ought to look at the substance of the matter; and in this case it is sufficient to say that, when the plaintiff obtained judgment in the County Court, this Court would have stayed the

proceedings, and made the plaintiff pay the costs of the action in this Court. Looking at the substance of the jurisdiction of the County Courts, I think it was never intended to fetter their proceedings by pleas in abatement.

[395] BRAMWELL, B. I am of the same opinion. I think this a plain case. There were three possible terminations of the action in the County Court. One was judgment in favour of the defendant, but that the judge could not have given, because the plaintiff proved his case. Another was a nonsuit, which a judge of a County Court can only direct when no satisfactory proof is given to him, entitling either the plaintiff or defendant to recover, and here proof was given that the plaintiff was entitled to recover. The only remaining course was the one which the judge took, viz., to give judgment for the plaintiff. It would be strange if the result of an action of ejectment was not the same in a County Court as in a superior Court. In this case the plaintiff would have recovered in the superior Court; then why should he not recover in the County Court? It may be that the superior Court would have stayed the proceedings in the County Court, but the question before the Judge of that Court was, whether he ought to find for the plaintiff or the defendant, or direct a nonsuit. It may be further observed that in an action of ejectment there never can be any proceeding analogous to a plea in abatement, because the plaintiff, by his writ, says, "I am entitled to possession," and therefore matter in abatement can be no reason for the defendant holding the land.

CHANNELL, B. This is an appeal against the decision of the judge of a County Court, and the grounds of appeal are three, viz., that the proceedings ought to have been stayed, or the plaintiff ought to have been nonsuited, or the verdict ought to have been entered for the defendant. I am clearly of opinion that the two last objections are wholly untenable; and the only question is, whether the proceedings ought to have been stayed? This is a proceeding under the 50th section of the 19 & 20 Vict. c. 108, which gives jurisdiction to a judge of a County Court, not [396] in every action of ejectment, but in actions of ejectment of a limited class, viz., where neither the value of the premises nor the rent exceeds 50*l.*, and the interest of the tenant has expired, or has been determined by a notice to quit. Upon proof of those facts, the judge is to order that possession of the premises be given up by the defendant to the plaintiff, unless good cause be shewn to the contrary. Here it is not pretended that the value of the premises, or the rent, exceeds 50*l.*, or that the interest of the tenant has not expired by effluetuation of time, but it is simply said that another action of ejectment, for the same cause, is pending in a superior Court. But that is matter upon which the judge must exercise his discretion, and I do not think we are at liberty to review it. The judge may look at all the circumstances, and if the pendency of the other action was a sufficient reason for not ordering possession of the premises to be given up, when an undertaking was given to abandon the proceedings and pay the costs, there was good ground for making the order.

WILDE, B., concurred.

Appeal dismissed.

ANGELL v. FELGATE. Nov. 16, 1861.—A judge has power, under the 3rd section of the Common Law Procedure Act, 1854, to refer to arbitration an action for dilapidations.

[S. C. 31 L. J. Ex. 41; 10 W. R. 83; 5 L. T. 322.]

The declaration stated that the defendant was tenant to the plaintiff of a certain messuage and premises on the terms (amongst others) that the defendant should keep in repair the said messuage and premises during the said tenancy, and at the expiration thereof should deliver up to the plaintiff the same, in the like state and condition as the same then were, reasonable wear and tear excepted. And the said tenancy afterwards expired. Breach: that [397] the defendant during the said tenancy did not keep in repair the said messuage and premises and every part thereof, nor at the expiration of the tenancy did the defendant deliver up to the plaintiff the same in the like state and condition as the same were at the time of the defendant becoming tenant as aforesaid, reasonable wear and tear excepted. And also for that, by deed, dated the 12th day of August, 1856, the plaintiff agreed to let to the defendant, and the defendant agreed to take a certain messuage and premises for the term of three years

from the 11th day of August then instant, and so on from year to year until six months' previous notice to quit should be given by the defendant. And the defendant thereby covenanted with the plaintiff to keep in repair the said messuage and premises, and every part thereof, during the said tenancy, and at the expiration thereof to deliver up to the plaintiff the same in the like state and condition as the same then were, reasonable tear and wear excepted. And the said tenancy afterwards expired. Breach: that the defendant did not, after the making of the said deed and during the said tenancy, keep in repair the said messuage and premises and every part thereof, and at the expiration of the said tenancy, although the defendant delivered up to the plaintiff the same, yet he did not deliver up the same, and the same were not, in the like state and condition as the same were at the time of the making of the said deed, reasonable tear and wear excepted.

Plea. Payment into Court of 10l.; and that the said sum is enough to satisfy the claim of the plaintiff.

Replication. That the said sum of 10l. is not enough to satisfy the plaintiff's claim in respect of the matters herein pleaded.

An order was made by Martin, B., at chambers, that the cause be referred to one of the Masters of the Court under the statute 17 & 18 Vict. c. 125.

[398] Holl now moved for a rule calling on the plaintiff to shew cause why the order of Martin, B., should not be rescinded. This is not a case in which the Judge had power, under the 17 & 18 Vict. c. 125, s. 3, to order a compulsory reference. It is not a matter of mere account, but involves disputed questions of fact. One question would be, what was the state and condition of the premises at the time the defendant became tenant? Another would be, what was their state and condition at the expiration of the tenancy? [Bramwell, B. Suppose the defendant, knowing that he had broken his covenant, employed a builder to do the repairs, and the builder sued him for price, might not that matter be referred under the statute?] That would be a case within the statute. [Bramwell, B. The 3rd section empowers a Judge to refer the matter in dispute "if it consists wholly or in part of matters of mere account." The fact of there being other questions in dispute does not make the claim not a matter of account.] In *Pellatt v. Markwick* (3 C. B. N. S. 760), the Court of Common Pleas refused an application by the plaintiff to refer to the Master an action upon bills of exchange. There Cockburn, C. J., said:—"The plaintiff sues the defendant as the drawer of certain bills. It is not a matter of mere account." [Wilde, B. In *Cummins v. Birkett* (3 H. & N. 156), this Court held that an action by a rector against his predecessor, to recover damages for dilapidations, and in which money was paid into Court, was a matter of mere account, within the meaning of the 3rd section of the 17 & 18 Vict. c. 125.] The decision in that case turned on another point, for the Court said that, whether the matter in dispute was a matter of account or not, they were clearly of opinion that it afforded no answer to the rule. The statute requires two things: first, that the matter in dispute should consist wholly or in part of [399] matters of "mere account;" secondly, that the matters, though of mere account, are such as cannot conveniently be tried in the ordinary way. If it turned out that the premises were in the same state and condition as when the defendant became tenant, no account would have to be taken; it is only in the event of a breach of covenant that the matter in dispute involves an account. The question as to what cases are within the statute was discussed in *Chapman v. Toll* (8 E. & B. 396). He also referred to *Broune v. Emerson* (17 C. B. 361), *Murray v. The Sunderland Dock Company* (1 F. & F. 179), and *Jones v. Beaumont* (1 F. & F. 336).

BRAMWELL, B.(e) I am of opinion that the rule ought to be refused. When the Act first passed I thought that there was great ambiguity in some of the expressions in the 3rd section; but the Courts have put a meaning, and a very salutary one, upon it, viz., that where the matter in dispute is such that, according to the old practice, the cause would have been referred by the Judge at the trial, they will avoid the scandal to the law, and the waste of time and money of the suitors, by referring the cause in the first instance. If a builder had been employed to do these repairs, it is clear that an action by him for the price could be referred under this section, and yet there might be a question of fact to be decided, viz., whether the defendant employed him. In this case a question of law might arise as to the performance of the covenant,

(e) Pollock, C. B., and Channell, B., were in the Court of Criminal Appeal.

but that does not take away the power of the Judge to refer it. There is scarcely a case in which there is not some question of fact or law to be decided besides the matter of account. *Cummins v. [400] Birkett* (3 H. & N. 156) is an authority that the order in question was properly made.

WILDE, B. I am also of opinion that the rule ought to be refused. I should be sorry if any doubt were thrown on the practice, as it exists, of making orders of reference under this Act, which I consider a very salutary one. It may be difficult to lay down any precise rule as to the cases within the Act, but when it is found that the question to be tried involves several items of account, a Judge would be doing great kindness to the parties by referring it to an arbitrator, because a jury could not try it. I think that the order of the learned Judge was quite right, and that he exercised a wise discretion in making it.

Rule refused.

THE LONDON AND NORTH WESTERN RAILWAY COMPANY, *Appellants*; BARTLETT, *Respondent*. Nov. 18, 1861.—Although a carrier has contracted with the consignor of goods to deliver them at a particular place, he may deliver them at any place at which the consignee has ordered their delivery.—The plaintiff having sold wheat by sample, to be delivered to the purchaser at his mill, sent it by the defendants' railway. On the arrival of the wheat at a station two miles from the mill, the defendants kept it there in consequence of instructions given to them by the consignee that wheat arriving for him at the station should not be forwarded to the mill without his written order. The plaintiff had no knowledge of these instructions. The consignee examined the wheat at the station, but refused to accept it, and whilst it remained there it became deteriorated in quality and value. Held, that the consignor had no right of action against the defendants for not delivering the wheat at the mill, as the non-delivery was by order of the consignee.

[S. C. 31 L. J. Ex. 92; 8 Jur. (N. S.) 58; 10 W. R. 109; 5 L. T. 399. Applied, *Cork Distilleries Company v. Great Southern and Western Railway*, 1871, Ir. R. 5 C. L. 185. Distinguished, *Metcalf v. Britannic Ironworks Company*, 1876, 1 Q. B. D. 631. Adopted, *Bethell v. Clark*, 1887, 19 Q. B. D. 560: affirmed 20 Q. B. D. 615.]

The following case was stated on appeal from the County Court of Northamptonshire:—

This was a summons in the County Court of Northamptonshire, holden at Brackley, entered on the 1st day of April, 1861, and tried before the judge of the Court and a jury on the 19th day of the same month.

[401] The particulars of demand were as follows:—"The plaintiff seeks to recover damages in this action, for that the defendants, being common carriers, agreed with the plaintiff on or about the 31st day of December last, for reward in that behalf, to carry and convey from Brackley to Birmingham, and from thence to carry, convey, and deliver into the mill and premises of Mr. Badger, in Birmingham, twenty-eight quarters of wheat, of the value 76l. 10s. 8d.; and that in pursuance of such agreement the said plaintiff caused to be delivered to the defendants, at the Brackley Railway Station, the said twenty-eight quarters of wheat for delivery as aforesaid; but that the said defendants as common carriers did negligently refuse and neglect to deliver the said corn into the mill and premises of the said Mr. Badger in Birmingham as aforesaid; whereby the said plaintiff has sustained damages to the amount of 24l. 6s. 10d."

The plaintiff is a farmer at Whitfield, near Brackley; the defendants are carriers along their railway from Brackley to Birmingham. On the 29th of December, 1860, the plaintiff verbally sold to Badger, a miller at Birmingham, twenty-eight quarters of wheat, at 54s. 8d. per quarter, according to sample, to be delivered to Badger at his mill in Birmingham, carriage paid on; and sent the wheat to the defendants' station at Brackley for that purpose.

Badger's mill is situated at a distance of about two miles from the defendants' station at Birmingham; and the plaintiff, on delivering the wheat to the defendants, paid to them the "station to station rate," as it is termed, of 8½d. for the carriage to

Birmingham, and an additional charge of 1s. 6d. for the carriage of it by van to the consignee's mill.

The wheat was delivered to the defendants at Brackley on the 31st day of December. It was dispatched on the following day, and arrived at Birmingham in due course on the same day.

[402] Badger was in the habit of having large quantities of grain sent to the Birmingham Station, consigned to him, and in consequence of his large business and deficiency of warehouse room at his own mill, he gave instructions from time to time to the railway Company at Birmingham, that no wheat arriving for him at the Birmingham Station was to be sent up to his mill until he had been advised of it, and had given written orders for it to be forwarded.

The last of such notices was delivered by Badger to the Company on or about the 24th of May, 1859. It was signed by Badger's clerk, and was posted up in the office of the clerk of the department at the railway station at Birmingham, and was as follows:—

“May 24, 1859.

“London and North Western Railway Company.

“We have sent you instructions several times not to deliver any grain to our mill unless you have received our written order for the same; no matter whether paid, delivered, or not. You have again this morning delivered the lot of Biddle's contrary to these orders. We beg to inform you that we shall in all cases return to the station any wheat delivered in this way, from this time.

“For JOHN and THOMAS BADGER.

“GEO. E. DOUGHTY.”

In consequence of these instructions, the usage and course of business between Badger and the defendants was for the defendants to advise Badger of the arrival for him of any grain at their station, and not to deliver the same at Badger's mill until they had received instructions from him to do so. On the arrival of the wheat at the Birmingham Station, as above mentioned, the defendants' clerk, whose duty it was, advised Badger by post on the same evening that the wheat [403] in question, consigned to him, had arrived at the station, and remained there at his risk.

On the 2nd or 3rd of January a person in the employment of Badger called at the station in consequence of this advice, and examined the wheat. He took a sample from each of the sacks, and remarked to the Company's servant, “This is rather a roughish lot, John;” but he gave no orders or instructions with regard to it. The defendants did not make to Badger any charge for demurrage or warehousing. The defendants heard nothing further respecting the wheat until the 4th March, and it remained with the defendants at their station from its arrival until that day.

The plaintiff finding that Badger refused to take the wheat, a correspondence ensued between the plaintiff and the Company, in which plaintiff required compensation from the Company, which they refused; and in reference to such claim the Company, on the 19th February, wrote to plaintiff's solicitor, reminding the plaintiff that the wheat was still at Birmingham waiting the order of the plaintiff, and adding that, if not removed without further delay, rent would be charged for warehousing.

On the 4th March a person in the employment of the plaintiff came and looked at the wheat, and found it had deteriorated from having remained so long in the sacks without having been dried. He took samples of it and offered it for sale in the Birmingham market, but could get no higher price offered for it than 40s. per quarter, and he consequently gave the defendants an order to return it to the plaintiff at Brackley, and he paid the carriage of it from Birmingham back to Brackley, where the plaintiff again received it, dried it, and worked it up with other wheat. The plaintiff said that the wheat, when it came back to him, was not worth more than 40s. per quarter.

Upon these facts, the judge directed the jury that the [404] defendants were the agents of the plaintiff, paid by him to carry his goods to Badger's mill at Birmingham, and that the defendants were liable to the plaintiff for their omission to deliver it, and for the damage arising from the deterioration of the wheat while in their custody. That, as between the plaintiff and the defendants, there had been no delivery of the wheat by the defendants to the consignee so as to terminate their liability, and that

the difference between the value of the wheat when it was sold by the plaintiff, and the price that it would fetch in the market at the time when it was again returned into his hands, was the proper measure of damage that the plaintiff had sustained by the neglect of the defendants to deliver the wheat at the mill upon its arrival at their station in Birmingham. The jury found a verdict for the plaintiff for the full amount claimed.

The defendants, being dissatisfied with the determination and direction of the County Court judge in point of law, have appealed therefrom to this Court.

Hayes, Serjt. (S. A. Hill with him), for the appellants. The direction of the judge of the County Court cannot be supported, for it goes to this extent, that there was an absolute contract by the Company to deliver the wheat at the mill of the consignee, whether he had room for it or not, and even though he refused to receive it, whereas the naming a place of delivery is for the convenience of the consignee. [Bramwell, B. Suppose, on the arrival of the wheat at Birmingham, the consignee had come to the railway station, and said to a clerk, "I have sold this wheat, send it to the purchaser," and he did so, would the Company be liable for a breach of contract with the consignor?] According to the direction of the judge he would. But in truth the Company made their warehouse the warehouse of the consignee. [Bramwell, B. Suppose a tailor in London was [405] ordered to send a coat to the house of a person in the country, and that, on coming to a railway station, he found the coat there, and said to a clerk, "I am glad to find my coat here, keep it for me until the evening," would the Company be liable to the tailor for its loss?] The consignor is not prejudiced, if the wheat he sent was according to sample. If he is not in a position to compel its acceptance, either by reason of not having a proper contract, or the wheat not being according to sample, he must bear the loss. The law is thus stated by Bayley, J., in *Foster v. Frampton* (6 B. & C. 109), "Where a man orders goods to be delivered at a particular place, the transitus continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business; for if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the transitus is at an end." In *Whitehead v. Anderson* (9 M. & W. 518), Parke, B., said:—"If the vendee take the goods out of the possession of the carrier into his own before the arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end: though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action." Here the defendants held the goods as agents for the consignee, and subject to a further order to be given by him for their removal.

Field, for the respondent. The ruling of the judge was substantially correct. The Company expressly contracted with the consignor to deliver the wheat at the mill of the consignee, and they made an additional charge for the carriage of it from the station at Birmingham to the mill. That contract they have broken. [Pollock, C. B. The contract [406] was to deliver the wheat at the mill of the consignee, or wherever else he might direct.] The question is, whether a course of dealing unknown to the consignor can deprive him of his right to have his contract performed. The wheat was injured by being kept by the Company for their own purposes. [Wilde, B. May not the consignee waive that part of the contract which requires a delivery at his mill. If he may alter the destination of the goods on their arrival, why may he not do so before their arrival?] He would be dealing with the goods of the consignor, not his own. The consignor cannot sue the consignee, because the sale was by sample, the contract verbal, and there was no acceptance, so that the property in the goods still remains in the consignor. As a general rule, the person who makes the contract has a right to sue for a breach of it. In *Daves v. Peck* (8 T. R. 330), it was held that the consignee might sue the carrier for the loss of the goods, but that decision proceeded on the ground that the consignee directed the goods to be sent by a certain carrier, and the property in them vested in the consignee upon the delivery by the consignor to that carrier. So, in *Dutton v. Solomonson* (3 Bos. & P. 582), it was held that the delivery to a carrier, though not named by the consignee, operated as a delivery to him. But where, as in this case, the property in the goods remains unchanged, the right of action is in the consignor: *Coombs v. The Bristol and Exeter Railway Company* (3 H. & N. 510); *Coats v. Chaplin* (3 Q. B. 483); *Freeman v. Birch* (3 Q. B. 492, note). [Wilde, B. The consignee may come and accept the goods wherever he finds them.]

Nicholson v. Bower (1 E. & E. 172) is an authority that, although the warehouse of the Company may be considered as that of the consignee, the property in the goods never vested in him, because the [407] contract of sale was not binding. [Wilde, B. If a consignee chooses to say to the carrier, "keep the goods for me in your warehouse," why is not the consignee as much bound by that acceptance as any other? If a consignee, without examining the quality of the goods, directs the carrier to deliver them at a particular warehouse, he takes the chance of their being according to sample.] The direction not to forward the wheat to the mill did not operate as an acceptance of it. The power of the consignor over the goods is not at an end until the delivery, or offer to deliver at the place of destination. [Channell, B. Suppose the wheat had been sent from the station at Birmingham to the mill of the consignee, and he had done nothing more than send it back to the station, would not the property have vested in him? Then, what substantial difference is there between that case and the consignee telling the carrier not to deliver the wheat at the mill?] The order did not amount to an acceptance, because it is a negative order, "do not forward the wheat to the mill;" or, if it be considered as an affirmative order, it is "keep the wheat until I see whether I will accept it." [Wilde, B. It is "keep it for me."]

Hayes, Serjt., was not called upon to reply.

POLLOCK, C. B. The subject has been ably discussed; but it seems to me that the judgment of the Court below was wrong, being founded on a notion that the carrier was bound to deliver the wheat at the mill, notwithstanding the distinct and positive order of the consignee not to deliver it there. It is clear that a consignee may receive the goods at any stage of the journey; and though the consignor directs the carrier to deliver them at a particular place, [408] there is no contract by the carrier to deliver at that place and not elsewhere. The contract is to deliver there unless the consignee shall require the goods to be delivered at another place. Here the wheat was delivered at the place where the consignee desired it to be delivered, and therefore the carrier is not liable.

BRAMWELL, B. I am of the same opinion. I cannot think that the contract between the parties is not only an affirmative contract to deliver at the mill, but also a negative contract not to deliver elsewhere. It would probably create a smile anywhere but in a Court of law, if it were said that a carrier could not deliver to the consignee at any place except that specified by the consignor. The goods are intended to reach the consignee, and provided he receives them it is immaterial at what place they are delivered. The contract is to deliver the goods to the consignee at the place named by the consignor unless the consignee directs them to be delivered at a different place. That being so, all difficulty arising from the Statute of Frauds is at an end. If, indeed, it could be shewn that the consignor would be prejudiced by a delivery at any other place than that named, there might be some reason for implying a contract to deliver at that precise place and no other. But still I should think that immaterial, for how can a carrier's liability be affected by the consideration whether or no there was a written contract between the consignor and consignee? It seems to me that in no point of view is it material to inquire whether the consignor can maintain an action against the consignee. But I cannot help thinking that the consignor is not worse off than he would have been if the contract had been strictly performed; because, whatever right of rejection the consignee had, or within whatever time he was bound to reject, [409] he has neither more nor less than he would have had if the wheat had been delivered at his mill. For these reasons I think that the appeal should be allowed.

CHANNELL, B. I am also of opinion that the appeal should be allowed. The contract is, in terms, to deliver at the mill of the consignee; but I think, for the reasons already given, that it did not bind the carrier to deliver at that place and no other, or prevent him from holding the wheat in his warehouse for the consignee. The contract on the part of the carrier is, not that the consignee shall accept, but that the carrier shall deliver. I do not mean to express a decided opinion; but I confess that at present I do not understand how the right of the consignor to maintain this action can be affected by the fact of the goods being above the value of 10l., and the absence of a written contract; although the consignor may possibly have some difficulty in maintaining an action against the consignee by reason of the Statute of Frauds.

WILDE, B. I am of the same opinion. I think that a consignee may at any time dispense with the delivery, which the consignor has contracted for with the carrier,

at a particular place, by receiving the goods which are the subject of the contract at some other place. That indeed was scarcely denied as a general proposition, and much absurdity would follow if it were not so. Suppose that, instead of the goods being delivered at the mill, the consignee, as in this case, desired the carrier to retain them at the station, and that they remained there six months, but afterwards, at the desire of the consignee, were delivered to him. If, during the six months, the goods were injured, would it not be monstrous to hold that the carrier, who had kept them at the request of the consignee, should be responsible to [410] him or the consignor. It would be contrary to common sense and justice if any such doctrine prevailed. I, therefore, think the consignee has the power of ordering the goods to be delivered to him at any place. Then it is said that, though he may have that power, if he exercises it before the goods arrive, that is different from exercising it afterwards. I confess I cannot see the distinction. Then it is said that the rights of the consignor are affected by the nondelivery of the wheat at the place where he directed it to be delivered. I do not think they are. If the consignee accepts the good, his rights and liabilities as regards the consignor are precisely the same whether he accepts them at his mill or at the station. I think that the consignor is under no such difficulty as that suggested, and, even if he were, it would not affect the question whether the carriers' contract was performed.

Judgment of nonsuit.

SINGLETON v. WILLIAMSON. Nov. 21, 1861.—A person into whose field cattle have strayed through defect of fences which he was bound to repair, cannot distrain them damage feazant in another field into which they have got by breaking through a hedge which he kept in good repair, since his neglect was the original cause of the mischief.

[S. C. 31 L. J. Ex. 17; 8 Jur. (N. S.) 60; 10 W. R. 174; 5 L. T. 664.

See further, p. 747, post.]

Trover for cattle.

Plea: Not guilty.(a)

At the trial, before Wilde, B., at the last Cumberland Assizes, the following facts appeared:—The plaintiff, who was a farmer at Irton, in Cumberland, was owner and occupier of a close, which was bounded on the north by the [411] river Irt. The defendant, who was a farmer at Gosforth, was owner and occupier of a close called Bridge Green, which was bounded on the east and south by the river Irt, and was directly opposite the plaintiff's close. In the year 1815, the Commissioners for inclosing lands in the parish of Gosforth, by their award, conveyed Bridge Green in fee to two persons, through whom the defendant derived his title to it. The award directed that "the owners and occupiers of Bridge Green should for ever thereafter uphold and maintain good and sufficient boundary fences on the east and south." After the award the owners of Bridge Green erected and maintained a sufficient fence on the east and south sides of it, but the defendant neglected to repair the fence, and it was broken down in several places. Adjoining Bridge Green on the north was a field belonging to the defendant, called the Cornfield. This field was separated from Bridge Green by a hedge, which the defendant kept in proper repair. In June, 1861, some cattle of the plaintiff, which were in his close, crossed the river, and, in consequence of the defective state of the fence, entered Bridge Green. They then went from Bridge Green, through the hedge, into the Cornfield, where the defendant distrained them, damage feazant. At this time the hedge between Bridge Green and the Cornfield was in good repair.

The learned Judge told the jury that, if they believed that the plaintiff's cattle crossed the river, and got into Bridge Green through the defect of the fence which the defendant was bound to repair, it was immaterial what was the state of the fence of the Cornfield, or whether the cattle were taken damage feazant, for that,

(a) By order of a Judge, made on hearing counsel on both sides, it was ordered that another plea which had been pleaded should be withdrawn, the plaintiff consenting that evidence of any defence might be given under the plea of "not guilty."

under those circumstances, the defendant, having been originally in fault, had no right to distrain. The jury having found a verdict for the plaintiff,

Edward James, in the present term, obtained a rule nisi [412] for a new trial, on the ground of misdirection; against which

Mellish and T. Jones shewed cause. If the defendant had found the plaintiff's cattle in Bridge Green, and distrained them there, it is clear that he would have been liable to an action; and the question is, whether he had any right to distrain them in the Cornfield, into which they got through a hedge in good repair, they having strayed into Bridge Green through the defective state of the fence which the defendant was bound to repair. [Wilde, B. Suppose a person has a hundred acres of land, which he keeps well fenced, and outside this he has a field of five acres, which he does not fence, and cattle get into this field and then break through the hedge into the other land, can he distrain them there?] In order to justify the distress the defendant must establish that the plaintiff's cattle were wrongfully in the Cornfield. But the defendant was bound to fence Bridge Green, not only to keep the plaintiff's cattle out of that field but to keep them in the plaintiff's field, and, having neglected that duty, how can the defendant say they were wrongfully in the Cornfield? If so, this consequence would follow, that where a person is bound to keep up a fence between his own and his neighbour's land, and also an interior fence on his own land, if he neglects to repair the former his neighbour would be obliged to repair the latter. Where there is an obligation to fence, and cattle stray through a defect of fences, the person who is guilty of the neglect is liable for all the consequences which naturally result from it: *Powell v. Salisbury* (2 Y. & J. 391), *Holbach v. Warner* (Cro. Jac. 665). If the plaintiff's cattle, in breaking through the hedge of the Cornfield, had staked themselves, the defendant would have been responsible.

[413] Edward James and Kemplay, in support of the rule. The learned Judge misdirected the jury. Assuming that the defendant was under an obligation, as regards the plaintiff, of fencing Bridge Green, that is no excuse for the plaintiff's cattle breaking through the fence of the Cornfield. If the plaintiff is entitled to recover he would be equally entitled if his cattle had broken through fence after fence and got into a distant field. [Pollock, C. B. If cattle stray over a large district, the person whose neglect first caused them to stray is responsible for the consequences.] The only authority bearing on the point is *Faldo v. Ridge* (Yel. 74), where, to a declaration for a trespass in a close called Great-long-Meade, the defendant pleaded that at the time of the trespass he was possessed of a close called Wood-end, which adjoined a close called Little-long-Meade, and that the close called Great-long-Meade adjoined Little-long-Meade: that the plaintiff was possessed of the closes called Little-long-Meade and Great-long-Meade, and was bound to repair the hedges as well between Wood-end and Little-long-Meade as between Little-long-Meade and Great-long-Meade: that the defendant placed his cattle in Wood-end to feed there: that the plaintiff allowed the hedges between Wood-end and Little-long-Meade to remain open, broken and unrepaired, whereby the defendant's cattle strayed from Wood-end into Little-long-Meade, and from thence into Great-long-Meade, and there consumed the plaintiff's grass, which is the trespass complained of. Upon demurrer to the plea judgment was given for the defendant, but this judgment was reversed in the Exchequer, and upon the record being returned into the King's Bench they gave judgment that the plaintiff should recover, for otherwise, they said, the law would be defective. [Channell, B. To a plea that the defendant took the cattle damage feasant [414] would it not have been a good replication that the cattle strayed from the plaintiff's to the defendant's land by reason of defect of fences which the defendant was bound to repair?] The obligation of the defendant was, not to keep up a fence between his land and the plaintiff's, but to fence his own land. Suppose the defendant had allowed the plaintiff to put his cattle in Bridge Green, and they had broken through the hedge into the Cornfield, would not the plaintiff have been liable? It is conceded that the defendant could not complain of the cattle being in Bridge Green, but, as regards the Cornfield, all that he was bound to do was to keep up a proper fence. The cattle getting into the Cornfield was not the necessary consequence of their getting into Bridge Green. Suppose there had been a wall between Bridge Green and the Cornfield, and the plaintiff's cattle had jumped over it, would he not have been responsible? [Wilde, B. Suppose cattle are in a pound, and a person lets them out, upon which they run over

several fields until they come to a field of the person who released them from the pound?] Their getting into that field would not be the necessary consequence of their being let out of the pound. Suppose there are three adjoining closes, the cattle getting into the third close would not be a necessary consequence of their getting into the first or the second. The state of the fences between the first, second and third closes would be material for the purpose of ascertaining whether the getting into the third close was a consequence of getting into the first. Here the hedge of the Cornfield was in proper repair.

POLLOCK, C. B. The rule must be discharged. When it was moved for, the case was put in a certain light which made me think it worthy of consideration, but I am clearly of opinion that the ruling of my brother Wilde was perfectly [415] correct, and in accordance with the policy of the law. When a wrong is done, and consequential damage sustained, the law inquires who committed the first wrongful act and thereby occasioned the mischief. In this instance the defendant, who was the owner of a close called Bridge Green, was bound securely to fence it, so that the cattle of the plaintiff, who was the owner of an adjoining close, might not be able to stray into it. This the defendant neglected to do, and in consequence the cattle of the plaintiff strayed into Bridge Green, and from thence into another close of the defendant, called the Cornfield. It was argued that the cattle getting into the Cornfield was not a necessary consequence of the defendant's neglect to keep up the fence of Bridge Green. Certainly it was not a necessary consequence—it was not a *causa causans*, but it was a *sine qua non*. If a pit be dug in a highway, or any place where persons have a right to pass, it is not a necessary consequence that anyone should fall into it, though it may be that, either in the night or day time, some one would do so. In such cases it is sufficient if the injury is the accidental result of the wrongful act. If it be, the person who committed the wrong is responsible for the consequences. For these reasons I think that the ruling of my brother Wilde, when examined, is strictly correct.

BRAMWELL, B. I am of the same opinion. It was conceded at the trial that the defendant, as between himself and the plaintiff, was bound to fence Bridge Green. That was a duty on the part of the defendant towards the plaintiff, in order to prevent his cattle from escaping, not a mere obligation on the part of the defendant to protect his own land; and the defendant has no right to complain if, through his own default in this respect, he sustains an injury,—and that comprehends not only an injury which is the necessary consequence, but [416] also an injury which is not an unnatural consequence of the breach of duty. Here the injury was not an unnatural consequence of the defendant's neglect to fence his land. If the plaintiff's cattle, having got into the defendant's field through his neglect to fence, had strayed from thence into the field of a third party, and there sustained injury, according to the authorities the plaintiff would have had a right of action against the defendant. That being so, for the avoidance of circuity of action the defendant should not be allowed to impound the plaintiff's cattle damage feazant on his land, for the plaintiff might maintain an action against the defendant for the impounding, and would recover back as damages the same amount as the defendant obtained from him. There may be cases where a person would not be liable for all the consequences of his neglect, as, for instance, if a bull got into a close through defect of fences, and, being irritated by some person, rushed through a hedge into an adjoining field; or if cattle were tempted to break through the hedge by some person offering them food. But it seems to me, on general principles, that if a person has done or omitted to do some act, and by reason of such commission or omission some not unnatural consequence ensues, whereby he is injured, he cannot complain, because he himself, in the first instance, was in fault.

CHANNELL, B. I am also of opinion that the rule should be discharged. I think that the direction of my brother Wilde was quite correct. It must be assumed in favour of the defendant that the hedge of the Cornfield was in such a state as not to require repair. Then the question is, whether the defendant can resist this action, it being clear to my mind that the cattle would never have escaped but for a breach of duty on his part in not keeping up the fence between Bridge Green and the river. I do not say that [417] under every state of circumstances the defendant would be liable for all the consequences of the cattle having escaped through the hedge of the Cornfield by reason of the defect of the fence between Bridge Green and the river, but I say that the cattle getting into the Cornfield was, if not a necessary, at any rate

not an unnatural, consequence of their getting into Bridge Green. Moreover there was no default whatever on the part of the plaintiff, the owner of the cattle. The injury being the result of the defendant's default, he had no right to distrain the plaintiff's cattle. The case is not distinguishable from that put by my brother Wilde, of a person, who, seeing cattle impounded, breaks the pound and lets the cattle out, upon which they stray through a fence into his own field.

WILDE, B. I am of the same opinion. I am sorry that the matter has been discussed, for it involves a novel point of law; but, on consideration, I retain the same opinion I formed at the trial. No doubt cattle will stray, and it is proper that the person through whose default they have strayed, should be responsible for the consequences of his neglect. Here the defendant, who complains of the cattle having strayed, was bound to fence so as to prevent them getting into his field. He neglected to do so, and the plaintiff cannot be responsible for injury caused by his cattle having strayed, when from the defendant's neglect he had no control over them. The injury was a consequence of the defendant's wrongful act, and therefore he has no right to complain.

Rule discharged.

[418] *HOLGATE AND OTHERS v. KILLICK*. Nov. 9, 1861.—An arbitrator, on the day on which he made his award, with a view to prevent further litigation, wrote to one of the parties a letter which disclosed the ground of his award. Held, that the letter could not be used for the purpose of shewing that the arbitrator was mistaken in point of law.

[S. C. 31 L. J. Ex. 7; 10 W. R. 10; 5 L. T. 358.]

This action was commenced by a writ specially indorsed to recover 277l. 19s. 8d., the balance of account alleged to be due from the defendant to the plaintiffs in respect of the rent of a farm. The defendant did not appear to the writ, and judgment by default was signed. The defendant subsequently applied to a Judge at Chambers to set aside the judgment, and for leave to appear and defend. The application was made on an affidavit, which stated that he had a good defence on the merits, except as to the sum of 18l. or 20l. Thereupon the Judge made an order that, on payment to the plaintiffs of 20l. and costs, the judgment should be set aside, and the defendant be at liberty to appear and defend. The defendant paid the 20l. and costs, and the plaintiffs then declared for use and occupation. The defendant did not plead to the declaration, but took out a summons to refer the action under the 3rd section of the Common Law Procedure Act, 1845, as being matter of mere account. An order was accordingly made, referring the action to a Master of this Court. At the hearing, it appeared that part of the premises, in respect of which the action was brought, was mortgaged, and the plaintiffs were owners of the equity of redemption: that they became owners of the part mortgaged, and also owners in fee of the residue, subsequent to the mortgage, and at Michaelmas, 1857, let them to the defendant at a rental, the terms of which the defendant disputed. The defendant paid the plaintiffs the rent due at Michaelmas, 1858. On the 11th of January, 1859, the mortgagees served the defendant with a notice to pay the rent to them, and, in pursuance thereof, the defendant paid portions of [419] the rent to the mortgagees. It was contended on the part of the defendant that, inasmuch as he had received notice from the mortgagees to pay the rent to them, the plaintiffs had no right of action. It was contended on the part of the plaintiffs, that the payment of the 20l. into Court estopped the defendant from denying the plaintiffs' title; and also that, as he had not paid to the mortgagees all the rent due, and pleaded payment thereof, the plaintiffs were entitled to recover. On the 23rd of August, 1861, the Master certified that he found nothing to be due from the defendant to the plaintiffs, and he ordered the plaintiffs to bear their own costs, and pay the defendant half his costs of the reference. On the same day (a) the Master wrote the following letter to the defendant's attorney, and gave it to the plaintiffs' attorney to deliver to him. "Dear Sir,—I have made my award in *Holgate and Others v. Killick*, finding for the defendant, and gave him half his costs of

(a) The affidavit of the plaintiffs' attorney stated, that "contemporaneously with the certificate the Master wrote the letter."

the reference. With respect to the matters in difference, as between Killick and the mortgagees, I cannot undertake the responsibility you wish to confide in me, of modifying the agreement of the 15th of August, but in order to give the parties interested the benefit of the time occupied before me, and to carry out the friendly spirit of arrangement which appears to exist between yourself and your client, and the persons to whom he is liable for rent, I will so far deviate from the usual course as to give you my opinion upon the several questions raised by that agreement, as founded upon the evidence given in *Holgate and Others v. Killick*, so as to give you the opportunity of acting upon it at your discretion." Then followed the Master's opinion upon the questions; and, amongst other things, he stated that all the rent was due to the mortgagees, as their notice and the [420] subsequent payment of rent to them, constituted a fresh tenancy. The letter concluded as follows—"I have seen the plaintiffs' attorney, and I now hand him the letter to be forwarded to you. I shall be glad if I have been able to assist the parties, and prevent the necessity for future litigation."

Pratchett now moved for a rule to shew cause why the Master's certificate should not be set aside, or remitted to him for reconsideration. The letter written by the Master is substantially part of his certificate, and it appears by the reasons he has given for his decision, that he was mistaken in point of law. The payment of rent to the mortgagees is no answer to this action, and as the defendant, by paying 20l. into Court, admitted that some rent was due, the only question before the Master was the amount. Unless the mistake is remedied the defendant will evade the payment of rent, for the mortgagees cannot distrain or sue for use and occupation. In *Hogge v. Burgess* (3 H. & N. 293) Watson, B., said:—"Where an arbitrator professes to decide according to law, but does not do so, if the mistake appears on the face of the award, or is disclosed by some contemporaneous writing, the Court will set aside the award." That is in accordance with *Kent v. Elstob* (3 East, 18), where it was laid down that if an arbitrator profess to decide upon the law, and mistake it, the Court will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper delivered therewith. [Bramwell, B. *Leggo v. Young* (16 C. B. 626) is an express authority that the Court cannot look at the arbitrator's letter for the purpose of seeing that he was wrong in point of law. In *Hogge v. Burgess*, Watson, B., never intended to say anything contrary to what was laid down by Maule, J., in [421] *Leggo v. Young*. Wilde, B. By "contemporaneous writing" is meant some writing attached to and forming part of the award. The question here is whether the Master's letter substantially forms part of his certificate. The affidavit does not state that the letter was delivered contemporaneously with the certificate. It was written, not so much for the purpose of giving the reasons for the conclusion at which the Master arrived as for facilitating a settlement of all disputes between the parties.]

BRAMWELL, B. The rule must be refused. If granted it would certainly be discharged. I am not dissenting from anything that was said by this Court in *Hogge v. Burgess*, or by the Court of King's Bench in *Kent v. Elstob*, where it was held that a paper delivered contemporaneously with the award formed part of it. Those decisions were right upon the facts. In *Leggo v. Young*, Maule, J., explains *Kent v. Elstob*, and says, "there the arbitrator delivered with his award a paper containing observations upon the evidence laid before him, and his reasons for making the award as he did. That, therefore, was a paper, which substantially formed part of the award, and was intended to do so. Here, however, there is no document delivered with the award to both the parties, but merely a letter addressed to one of them, intimating the umpire's regret that he could not give him the costs. I do not think that is a sort of thing that should be taken notice of, or permitted to operate against the deliberate decision to which the umpire has come." In the subsequent case in this Court of *Hogge v. Burgess*, Watson, B., whose opinions are entitled to the greatest respect, uses the general words "contemporaneous writing," by which he means a writing forming part of the award. Neither he nor my brother Martin ever intended to depart from the ratio decidendi, or the opinion expressed [422] by the Court of Common Pleas in *Leggo v. Young*. In this case the letter forms no part of the award, but is only advice given by the Master in order that the parties may not waste their time and money in future litigation. I therefore think that the rule ought to be refused, but I do not say that the Master was wrong, or that the difficulty suggested by Mr. Pratchett exists.

WILDE, B. The principle to be collected from the later cases is plain, viz., that the Courts will not look at anything for the purpose of reviewing the decision of an arbitrator upon the matter referred to him, except what appears on the face of the award, or some paper so connected with the award as to form part of it. If that were otherwise, affidavits might and probably would be made, that the arbitrator informed some person or other that the reason for his decision was so and so, which was a mistake in fact or in law. The simple question is, whether this letter is part of the Master's certificate. I am of opinion that it is not only not a part of the certificate, but that it was merely written for the purpose of conciliation, the Master, from a kind motive, thinking that he could assist the parties in coming to a settlement of their differences.

Rule refused.

[423] BAGNALL AND ANOTHER v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY. Nov. 25, 1861.—The plaintiffs were owners and occupiers of a coal mine which, as well as the surface land, formerly belonged to the same owner. A railway Company, to whose rights and obligations the defendants succeeded, purchased, under the powers of their act of parliament, the surface land for the purpose of their railway, and constructed it thereon. The Company cut and removed upwards of twenty feet in thickness of the surface soil over the plaintiffs' mines to get the level at which they laid their rails. This soil was clay impervious to water; by removing it a porous rock was reached. The soil was in like manner cut away by the Company along the length of their line to a lower district of country, through which a brook flowed. The railway was carried over the brook by a flat bridge. The line of railway sloped downwards from the bridge to the part over the plaintiffs' mine. The bridge was sufficient to let the ordinary water of the brook pass, but was an impediment to the passage of water in large floods. The Company were required by their act of parliament to make and maintain sufficient drains. At the time the railway was made the plaintiffs' mine was not worked within forty yards of it; and drains were made at the side of the railway sufficient to carry off the water. Subsequently the plaintiffs gave the defendants notice of their intention to work the mine under the railway. The defendants having declined to purchase the mine the plaintiffs worked under it, when, from no fault or negligence of theirs, but as the natural consequence of fair and lawful working, the railway sank and continued to do so from time to time. The defendants threw materials of a porous character on the sunken parts, but did not repair or puddle the drains. In the year 1860 a flood happened, and the water, part of which would have escaped but for the bridge, flowed down the railway, and in consequence of the high ground between the brook and the surface over the mine being removed it reached that spot, and, together with the water falling there and the springs arising in the cutting, penetrated into the mine for want of efficient drains. Held, that the defendants were liable in an action for the damage sustained by the plaintiffs; and that the claim was not one which could have been enforced under the Compensation Clauses of the Railway Clauses Consolidation Act, 1845.

[S. C. 31 L. J. Ex. 121; 8 Jur. (N. S.) 16; 5 L. T. 621: affirmed 1862, 1 H. C. 544.]

The first count of the declaration stated, that whereas the Grand Junction Railway Company, by virtue of an act of parliament passed, &c. (3 Wm. 4, c. xxxiv.), intituled "An Act for making a railway from the Warrington and Newton Railway at Warrington, in the county of Lancaster, to Birmingham, in the county of Warwick, to be called 'The Grand Junction Railway,'" made and constructed the railway hereinafter mentioned. And whereas the defendants, by virtue of an act of parliament passed, &c. (9 & 10 Vict. c. cciv.), intituled "An Act to consolidate the London and Birmingham, the Grand Junction, and the Manchester and Birmingham Railway Companies," acquired the said railway, and have ever since been and still are owners and workers of the same; and the plaintiffs, before and at the times of the committing by the defendants of the grievances hereinafter mentioned, were possessed of certain lands ad-[424]-joining to and through which the said railway of the defendants passes,

and were the owners of, and had the right of getting, certain seams of coal, ironstone, and other minerals, and of working certain mines, and a certain colliery, lying and being under the said lands, and under the said railway where it passes through the same; and the strata between the said mines and colliery and the surface above the same, are, and at and before the times of the committing of the grievances by the defendants, and of sustaining of the damages by the plaintiffs as hereinafter mentioned, were subject to become and were in such a state and of such a nature as to allow any accumulation of water on the surface thereof, and on the said railway, to penetrate into and through the same down into the said mines and colliery of the plaintiffs; of all which the defendants, before the times of the committing of the said grievances, had notice. And the plaintiffs say, that near to their said lands and colliery is a certain brook, called "Tame Brook," across which said brook the railway of the defendants is carried by means of a flat bridge constructed for that purpose; and that before the said railway of the defendants was made there was a rising ground near the said brook, where the said railway now crosses the same, which entirely prevented any of the water of the said brook from flowing into, upon, or over the plaintiffs' said lands, mines, and colliery; and that the said Grand Junction Railway Company, in making their said railway, cut through the said rising ground and carried their said railway in the said cutting at a much lower level than the surface of the adjacent land. And the plaintiffs say, that the said bridge over which the said railway was carried was and is incapable, from the insufficiency thereof, of carrying off and permitting the water of the said brook, in times of flood, to flow away in its natural course, and at such times the water of the said brook, being obstructed by the said railway and [425] bridge, is accumulated at a high level, and escapes into and runs along the said railway through the said cutting, and used to escape along certain large drains made on and by the side of the said railway, from a point near to the said flat bridge, through the said cutting, over the plaintiffs' said lands, mines, and colliery, to a point where it escaped without doing any damage to the plaintiffs' mines; and while the said drains were kept in proper order the said water always so escaped without doing any such damage. And the plaintiffs say, that it became and was the duty of the defendants to provide for the passing away of the water of the said brook in times of flood, either by maintaining a proper and sufficient bridge, or other means of passage, at the place where the said railway crosses the said brook as aforesaid, so that the said water might pass away in its natural channel along the said brook, or to maintain and keep the said drains, or other drains or means of passage, in good order and condition, so that the said water might pass away along them without resting on the surface, and sinking through the earth into the plaintiffs' said mines and colliery: Yet the defendants wholly neglected their duty in that behalf, and did not provide for the passing away of the water of the said brook in times of flood, either by maintaining such a proper and sufficient bridge, or other means of passage as aforesaid, or by maintaining and keeping the said drains, or any other drains or means of passage, in good order and condition, so that the said water might pass away along them as aforesaid; whereby, and by means of the premises, and by reason of the want of care and of the neglect of the defendants in that behalf, and of the said drains being allowed to be broken, choked up and in bad order and condition, the said railway and lands of the plaintiffs became and were flooded with water from the said brook, which water sank and penetrated into and through the [426] strata lying beneath into the said mines and colliery of the plaintiffs, and filled the same; and the plaintiffs were thereby wholly prevented from working their said mines and colliery, and from getting the coal, ironstone and other materials therefrom, and have been put to great expense in pumping out the water from their said lands and collieries, and in restoring them to their former condition, and have lost large profits, which they would have made from the sale of the said coals and other minerals, &c.

Second count. For that, whereas, after the making of the said cutting in the first count mentioned, and the said railway in and through the same, and after the defendants acquired and became the owners and workers of the said railway as in the said first count mentioned, and while the said mines and colliery of the plaintiffs were subject to become and were in such a state and of such a nature as in the first count mentioned, large quantities of water continually arose in the said cutting from rain falling therein, and from surface drains intercepted and springs opened up by the said cutting and otherwise; and it thereupon became and was the duty of the defendants

to provide sufficient drainage in the said cutting and means whereby the rain and water in this count mentioned should be carried off and prevented from accumulating in the said cutting and upon the said railway, so as to penetrate into the said mines and colliery of the plaintiffs: Yet the defendants wholly neglected their duty in that behalf, and did not provide any sufficient drainage in the said cutting, or means whereby the said last mentioned water was or could be carried off and prevented from accumulating in the said cutting and upon the said railway, but on the contrary thereof allowed certain drains which had theretofore been made therein to be broken, choked up and out of repair, whereby and by reason of the premises in this count mentioned, the said railway, and the [427] said lands of the plaintiffs adjoining thereto, became and were flooded with rain-water falling in the said cutting, and with water produced and arising from the said surface drains and springs, which water sank and penetrated through the strata lying below into the said mines and colliery, and filled the same, and the plaintiffs thereby suffered and sustained a similar damage as in the first count mentioned.

Pleas. First: Not guilty. Secondly, to the first count: That the plaintiffs were not possessed of the lands therein mentioned, nor the owners of, nor had they the right of getting, the said seams of coal, ironstone, or other minerals, or of working the said mines and colliery lying and being under the said lands, or under the said railway, *modo et formâ*. Thirdly, to the first count: That the defendants had not notice of the said circumstances in the first count alleged as to the said strata therein mentioned. Fourthly, to the first count: That there was not such rising ground near the said brook as therein mentioned, nor had it the effect therein mentioned, nor did the said Grand Junction Railway Company cut through the said rising ground and carry their railway at such lower level as alleged. Fifthly, to the first count: That the said bridge was not nor is incapable, from the insufficiency thereof, of carrying off and permitting the water of the said brook in times of flood to flow away in its natural course, nor is such water at such times obstructed by the said railway or bridge, nor does the same accumulate, escape into, or run along the said railway through the said cutting, as alleged. Sixthly, to the second count: That the said water did not arise in the said cutting in manner and form or from the causes in that count alleged. Seventhly, to the second count: That the said cutting therein mentioned was not made in the manner alleged. Issues thereon.

The cause was tried, before Blackburn, J., at the Stafford-[428]-shire Spring Assizes, 1861, when a verdict was entered for the plaintiffs, subject to the following case:—

The railway mentioned in the declaration was formerly called the Grand Junction Railway, and was constructed by the Grand Junction Railway Company, under the authority of the 3 Wm. 4, c. xxxiv., intituled “An Act for making a railway from the Warrington and Newton Railway at Warrington, in the county of Lancaster, to Birmingham, in the county of Warwick, to be called ‘The Grand Junction Railway.’”

By the Act, 9 & 10 Vict. c. cciv., certain railway Companies, viz., the London and Birmingham Railway Company, the Grand Junction Railway Company, and the Manchester and Birmingham Railway Company, were dissolved, and the proprietors of shares and stocks therein were incorporated by the name of “The London and North Western Railway Company;” and the railways of the said Companies, including the Grand Junction Railway Company, were vested in and declared to belong to the said London and North Western Railway Company, who are the defendants in this cause, and they have ever since continued to be the owners of the railways, and the occupiers and workers thereof.

The plaintiffs were the proprietors of a colliery called “The Crescent Colliery,” in the parish of Willenhall, in the county of Stafford. The mines and minerals belonging to the plaintiffs, and forming part of the colliery, lay under the railway mentioned in the declaration, and extended on both sides of it. The distance of the bridge, hereinafter and in the declaration mentioned, from the nearest boundary of the colliery (measuring along the line of railway) is 570 yards.

Before the making of the railway there was at this place, [429] and still is, a brook, called “The Tame Brook.” On that side of the brook on which the plaintiffs’ colliery is, the ground rose to a much higher level than the level of the brook. The railway was carried across the brook by means of a bridge, mentioned in the declaration, and immediately on crossing entered into a cutting made by the Company for the purpose;

and the depth of the railway in the cutting below the surface, where it passed over the plaintiffs' colliery, varied from twenty-one feet to twenty-seven feet.

The bridge which carried the railway over the brook (being the bridge already mentioned) was a flat bridge, the girders of which, at their lower surface were from two feet to two feet six inches above the level of the brook, and being one foot in depth, were at their upper surface from three feet to three feet six inches above the level of the bed of the brook. The upper surface of the rails on which the carriages ran was on a level with the upper surface of the girders. These girders rested on their ends on pieces of masonry at each side of the brook, and were supported between the piers by iron pillars resting on the bed of the brook, and standing in the water-way.

The Grand Junction Railway Company, in making the railway, made the cutting and the bridge at the level at which they have stood ever since, and now stand.

Before and at the time of the application to parliament for making the railway the following Standing Order of the House of Commons, "relating to bills for making navigable canals, reservoirs, aqueducts, and the navigation of rivers," had been extended to bills for making any ways or roads commonly called "railways or tram-roads," viz., "that in cases where application is intended to be made for a bill for making any cut, canal, reservoir, or aqueduct, for the purpose of navigation, or for supplying any city, town or place with water, or for varying, abridging, extending, or enlarg[430]-ing any such cut, canal, reservoir, or aqueduct already made or authorized to be made, or for making or improving the navigation of any river, a map or plan and section of such intended cut, canal, reservoir, aqueduct, or navigation, or of any intended variation, abridgment, extension, or enlargement of any cut, canal, reservoir, aqueduct, or navigation already made, upon a scale of not less than three inches to a mile, so far as relates to the said cut, canal, reservoir, aqueduct, or navigation, or to such variation, abridgment, extension, or enlargement, shall be deposited for public inspection at the office of the clerk of the peace of every county, riding, or division in or through which such cut, canal, reservoir, aqueduct, or navigation, or such variation, abridgment, extension, or enlargement, is intended to be made, on or before the 30th November previous to the session of parliament in which such application is intended to be made, which map or plan shall describe the line or situation of such intended cut, canal, reservoir, aqueduct, or navigation, or of such intended variation, abridgment, extension, or enlargement, and the lands in or through which it is intended to be made, together with a book of reference, containing a list of the names of the owners or reputed owners and occupiers of such lands respectively; and the plan shall also describe the brooks and streams to be diverted into such cut, canal, reservoir, aqueduct, or navigation, or into such variation, abridgment, extension, or enlargement, for supplying the same with water, and the elevation of any such aqueduct, and such section shall specify the levels, and describe the same by feet and inches."

In pursuance of this Standing Order, plans and sections of the railway, as intended to be made, and as afterwards formed, in the parish of Willenhall, were deposited with the clerk of the peace at Stafford. The vertical scale of the section was 100 feet to an inch, and indicated the places [431] where the intended line crossed brooks and roads; but the sections did not shew the height at which the railway was intended to cross the brooks and roads, and the railway might have been carried over the brook in question at a greater elevation without exhibiting any inconsistency with, or apparent deviation from, the deposited sections or plans. The sections, however, represented, and the railway at this part of the line was constructed with, a slight inclination, the descent being from the bridge towards the plaintiffs' mines. The gradient, as represented in the section, was apparently uniform for some miles, in the course of which the railway crossed several turnpike and other roads, as well as brooks.

The railway, from the bridge through the cutting and over and beyond the plaintiffs' mines, was, as already stated, on a slight descent, and was constructed with a drain on each side, about three feet in width and two feet in depth, which drains discharged themselves into another brook beyond the other end of the cutting, and beyond the plaintiffs' mines.

At the cutting, and over the plaintiffs' mines, there are about twenty-three feet of soil and clay in depth from the surface, impervious to water; and below the soil and

clay, and above the plaintiffs' mines, there is a stratum of stone, called the new mine rock, which is a brittle rock, subject naturally to cracks and fissures, and is very liable to be split and broken if let down or sunk, from mines being worked under it. In making the cutting and the railway the soil and clay were entirely cut through, and the new mine rock below was cut into a depth varying from one foot to four feet, and the railway was formed in the cutting at a level varying from one foot to four feet below the upper surface of the new mine rock.

[432] At the time when the railway was made no mines had been worked underneath its site at the place in question.

In the year 1858 the plaintiffs, who for about two years previously had been working their mines, approached with their workings to a distance of forty yards from the railway, and were desirous of working their mines under the railway, and within the distance of forty yards from it; and thereupon, on the 8th October in that year, they gave to the defendants a notice in writing, under their hands, of their intention so to work; and the defendants caused the mines to be inspected, but did not agree for the purchase of the mines or minerals, or any part thereof, and the defendants did not at any time declare their desire to purchase such mines, and did not treat for the same; and thereupon the plaintiffs, after the expiration of twenty-one days at least from the giving of the said notice, began to work and did work and get the mines lying under the railway, and within the distance aforesaid: and, although damage was thereby done to the railway as after mentioned, such damage was not willfully done, nor was it caused by the working of the mines in an improper manner.

The consequence of such workings was, that the railway in the cutting sank from time to time, such sinkings amounting in the whole to several feet, and the rock between the mines and the railway cracked, so as freely to allow water, falling or being upon the surface of the railway, to pass through the rock into the mines. The drains by the side of the railway sank with the rest of the surface of the cutting, and were cracked and broken, and it became necessary for the defendants to raise the railway to its former and proper level. This was done from time to time, as frequently as the sinkings occurred, with materials (principally ashes obtained from works in the neighbourhood) of a kind which [433] admitted of water sinking into and passing through them. In raising the railway the drains were filled up with the materials thus used, and from the porous nature of these materials, and from the cracking and sinking of the surface of the railway and of the drains, caused by the plaintiffs' mining, water falling and being upon the surface of the railway and drains sank through into the mines beneath.

At the time of the injury hereinafter mentioned the plaintiffs had worked out the mines under the railway, but continued their workings in other parts of their colliery, and the sinking and drainage of the railway had not then ceased.

The drains in question were made at the time the railway was carried through the cutting, and formed in the rock above mentioned. The object of such drains was to keep the railway clear of water, and until they were sunk and cracked as above mentioned they were sufficient for that purpose.

Evidence was given for the plaintiffs, that wherever mines are being worked, and the strata are of such a nature as to allow of water passing or sinking through into the mines, it is very important to keep the drains on the surface well puddled and water-tight. On the other hand, the evidence for the defendants was, that it was impracticable to keep the drains open while the mining was going on, as they were so frequently being let down; and that the puddling the drains would not, in the case of floods, prevent water from escaping through the cracks in the new mine rock into the plaintiffs' mines, unless the whole surface of the railway were also kept puddled.

The area of the cutting over the plaintiffs' mines, and from thence up to the Tame Brook (measuring the surface of the sloping sides), is five acres and three quarters, and the rain falling in that area, as also the water from the [434] springs in the cutting laid open in its formation, passes on, to, or over the plaintiffs' mines.

On the 14th August, 1860, in consequence of heavy rains, there was a flood in the Tame Brook, and at the bridge above mentioned the water rose to a higher level than the top of the girders, and overflowed the railway and large quantities of water flowed down the cutting, partly along the railway and partly along the drains. When the water arrived at the place where the railway sank, and had been raised as aforesaid, it sank through the before mentioned materials, and through the cracks in the new

mine rock, caused as aforesaid, into the mines of the plaintiffs. By these means the plaintiffs were drowned out of some of their workings, and sustained considerable damage.

The plaintiffs alleged, and called witnesses to prove, that the overflow of the water at the bridge was entirely caused by the obstruction which the bridge itself, its piers, pillars and girders, presented to the flow of the water. The defendants on the other hand, alleged, and called witnesses to prove, that the obstruction presented by the bridge had no effect in raising the level of the water at the bridge, and that, if the bridge had not been there, the water would have risen to the same level, and an equal quantity of water would have flowed down the cutting, and so into the plaintiffs' mines.

The plaintiffs also alleged, and called witnesses to prove, that if the drains by the side of the railway had been kept in proper order, on the proper level, and properly water-tight, from time to time, as the railway was raised, the whole of the water which came from the brook down the cutting would have been carried by those drains, and so would have passed over the plaintiffs' property without sinking into the earth or getting into the mines. The defendants, on the other hand, alleged and called witnesses to [435] prove that, even if the drains had been in perfect order, they were not of sufficient capacity to carry the whole of the water which flowed down the cutting, and that a large portion of the water must have passed over the line of railway in the cutting, and would have sunk into the mines.

It was admitted that the Company's surveyors and engineers from time to time went into the plaintiffs' mines and inspected the workings, and that the defendants knew the nature of the strata, and that water from the railway would get into the mines.

On several occasions between the making of the railway and the flood of August, 1860, there had been floods which caused water to flow down the cutting; and it was also proved that since the flood in August there had been other floods in the brook which would have caused water to flow into the cutting, but the defendants, by putting a dam across the cutting, had prevented the water from passing into it.

It was proved that the flood of August, 1860, was a high flood, but not a very extraordinary one; and that there was a flood of about the same height in December, 1860, and a still higher flood in the year 1852.

The plaintiffs' counsel contended that one cause of the insufficiency of the bridge was, that it was constructed at too low a level to allow the water to pass under it in times of flood, and that, if it had been constructed at a higher level, not only would the water have had room to pass under it, but as the cutting would have been less deep, the level of the water, whether in any degree obstructed by the bridge or not, would not have risen to the bottom of the cutting, and consequently none of the water from the brook could have got into the cutting. But the learned Judge held that, for the purpose of the trial, he would assume that the Company were bound to make their railway on the level on which they had made it, and they were right in making the [436] cutting of the depth they did; and that the plaintiffs were bound to shew that an insufficient bridge caused the damage; and that, in shewing the bridge to be insufficient, the plaintiffs were not in a condition to find fault with the cutting; observing that on this subject there could be no question of fact, as it was obvious that if the railway had been a foot higher and the cutting a foot shallower, the water could not have entered it; and that the question, whether the plaintiffs could succeed in establishing the insufficiency of the bridge by this means, was a question of law, and must be reserved for, and decided by, the Court.

The Judge put certain questions to the jury, the precise terms of which were as follows:—

1. Whether the bridge has in any floods (by which I mean to call your attention to floods not so high as the flood in August), the effect of causing water to flow down the cutting, which, if there was a sufficiently wide water-way under the bridge, would flow down the brook, though the line was at its proper level? To this question the jury answered, that "the bridge was sufficient for ordinary purposes."

2. Whether the bridge made any difference in the quantity of water flowing down the cutting in the floods of August which did the mischief? The jury answered, that "the bridge caused some difference in the quantity of water flowing down the cutting, but was not the principal cause of the mischief."

3. Whether the side drains, if kept open and puddled, would carry off the whole water of ordinary floods, not so high as the floods of August, 1860? The jury answered "yes."

4. Whether, if the drains were kept open and not puddled, the whole water in such floods, as first supposed, would equally have sunk through the bottom of the side drains into the mines? The jury answered, that "the greater portion would go into the mines."

[437] 5. The same question as the third, but applicable to the August floods? The jury answered, that "the greater portion would be carried off."

6. The same question as the fourth, but applicable to the August floods? The answer of the jury was, "no; a portion would have gone off, but not all."

The Judge thereupon directed a verdict to be entered for the plaintiffs, subject to this special case.

It was agreed between the parties that the jury should not be required to assess the damages, but that they should be referred to an arbitrator to be assessed, in accordance with the judgment of the Court, if the judgment should be in the plaintiffs' favour; and it was agreed that the Court should, if necessary, be at liberty to draw such inferences of fact as they might think a jury should have drawn: and also that they should be at liberty to amend for either party, if they should think any amendment necessary.

The questions for the opinion of the Court are:—

First, whether the plaintiffs are entitled to recover on the first count; and, if so, whether for the damage done by the whole of the water of the flood of August, or with any and what limitations.

Secondly, whether the plaintiffs are entitled to recover on the second count.

Gray (with whom was Macnamara) argued for the plaintiffs (Nov. 13). Upon the facts stated, the plaintiffs are entitled to recover on both counts. The surface land was purchased by the Grand Junction Railway Company, for the purpose of their railway, under the powers of the 3 Wm. 4, c. xxxiv., which contains provisions similar to those in the Lands Clauses Consolidation Act, 1845, by which mines are reserved to the owners, but they are required to give the Company twenty-one days' notice of an inten-[438]-tion to work them. In making the railway it was necessary to cross a brook on one side of which was some rising ground, and the Company erected a bridge across the brook and made a cutting through the rising ground over the plaintiffs' mines. At this time the mines had not been worked. The cutting was made so deep that in flood times the water rises above the level of the rails, and flows along the cutting over the plaintiffs' mines until it escapes into another brook. If the cutting had been a foot shallower, the bridge must have been a foot higher, and that would have remedied the mischief. The plaintiffs complain that in times of flood the flow of the water of the brook is obstructed by the railway and bridge; the defendants answer that the railway and bridge have been constructed as delineated on the plan and sections deposited with the clerk of the peace of the county. But the 3 Wm. 4, c. xxxiv., does not require the railway to be made according to sections, and moreover there is nothing in the sections to shew that the level of the railway and bridge might not have been raised. On each side of the railway there was a drain, which until the mines were worked carried off the water. In the year 1858, the plaintiffs, who had worked their mines to a distance of forty yards from the railway, gave the defendants notice, under the 70th section of the 3 Wm. 4, c. xxxiv., of their intention to work under the railway. The defendants caused the mines to be inspected, but elected not to purchase them, thinking, probably, that it would be cheaper to raise the railway, if it sank in consequence of the working, than to buy the mines. The plaintiffs then worked the mines in a proper manner and without doing wilful damage; but in consequence of such working the railway in the cutting sank several feet, the rock between the mines and the railway cracked so as to allow the water to flow through it into the plaintiffs' mines, and the drains [439] were broken. From time to time, as the sinkings occurred, the defendants raised the railway to its former level, but in so doing the drains were filled up. It was not enough for the defendants to attend to their own convenience and raise the level of the railway; they ought also to have reconstructed the drains. It may be said, why are the defendants to pay for damage which has in some measure been caused by the plaintiffs. *Fletcher v. The Great Western Railway Company* (4 H. & N. 242. In error,

5 H. & N. 689) is an express authority that as the defendants declined to purchase the mines after notice from the plaintiffs that they intended to work them under the railway, they were entitled to do so, although the working might cause the surface to subside. [Channell, B., referred to *Stourbridge Canal Company v. The Earl of Dudley* (30 L. J. Q. B. 108).] The defendants only bought and paid the plaintiffs for the surface, and therefore they had a right to work the mines in as profitable a manner as if the surface had never been sold. It is through the election of the defendants not to purchase the mines that the railway has sunk. To say that the plaintiffs were the cause, and therefore they cannot complain, would be to deprive them of a large portion of the value of their land without any compensation. [Channell, B. The obligation originally imposed on the Company was not only to make but to maintain drains.] By the 180th section of the 3 Wm. 4, c. xxxiv., the Company are required to make, and from time to time maintain, such and so many "ditches, drains and passages over, under, or by the side of or leading to or from the said railway, of such dimensions and in such manner as two or more justices," &c., "shall, upon the application of the owner, lessee, or tenant of any lands, mines, or minerals, judge necessary and appoint," &c. And the 196th section requires the Company to make such [440] "drains, or other passages, over, under, or by the side of the said railway, and the fences on the sides thereof respectively, of such breadth, depth, and dimensions as shall be sufficient at all times to convey the water as clearly from the lands adjoining or lying near to the said railway as before the making of the said railway," &c. The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, which is incorporated with the 9 & 10 Vict. c. cciv., contains a similar provision: sect. 68. By the interpretation clause, section 3, the word "lands" shall include "tenements," therefore it will include mines; and reading the first and third clauses of the 68th section in conjunction with the interpretation clause, it is clear that the Company are bound to make and maintain works for the protection not only of the surface land but also the mines beneath it. Although, in one sense, it may be said that the plaintiffs by working the mines have caused the damage, yet in a legal sense they have not, for they had a right to work them. The damage was in truth caused by the Company, who, having refused to purchase the mines, neglected to maintain the drains. The Company might, by constructing proper works, have prevented the injury which the plaintiffs have sustained, and therefore they are responsible for it: *Lawrence v. The Great Northern Railway Company* (16 Q. B. 643). [Pollock, C. B. It is no answer for the Company to say, "What we have done we have done under an act of parliament which gave us certain powers." Those powers are subject to the maxim, "Sic utere tuo ut alieno non lædas." The power to make a railway can only be used to this extent, that it cannot be said that the act per se is a nuisance. The common law allows any person to build on his own land, but it does not allow him to build so as to obstruct his neighbour's light.] Then with respect to the finding of the jury. The plaintiffs contended at the [441] trial that the Company ought to have constructed the bridge a foot higher; but the learned Judge ruled that the question of level, and whether the plaintiffs could by that means succeed in establishing the insufficiency of the bridge, was a question of law. The jury found that the bridge caused some of the damage; and that, if the drains had been kept open and puddled, the greater portion of the water would have been carried off. The defendants have constructed the railway improperly both in respect to the level, and irrespective of the level, and also in not maintaining the drains.

Bovill (Pigott, Serjt., with him), for the defendants. The defendants are entitled to judgment. It is material to ascertain upon what ground the plaintiffs rest their action. Not upon the infringement of any common law right, or any neglect of duty. No duty is cast upon the Company. [Pollock, C. B. There is a duty of this kind. Any person has a right to travel on a public highway, but he has no right to ride over people.] The original Company purchased this land for the purpose of constructing their railway as authorized by the 3 Wm. 4, c. xxxiv., and it is not suggested that they have exceeded their powers. They acquired, in respect of the purpose for which they purchased the land, all the rights, and became subject to all the obligations of surface owners, and to no others, unless imposed by the legislature. It is said that, consistently with the Act, the railway might have been made at a higher level; but it might, consistently with the Act, have been made at a lower. That depends on a variety of circumstances. The Act gives no instructions as to gradients or

sections, nor does it require that the bridge should be built at any particular height. The 2nd and 4th sections clearly authorized the Company to do all that they have done, and if any [442] injury to the plaintiffs was likely to result therefrom, their remedy was either to oppose the bill in its progress through parliament, or seek redress under the compensation clauses. Then, what are the obligations of the defendants, and what are the rights of the plaintiffs? Private interest must yield to public benefit. The legislature authorized the Company to cut through this bank of clay. [Bramwell, B. It has authorized them to purchase the surface land, and having purchased it they have the ordinary proprietary rights; but has it authorized them to make the cutting without being responsible for the damage thereby caused to the owners of the mines? Could the plaintiffs, at the time of the cutting, have claimed compensation for future possible damage?] In constructing the bridge, the paramount object was the benefit of the public, and, if injury was thereby done, that is the subject of compensation, not of action. The legislature has imposed no restriction in respect of this bridge, and, within the limit of deviation, the Company might construct the railway as they pleased. All that the legislature required was, that plans and sections should be submitted to them, in order that, for the public safety, they might see that the gradients were proper. In constructing the railway, the Company adopted one level throughout, the effect of which was, that they cut through the clay of the rising ground near the brook, into the new mine rock, and so removed the bank which separated the brook from the plaintiffs' land; but there is no pretence for saying that is not legal. The owners of the land sold it to the Company, for the purpose of constructing a railway upon it, and it has been constructed. They are in the position of the owner of a mine, who has sold the surface land for the purpose of building upon it a house, with cellars underneath. If the person forming the cellars does no more than he was authorized to do, he is not responsible for damage to the minerals. [443] [Bramwell, B. In that case the purchase money would be proportionate to the purpose for which the land was sold.] The Company formed drains for the purpose of carrying off the water from their railway, not for the purpose of draining the adjoining lands. Having constructed their railway and formed drains, what further obligations were they under either at common law, or by statute? As regards the common law, clearly none—because the Company had only done on their own land that which they were authorized by statute to do. They were not bound to render the surface waterproof because it was subject to cracks and fissures. Then what was their obligation under the statute? The owners having parted with the surface land for the purpose of a railway being constructed upon it, would not, at common law, be at liberty to do anything which would injuriously affect the railway, but, as regards the mines, the legislature has given an additional right, and in the event of the Company declining to purchase them, has allowed the owner to work them, provided he does so in a proper manner, and commits no wilful damage: 3 Wm. 4, c. xxxiv., 8 & 9 Vict. c. 20, ss. 77 to 85. The inevitable consequence of the plaintiffs working the mines was to cause cracks and fissures, through which the water flowed into the mine. But suppose, instead of water, the rock itself had sunk and filled up the workings of the mine, could the plaintiffs have claimed damages from the defendants for not supporting the rock? The legislature has said that the mine-owner shall not be responsible for damage to the railway caused by his workings, not that the Company shall indemnify the mine-owner against such damage. The defendants are under no obligation to protect the plaintiffs against the consequences of their own act. The argument for the plaintiffs must go to this extent, that it makes no difference whether the plaintiffs' mine was filled with water [444] or earth; but there is clearly no obligation on the part of the defendants to construct their railway upon arches or girders to prevent a falling of the earth, in the event of the plaintiffs working their mine. Canals may pass over a mine, but they are puddled, not for the benefit of the mine-owner, but to keep in the water. Suppose a mine-owner in working caused the water of a canal to flow into his mine, would the proprietors of the canal be responsible? [Bramwell, B. In that case, in assessing compensation for the surface, it would be taken into consideration that there would be a stream of water over the mine. Suppose the defendants were only owners of part of the land over the mine, and another person was owner of the other part where the cutting was made and the bridge built, though the plaintiffs had caused the defendants' land to sink, might they not complain that the other person, by erecting the bridge and making the cutting, had caused

water to flow into the mine; then, how can they have the less right to complain because all the land belongs to one person?] In that case there would be an obligation on the owner not to make the cutting, or build the bridge so as to let the water into the mine, but the defendants have only done what they were authorized to do. If the owner of chambers chose to remove a beam by which the upper floor fell, could he complain? [Bramwell, B. In the judgment of Crompton, J., and Willes, J., in *Broadbent v. The Imperial Gas Light Company* (7 De Gex, M. & G. 436), it is said that the cases establish "that an injurious act unauthorized by statute, or done by the Company negligently in abuse of their statutory powers, is the proper subject of an action; and that any act other than the erection of the permanent works, if properly done by the Company in pursuance of the statute, whatever damage it may cause, is considered sufficiently compensated for, by the public benefit—[445]—fit expected to follow, and is neither a subject of action nor compensation." Channell, B. A gas Act authorizes the Company to make and sell gas, but not to make it a nuisance to the neighbourhood.] The true principle is thus stated by Erle, J., in *Cotton v. Wood* (8 C. B. N. S. 568):—"The plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of the defendant or his servant; and there can be no such proof unless it be shewn that there existed some duty owing from the defendant to the plaintiff, and that there has been a breach of that duty." The plaintiffs complain of the act done, not of the mode in which it is done. If the defendants had built the bridge of such materials that a person fell through it, or if the culverts were too small to carry off the water, they would be responsible because they would not have complied with the requisitions of their Act. But there was no negligence on their part, for they could not have constructed the bridge at any other level. Moreover, no question of negligence was left to the jury. [Bramwell, B., referred to *Ruck v. Williams* (3 H. & N. 308).] It is said that the defendants ought to have puddled the drains, but no such obligation is imposed on the Company by their Act. The drains were made, not for the benefit of the plaintiffs, but to keep the railway clear of water, and until the sinking and cracking caused by the plaintiffs' act, they were sufficient for that purpose. Then what obligation is there on the defendants to construct fresh drains or to maintain these drains. The declaration is not founded on any breach of a statutory obligation. The defendants have never violated the provisions of the 180th section of the 3 Wm. 4, c. xxxiv., which requires them to make and maintain such drains as two justices shall judge necessary and appoint. [Bramwell, B. By the 196th section the Company are bound to make sufficient drains, and if any [446] landowner is not satisfied and requires more to be made he must apply to two justices.] The complaint is, not that the defendants have not made drains, but that, having made them, they have not puddled them. The 196th section of the 3 Wm. 4, c. xxxiv., has reference to the drainage of adjoining lands, not of the railway; so, also, the 68th section of the Railway Clauses Consolidation Act. By the 73rd section of that Act, "the Company shall not be compelled to make any further or additional accommodation works for the use of owners and occupiers of land adjoining the railway after the expiration of the prescribed period, or if no period be prescribed, after five years from the completion of the works." [Channell, B. That provision would not relieve the defendants from the obligation to maintain the drains they made under the Act.] The damage has arisen, not from the defendants' neglect to repair the drains, but from the plaintiffs' act in letting down and thereby destroying them. [Bramwell, B. Suppose some other landowner complained, would it be any answer for the defendants to say we made sufficient drains, but the plaintiffs let them down?] Assuming that the drains were made for the convenience of the mine-owner, the obligation of the statute has been complied with. The word "land" in the interpretation clause of the Railway Clauses Consolidation Act does not include mines; there are express provisions relating to them in the 77th and eight following sections. The plaintiffs must establish that they have a right to accommodation works under the 68th section; and then, by section 69, if any difference arise respecting the kind or number of such works, it must be determined by two justices. In *Lawrence v. The Great Northern Railway Company* (16 Q. B. 643), the defendants might, by proper caution, have prevented the injury, and the plaintiff in no way contributed to it. The [447] damage that might arise from working the mine should have been the subject of claim to compensation at the time the defendants purchased the land: *Rex v. The Leeds and Selby Railway Company*

(3 A. & F. 683). *The Dudley Canal Navigation v. Grazebrook* (1 B. & Adol. 59) was an action by a canal Company against a mine-owner who worked his mine under their reservoir, whereby it was damaged, and it was held that the action was not maintainable, since, after notice of his intention to work the mine, the Company declined to purchase his rights, and he worked in the usual and ordinary mode.

Gray, in reply. It is a fallacy to say that the defendants have committed no breach of duty because they made the railway as authorized by their Act. The legislature, in allowing them to make it, expected that it would be done skilfully and properly. [Pollock, C. B. Suppose, in the construction of the permanent way, it is discovered that it would be a great improvement if in every hundred yards a pile was driven into the ground, and that was not provided for by the Act.] The defendants would be bound so to work that no damage should afterwards happen. [Channell, B. Suppose a Company made a railway on a different line from that proposed, but within the limits of their deviation, and damage was caused by their working on that line, which would not have arisen on the other, assuming the works to be sufficient, would the Company be liable? Bramwell, B. It may be that by selecting a new line the Company would be bound to prevent any damage arising on that line which would not have arisen on the other.] This was not a damage in respect of which the plaintiffs could have obtained compensation at the time the land was purchased by the defendant: *Lawrence v. The Great Northern Railway Company*. [Pollock, C. B. Compensation is for damage [448] that can be ascertained at the time the railway is made; here the damage arose some years after, and could not have been foreseen. If it was not the subject of compensation, and no action will lie in respect of it, the plaintiffs are without remedy.] The meaning of the 180th and 196th sections of the 3 Wm. 4, c. xxxiv., is, that the owners of land adjoining the railway shall have sufficient drains made by the Company, and in case of neglect may apply to two justices to compel the Company to make them. But where sufficient drains have been made, what remedy has the landowner if the Company does not maintain them? He cannot apply to the justices, because the answer would be, "We made sufficient drains." The defendants cannot say that, because they made for their own benefit drains which rendered an application to justices unnecessary, they are not bound to maintain them. It is unimportant what was the object of the defendants in making the drains,—if they answered the purpose the plaintiffs could not complain; but there is a continuing duty on the part of the defendants to maintain the drains, and for the breach of that duty an action will lie.

Cur. adv. vult.

The judgment of the Court was now delivered by

BRAMWELL, B. The material facts in this case are as follows:—The plaintiffs are owners and occupiers of a coal mine. The surface soil as well as the coal below formerly belonged to the same owner, but a railway Company (to whose rights and obligations the defendants have succeeded) took the surface under the powers of a private act of parliament for their railway and constructed it thereon. The railway Company (by which may be understood indifferently the original Company or the defendants) cut and removed [449] upwards of twenty feet in thickness of the surface soil over where the plaintiffs' mine now is, to get the level at which they laid their rails. This surface soil was clay impervious to water; by removing it a porous rock was reached. The soil was in like manner cut away by the railway Company along the length of the line to a lower district of country, through which a brook flowed. Here the railway was on or above the natural level of the ground. It was carried over the brook by a flat bridge. The line of railway sloped downwards from the bridge to the part over the plaintiffs' mine. The bridge was sufficient to let the ordinary water of the brook pass, and even more, but was an impediment to the passage of water in large floods. The railway Company was bound to make and maintain drains, the obligation being substantially the same as in the Lands Clauses Consolidation Act. A flood happened in 1860, and the result of the combined acts of the Company was that water, part of which would have escaped but for the bridge, flowed down the railway, and, the high ground between the brook and the surface over the mine being removed, it reached that spot, and the high ground and protection of clay then being gone, and the drains being imperfect as after mentioned, it penetrated into the mine. So also did the water falling on the spot itself and the springs arising in the cutting. But it here becomes necessary to mention that when

the railway was making the mines were not worked under nor within forty yards of the railway. The railway was made with drains at the side sufficient to carry off the water which fell or came there without doing any mischief as matters then stood. When the plaintiffs' workings came to forty yards from the railway, they gave the defendants notice under their local Act, which may be treated as substantially the same in its provisions as the Railway Clauses Consolidation Act. The defendants, however, did [450] not purchase the mines. The plaintiffs accordingly worked on, and when their workings came under the railway, from no fault or negligence of theirs, but as a natural consequence of fair and lawful working, the railway sunk and continued to do so from time to time. The defendants repaired this by throwing material of a porous character on the sunk parts; they did not however repair and puddle the drains which, from the sinking of the soil, became inefficient, and even had they been efficient they would not have carried off the flood water of August, 1860. For the damage sustained from the water thus getting into the mines this action was brought.

It seems to us impossible to state these facts without shewing that the plaintiffs have a claim on the defendants of some kind. Without any fault of theirs the natural condition of things had been altered, the water of the brook which flowed at a distance of one-third of a mile from their mine, inaccessible to it by being separated from it by ground twenty-five feet high, has been diverted over it, its natural covering and upper soil removed from it. From the last mentioned circumstance and want of efficient drains the rain which fell on it, and the springs which arise in the cutting, have got into it. These are the acts of the railway Company alone. It is said that the plaintiffs have brought about the mischief by working their mines, but they had a right to work them as they did. They lose no right by doing so. It could not be contended that, had the defendants thought fit to agree to purchase, they could have done so at a nominal price, on the plea that if the plaintiffs worked them they would be worthless, as they would be drowned. We do not say that the defendants were bound to restore the surface. They might have diverted their line and left hollows over the spot in question, but they were bound by their Act to make and maintain effectual drains.

[451] This reasoning applies to the water other than that from the flood. As to that the plaintiffs' case is still clearer. Suppose, instead of the defendants' railway passing through the cutting and over the brook, it had been a branch railway belonging to a private proprietor and adjoining the defendants' railway just before reaching the plaintiffs' mine, would not such private proprietor have been clearly liable to this action, and if so, why are not the defendants? As to this flood water, they are not sued merely as the railway Company who have taken the surface of the plaintiffs' land, but as persons who, by their acts on land at a distance, have done this injury; and it seems to us they would be liable for the damage by flood water if the plaintiffs had continued owners of the surface, and for some reason had thought fit to remove it to the depth the railway Company has; for it would still be acts of the defendants which sent the water there.

But it was suggested that if the plaintiffs had a claim it was to be enforced under the compensation clauses. We think not. The plaintiffs are not injuriously affected by the works of the railway Company. Supposing the Company had possessed no statutory powers, they could not have been restrained by injunction from executing any of those works, nor could any action have been maintained against them singly for their construction. The railway Company would have been entitled to say, "These are not injurious and never will be. By means of puddling the surface and drainage no water will ever reach you." Nor need it, as appears.

It is not therefore the works intrinsically which injuriously affect the plaintiffs, but the defendants' wrongful conduct in relation to them, in not making and maintaining outlets for the flood water or draining it off the plaintiffs' land, or covering the surface thereof with clay, and in not maintaining [452] those drains which were efficient to carry off the rain which fell, and the spring water which arose there.

Our judgment, therefore, is for the plaintiffs in respect of both these claims.

Judgment for the plaintiffs.

EASTON v. ALCE. Nov. 18, 1861.—By the 1 Wm. 4, c. cxxxv., s. 2, it is enacted
 "That twelve inhabitant householders resident in the town or parish of Rye,
 rated to the relief or maintenance of the poor of the said parish by one or more

rate or rates to the amount of 10l. per annum," shall be appointed Commissioners of the Harbour of Rye. Held, that the rateable annual value, and not the rates payable, conferred the qualification.

[S. C. 31 L. J. Ex. 115 ; 8 Jur. (N. S.) 156 ; 10 W. R. 110 ; 5 L. T. 323.]

By order of a Judge made by consent, pursuant to the 46th section of the Common Law Procedure Act, 1852, the following case was stated for the opinion of this Court.

By the statute, 1 Wm. 4, c. cxxxv. (local), intituled "An Act to amend an Act passed in the 41st year of his late Majesty King George the Third, intituled 'An Act for more effectually improving and maintaining the old harbour of Rye, in the county of Sussex, and to appoint new Commissioners, and to enable the Commissioners to raise additional funds, on the tolls, by way of mortgage or otherwise ;' it was by section 2 enacted, That the qualification required by the said recited Act for persons acting as Commissioners in the execution thereof shall be and the same is hereby repealed ; and that from and after the passing of this Act the Lord High Admiral of Great Britain for the time being, or the Lords Commissioners for the time being for executing the office of Lord High Admiral of Great Britain, the mayor and jurats for the time being of the town and port of Rye, in the county of Sussex, and also twelve persons resident in the town of Rye or within three miles thereof, not being Commissioners of Sewers for any or either of the levels sewing into the said harbour, and each of whom shall be [453] himself interested in ships or vessels, or a ship or vessel, trading to or from the said town of Rye, and registered at the port of Rye to the extent of twenty registered tons, and also twelve inhabitant householders resident in the town or parish of Rye, rated to the relief or maintenance of the poor of the said parish by one or more rate or rates to the amount of 10l. per annum, and not having qualified to act as Commissioners of Sewers for any or either of the levels aforesaid ; and also twelve persons being respectively Commissioners of Sewers acting in and for the four following levels (that is to say), the Kent and Sussex Rother Levels, Walland Marsh Level, Guldeford Level and Pevensey Level, in the respective counties of Kent and Sussex, shall be and they are hereby appointed Commissioners of the said harbour of Rye, for putting this Act and the said recited Act, and all other Acts now in force relating to the said harbour, into execution."

Section 4 prescribes the mode of election.

Section 5 provides "that in case of the death, removal, declining, becoming disqualified, or ceasing to act," of any Commissioner, another shall be elected in his place.

Section 6 enacts, that if any person, not being so qualified as thereinbefore mentioned, shall act as a Commissioner in the execution of the Act, he shall forfeit and pay the sum of 50l. to any person who shall sue for the same.

The defendant was duly nominated and elected, and acted as a Commissioner in the execution of the said Act. At the time the defendant was so nominated and elected, and when he so acted as such Commissioner, he was an inhabitant householder resident in the said town and parish of Rye ; and he was then and has ever since continued to be and is still rated to the relief of the poor of the said parish, as the occupier of one dwelling-house in the said town and parish, on a gross estimated rental of 20l., and upon a [454] rateable value of 15l. and no more ; and the aggregate amount of poor rates then and still paid or payable by him in respect of such occupation and rateable value has amounted to 3l. 5s. per year and no more.

Under these circumstances the plaintiff contends that the defendant was at the time of the said election, and ever since hath been and still is, disqualified to act as a Commissioner of Rye Harbour as aforesaid, or in the execution of the said Act, because he never has been rated to the relief of the poor of the said parish by one or more rate or rates to the amount of 10l. per annum, within the meaning of the said Act, and therefore the defendant has forfeited the penalty of 50l., for the recovery of which this is brought.

On the part of the defendant it is contended that his qualification is sufficient, because he was and is assessed on a rateable value exceeding 10l. a year, and that the qualification is not confined to those inhabitant householders only who shall pay, or be liable to pay, poor rates to the extent of 10l. a year, but includes those who may be assessed on a rateable value to that amount, notwithstanding the aggregate of the assessments paid or payable by him amounts to less than 10l. per annum.

The question for the opinion of the Court is, whether, under the circumstances, the defendant was, on the 25th day of April last, legally qualified to act as a Commissioner for executing the said act of parliament or not.

If the Court shall be of opinion that the defendant was duly qualified, he is to have judgment with costs; but if not the plaintiff is to have judgment for the penalty and costs.

HANCE, for the plaintiff. The defendant was not legally qualified to act as a Commissioner, within the meaning of the 1 Wm. 4, c. cxxxv. s. 2, because he was not rated to [455] the relief of the poor in such an amount as rendered him liable to pay 10l. a year. The words of the Act are "to the amount of 10l.," not at the amount of 10l. [Bramwell, B. If the qualification depended on the amount of the rate it would be greater or less according to the assessment. Wilde, B. There must be a liability to pay in one year, by one or more rates, in respect of some property of the rateable value of 10l. a year. On the other view, if a person had paid one rate of 3l. and there were four rates in the year, he would be rated to the amount of 10l. a year, but there would be a portion of the year during which the qualification would be in abeyance.] The rating must be such as would create a liability to pay by one or more rates the amount of 10l. in a year. [Channell, B. That construction would exclude a person who had paid one or more rates to the amount of 9l., and the time had not arrived for payment of another rate of 1l. If the qualification depended on the rates, how could it be known, at the time the action was brought, that the person sued would not pay rates to the amount of 10l. before the end of the year?] The qualification must exist at the time the person takes upon himself the office. [Channell, B. A person might be liable in one year to pay rates to the amount of 10l., and in another year they might be reduced below that amount.] The same difficulty might arise upon the other construction, for it might happen that no poor rate was made.

LUSH, for the defendant. Putting the one interpretation on the Act leads to absurdity, whilst the other renders it sensible. If the qualification depended on the amount of the rate or rates which a person was liable to pay within the year this case would stand alone, because all qualifications proceed upon the rateable value. The only difficulty arises from the words "one or more rate or rates," but they refer [456] to a rating to the required amount in respect of one or more houses. [Pollock, C. B. A person may be rated for a dwelling-house, a warehouse, and a small tenement, which together make up the rateable value of 10l. Channell, B., referred to the Small Tenements Act, 14 & 15 Vict. c. 39.] If the other construction be adopted, when is the year to begin? The election might take place at the commencement or at the end of the year, and no person could tell whether he was qualified. The 5th section requires the qualification to continue. If the words "by one or more rate or rates" be read "by one or more ratings," effect will be given to the intention of the legislature. [Pollock, C. B. If the Act meant what is contended for on the part of the plaintiff, it would stand alone among the Acts relating to qualification by rating.] He was then stopped by the Court.

POLLOCK, C. B. This is not so clear a case as to enable us to award to the plaintiff a penalty. The Act ought to receive a reasonable construction, and, for the reasons given in the course of the argument, I think that the defendant is entitled to judgment.

BRAMWELL, B. I am of the same opinion. The words "by one or more rate or rates" mean by a rating in respect of one or several houses or property. Then the Act proceeds, "to the amount of 10l. per annum," that is, yearly. That shews that the rating must be something of an annual character, such as rent. "Yearly" cannot mean in the year. Therefore if the words "to the" amount of 10l. per annum had stood alone, this would have been a tolerably plain case. Then, does the addition of the words "by one or more rate or rates" alter the effect of the clause? I think not; and that its meaning is, that a person is qualified if he is rated to the annual value of 10l., whether by one or more rates.

[457] CHANNELL, B. I am also of opinion that the defendant is entitled to judgment. The only words which raise any difficulty are "by one or more rate or rates;" but if those words are read as already explained all difficulty is removed. A reasonable construction ought to be put upon the Act.

WILDE, B. I also think that a reasonable construction ought to be put upon the

Act. A strict construction might favour the plaintiff's view ; but giving the Act a reasonable construction, the defendant is entitled to judgment.

Judgment for the defendant.

ALLSOPP AND OTHERS v. DAY AND ANOTHER. Nov. 11, 1861.—The trustees, under the settlement of a married woman, purchased of her husband his household furniture, when he gave them the following receipt: "Received of J. D. and C. J., the trustees under the deed of settlement for the benefit of my wife, the sum of 93l. 6s. 6d. for the purchase of my household goods and effects mentioned in the inclosed inventory and valuation as purchased this day by J. D. and C. J., as trustees named in the deed of settlement, and empowered to purchase by such deed." Held, that the document was not a bill of sale within the 17 & 18 Vict. c. 36.—Semble, that a bill of sale within that Act must be an instrument by which the property in personal chattels is transferred by one person to another.

[S. C. 31 L. J. Ex. 105 ; 8 Jur. (N. S.) 41 ; 10 W. R. 135 ; 5 L. T. 320. Followed, *Byerley v. Prevost*, 1871, L. R. 6 C. P. 146. Questioned, *In re Walden* ; *Ex parte Odell*, 1878, 10 Ch. D. 90. Distinguished, *In re Baum* ; *Ex parte Cooper*, 1878, 10 Ch. D. 321. Approved, *Marsden v. Meadows*, 1881, 7 Q. B. D. 83. Referred to, *North Central Wagon Company v. Manchester, Sheffield and Lincolnshire Railway*, 1887, 35 Ch. D. 209.]

This was a proceeding under the Interpleader Act ; and by consent of the parties and order of a Judge the following case was stated for the opinion of this Court under the 15th section of the Common Law Procedure Act, 1860.

The plaintiffs are the execution creditors under a writ of fi. fa. directed to the sheriff of Staffordshire, issued on a judgment recovered by them in an action against George French. The defendants are trustees under a deed, bearing date the 8th day of November, 1858, made and executed between the said George French and Louisa Maria his wife, of the one part, and John Day and Charles Jones, the now defendants, of the other part.

[458] The sheriff of Staffordshire, under and by virtue of the said writ of fi. fa., on the 14th day of April, 1861, seized and took in execution certain goods, which the now defendants claim as their property as against the now plaintiffs, the execution creditors.

By the said deed, after reciting that the said Louisa Maria, as one of the children of John Watkins, deceased, was, under the will of Benjamin Hudson, deceased, bearing date the 2nd August, 1805, entitled to certain interests and shares in certain Bank 3l. per cent. annuities and Reduced 3l. per cent. annuities, standing in the name of the Accountant General of the Court of Chancery to the credit of a certain cause "*Hudson v. Mousley*," and in certain cash ; and that, by a petition presented to the Master of the Rolls in the said cause by the several persons interested therein, it was prayed that such stock and cash might be transferred and paid to the several persons interested therein ; and after reciting also that the said Louisa Maria was desirous, and, by virtue of her equitable right as the wife of the said George French to a settlement in respect of her said share and interest, had required that the sum of 520l. Bank 3l. per cent. annuities, parcel of her said share, should be transferred and vested in the now defendants by way of settlement, upon the trusts and for the purposes thereafter expressed ; and that the said George French had agreed to concur in these presents : In pursuance of the said agreement, and in consideration of such equitable rights, and of the payment of the sum of 5s. to the said George French and Louisa Maria by the now defendants, the said George French and Louisa Maria did, according to their respective estates, sell, assign, and transfer unto the now defendants the said sum of 520l., parcel, &c., and the annual produce to accrue due in respect thereof and all their right therein [459] respectively, in trust that they the now defendants, or other the trustees for the time being of these presents, should and would during the life of the said Louisa Maria pay and apply the interest, dividends and annual produce to arise from the said sum of 520l., or from the stocks, funds, and premises in or upon which the principal monies to arise or be produced from the said sum of 520l. might from time to time be invested as hereinafter mentioned, into

the proper hands of her the said Louisa Maria, or to such person as she from time to time under her hand, but not by any way of anticipation, should direct, to the intent that the same interest, dividends and annual produce should be for her sole and separate use and benefit, independent of her husband and not to be subject to his debts, control, or engagements, and that her receipt should be the only sufficient discharge for the said interest, dividends and annual produce; and after her decease upon the further trusts in the said deed mentioned.

And by a certain proviso therein contained it was thereby declared and agreed by the parties thereto, that it should be lawful for the said trustees at any time thereafter, or from time to time, at the request or by the direction of the said Louisa Maria, notwithstanding her coverture, and whether such request or direction be so made as to take effect in her lifetime or after her decease, to lay out or invest any sum or sums of money, part or parts of the said trust funds and premises, but not exceeding in the whole 100l., in the purchase of such household furniture and effects as she should direct or require, and that the said trustees should stand and be possessed upon trust to permit and suffer her, if living, to use, possess and enjoy the said furniture and effects during the term of her natural life, free from the debts, control, and engagements of her said husband, and from [460] and after her decease to permit him, in case he should survive her, to possess and enjoy the same during his natural life, he keeping the same in good order and condition, reasonable wear and tear excepted; and after the decease of both of them, or at any previous time, at her request or direction, and notwithstanding coverture, or at his request in case he should survive his said wife, upon trust to sell, dispose, and convert the same into money, and to stand possessed of the same upon the same trusts as were thereinbefore declared with respect to the said sum of 520l.

On the 29th July, 1859, at the request and by the direction of the said Louisa Maria, the now defendants as such trustees purchased from the said George French his household effects, which are the said goods so seized under the said writ of fi. fa., and which had some time previously been in his possession and use in his dwelling-house at Walsall, where he and his said wife and their children then resided and still reside.

The said trustees then paid the said George French the sum of 95l. 18s. 6d., being the appraised value of the same. And the said George French received the said money for the purchase of the said furniture by them, and gave to the defendants the following receipt:—

“Walsall. July 29th, 1859. Received of Mr. John Day and Mr. Charles Jones, the trustees under the deed of settlement for the benefit of my wife, the sum of 93l. 6s. 6d. for the purchase of my household goods and effects contained in the inclosed inventory and valuation, as purchased this day by Mr. John Day and Mr. Charles Jones, as trustees named in the deed of settlement, and empowered so to purchase by such deed. The date of such deed is 8th November, 1858. 93l. 6s. 6d.—George French.”

The sale or transaction was not registered under the Bills [461] of Sale Act, nor was there any change in the apparent ownership of the goods, but the same remained in the house of the said George French; and his name continued upon the door, and he continued to carry on business as before.

The said Louisa Maria continued to reside with her husband, and whilst she had jointly with her husband and family the use, possession, and enjoyment thereof, and on the 15th day of April, 1861, the said sheriff took and seized the said furniture and effects under and by virtue of the writ of fi. fa. The now defendants, as such trustees, claimed the said goods and the said sheriff has interpleaded.

The question for the opinion of the Court is, whether the said furniture and effects were, at the time of such seizure, the goods of the now defendants as against the now plaintiffs, the execution creditors.

Gray (Baylis with him), for the plaintiffs. The receipt with the inventory annexed is a bill of sale within the meaning of the 17 & 18 Vict. c. 36, and, not having been registered, is void as against the plaintiffs, the execution creditors. This case is within the mischief which the statute intended to remedy, namely, the secret transfer of personal chattels; for there has been no change of possession of the goods, nor anything to indicate that the execution debtor has ceased to be the owner of them. By the interpretation clause, section 7: “The expression” bill of sale “shall include bills

of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt, but shall not include the following documents, that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or [462] any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts, or at sea, bills of lading, India warranty, warehousekeepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or by delivery, the possession of such document to transfer or receive goods thereby represented." This document is not within the exemption of the latter part of the clause; and, although it is in form a receipt, it is the evidence of the transfer of the property in the goods. A bill of sale usually contains a receipt for the purchase money, and therefore the form of this document does not make it the less a bill of sale. The words "for the purchase of my household goods and effects," contained in the inclosed inventory and valuation, as purchased this day, are a declaration of the contract between the parties, and that the goods have ceased to belong to the assignor, and have become the property of the assignees. [Channell, B., referred to *Thomson v. Barrett* (Q. B. Hil. T. 11 Jan. 1860).] There is every ingredient of a bill of sale, namely, a document by which the property is intended to pass, and an evidence of the contract.

Mellish, for the defendants. The real question is, whether the property in the goods passed by this document; if not, it is no bill of sale. The 17 & 18 Vict. c. 36 does not apply to cases where the property passes by the contract and payment of the purchase money. Where the property passes by a bill of sale, and that becomes void, the contract is void; but here there was a valid parol contract, independently of the receipt. Upon the trial whether the property in the goods passed to the defendants, the receipt would [463] not be admissible as evidence of the contract, though it might be used to refresh the memory of the vendor. [Bramwell, B. Suppose the vendor was asked, "Was there not a contract in writing for the sale of the goods?" the answer would be "no."] He was then stopped by the Court.

POLLOCK, C. B. We are all of opinion that this receipt is not a bill of sale within the meaning of the 17 & 18 Vict. c. 36. We cannot extend the provisions of the Act merely because a particular contract or instrument is within the mischief intended to be remedied. If there is any enactment which ought to be construed strictly, it is a clause which declares that one thing shall mean another.

BRAMWELL, B. I am also of opinion that this receipt is not a bill of sale within the meaning of the 17 & 18 Vict. c. 36. In construing that statute, we cannot take as a criterion the mischief intended to be remedied, because the same mischief would arise in the case of a parol contract; for, under such a contract, a person might cease to be owner of the goods, although he remained in possession of them. The interpretation clause says that the expression "bill of sale" shall include "bills of sale;" this is not one; "assignments"; this is not one; "transfers"; this is not one; "declarations of trust, without transfers, and other assurances of personal chattels," and so it goes on naming other documents of which this, namely, a receipt for the purchase money of goods sold, is not one. The interpretation clause goes on to say what the expression "bill of sale" shall not include, and, in my opinion, shews the meaning of the former part of the clause. Amongst other documents not included are, "transfers of goods in the ordinary course of business of any trade or calling," "warrants or orders for the delivery of goods, or any other documents used in the [464] ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or by delivery, the possessor of such documents to transfer or receive goods thereby represented." It would seem that, but for that provision, documents used in the ordinary course of business would require registration, but the legislature has expressly said that they shall not. Where, however, a document not so used is one by which the property in the goods is transferred the statute requires it to be registered. It seems to me that this case is not within the general mischief intended to be remedied, and, even if it were, we could not interpret the Act by that consideration, because we should then extend its provisions to parol contracts. For these reasons, it seems to me that this receipt is not a bill

of sale within the first part of the interpretation clause, nor one of the documents excepted in the second part of that clause, nor is it within the practical mischief intended to be remedied. The test suggested by Mr. Mellish, is to my mind, conclusive: on the trial of this issue, it could not be given in evidence as proof of the contract.

CHANNELL, B. I am also of opinion that this receipt is not "a bill of sale," as mentioned in the body of the Act, or as explained by the interpretation clause. I do not rest my opinion on the ground that the document would not be admissible as evidence of the contract, however well founded that argument may be. My judgment proceeds on the ground that the document is not a bill of sale—it is a mere receipt, not an instrument of transfer. Our decision will not interfere with the right of the plaintiffs to contend before a jury that the transaction was not *bonâ fide*, but fraudulent.

WILDE, B. I am disposed to adopt Mr. Mellish's inter-[465]-pretation of the Act, namely, that a bill of sale means an instrument by which the property passes. But, without expressing a decided opinion upon that, I think that this is not a document within the Act.

Judgment for the defendants.

BLAKE AND OTHERS v. ROBERT DONE. Nov. 22, 1861.—In ejectment by mortgagee of devisee against heir-at-law, in which the question was as to the competency of the testator to make a will, it appeared at the trial that the legal estate was in two trustees, the devisee having an equitable interest only. The Judge amended the writ by adding the names of the two trustees, they being present in Court and consenting to be parties. Held, that the Judge had power to make the amendment under the 222nd section of the Common Law Procedure Act, 1852.

[S. C. 31 L. J. Ex. 100; 7 Jur. (N. S.) 1306; 10 W. R. 175; 5 L. T. 429. Explained, *Clay v. Oxford*, 1866, L. R. 2 Ex. 54. Referred to, *Norris v. Beazley*, 1877, 2 C. P. D. 86.]

Ejectment to recover possession of two cottages and a piece of land, situate at Swanbach in the county of Chester.

At the trial before Bramwell, B., at the last Cheshire Assizes, it appeared that John Done, the grandfather of the defendant, by his will made in the year 1823, devised the property in question to Sarah Done for life, with remainder to her three children as tenants in common in tail, with cross-remainders. Two of the children died in their mother's lifetime; and in the year 1839 John Done, the survivor, joined with his mother in executing a disentailing deed, and by his will devised the property in question (subject to his mother's life interest) to T. Heath and W. Eardley in trust for Edward Done for life, and his lawful issue for ever, with remainders over. John Done, the surviving child of Sarah Done, died in 1845 without issue, and his mother died in 1860. On her death, the defendant, who was heir-at-law of his grandfather, John Done, took possession of the estate. The action had been brought by the plaintiff Blake alone as mortgagee of Edward Done, the cestui que trust.

It was objected on behalf of the defendant that the legal estate was in the trustees under the will of John Done the younger. The plaintiffs' counsel then applied to the learned Judge to amend the writ by adding the names of the trustees, [466] which was accordingly done. The trustees were present in Court and consented to be parties to the record. The trial then proceeded, the question being whether John Done the younger was competent to make a will. The jury having found a verdict for the plaintiff,

Grove, in the present term, obtained a rule nisi to set aside the verdict, on the ground that the learned Judge had no power to make the amendment, against which

Welsby and Morgan Lloyd shewed cause (Nov. 21). The learned Judge had power to make the amendment. The Common Law Procedure Act contains a series of provisions "with respect to the joinder of parties to actions," commencing with the 34th section and ending with the 40th. The 34th section enables "the Court or a Judge at any time before the trial of any cause, to order that any person or persons, not joined as plaintiff or plaintiffs in such cause, shall be so joined, or that any person or persons, originally joined as plaintiff or plaintiffs, shall be struck out from such

cause," &c. Then by the 35th section, "in case it shall appear at the trial of any action that there has been a misjoinder of plaintiffs, or that some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such joinder," &c., "such misjoinder or nonjoinder may be amended, as a variance, at the trial by any Court of record holding plea in civil actions and by any Judge sitting at Nisi Prius," &c., "if it shall appear to such Court or Judge," &c., "that such misjoinder or nonjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons, to be added as aforesaid, consent either in person or in writing, under his, her or their hands to be so joined." [467] That section confers ample power to make this amendment. Two persons, who ought to have been joined as plaintiffs, were not joined; and they consented in person to be joined. The case is therefore within the express provisions of the 35th section. There is nothing to limit the power of amendment conferred by that section to personal actions. It uses the words "any actions," which would include ejectment. But assuming that the 35th section does not apply to this case, the learned Judge had power to make the amendment under the 222nd section. The language of that section is general. It enables a Judge at Nisi Prius "to amend all defects and errors in any proceeding in civil causes;" and it declares that "all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made."

Grove and Pullen, in support of the rule. The learned Judge had no power to make the amendment. First, the 35th section applies only to cases of nonjoinder, or misjoinder of plaintiffs in the legal sense of the words. It enables an amendment to be made by inserting, as plaintiff, the name of a person who has a joint interest, or striking out the name of a defendant who has been erroneously joined. The object of the enactment was to obviate an objection which might have been taken advantage of by plea in abatement, or have been a ground of nonsuit. But what was here done was to add the names of two persons, who claimed under a title totally different from that of the person named in the writ. That is in effect to make a new action. Under the old form of proceeding in ejectment, a new demise could not be added at the trial. In *Doe d. Wilton v. Beck* (13 C. B. 329) an action of ejectment was brought on [468] the joint demise of husband and wife, but on the trial it appeared that the legal estate was in the husband alone, and it was held the Judge had no power, under the 3 & 4 Wm. 4, c. 2, s. 23, to amend the record by striking out the name of the wife. [Bramwell, B. That statute only conferred a power to amend in any particular, not material to the merits of the case, by which the opposite party could not have been prejudiced in the conduct of his action or defence.] If this amendment had not been made the defendant would have obtained the verdict, and recovered his costs; but now a general verdict has been found for the three plaintiffs, although they have no joint interest, and two of them claim by a title different from that of the third. [Bramwell, B. A summons might be taken out before me, as the Judge at Nisi Prius, to have the postea correctly drawn up.] Secondly, the 35th section applies to personal actions, not to ejectment. It speaks of a "co-plaintiff," not of a "co-claimant." All the sections prior to the 34th are clearly applicable to personal actions only. The Act commences with a series of provisions with respect to writs; and the 1st and 2nd sections use the words "personal actions." Then follow provisions with respect to the appearance of the defendant. The 34th section is headed, "And with respect to the joinder of parties to actions," that is, the actions previously mentioned. [Wilde, B. If that were so, one would expect to find the words "personal actions."] Thirdly, this amendment could not be made under the 222nd section. That section does not apply to the case of a nonjoinder or misjoinder of parties: *Robson v. Doyle* (3 E. & B. 396), *Wickens v. Steel* (2 C. B. N. S. 488). [Bramwell, B. It was held in those cases that the 222nd section did not apply to a nonjoinder or misjoinder in personal actions, because that was specially provided for by the 34th and six [469] subsequent sections; but, if those sections do not apply to ejectment, there is no reason for not resorting to the 222nd section.] The legislature has annexed certain conditions to amendments under the 34th and 35th sections, and it could never have been intended by the 222nd section to confer an unconditional power to add a new claimant in ejectment. The 169th section expressly requires that the writ in ejectment shall state the names of all the persons in whom the title is

alleged to be; and the defendant goes to trial with notice of those persons only, and as against them alone is he prepared to defend his possession of the property. Moreover, the 222nd section directs amendments to be made for the purpose of determining, "in the existing suit," the real question in controversy between the parties. Here there was no "existing suit" to which the trustees were parties. [Pollock, C. B. Suppose an action of ejectment was brought in the name of a nominal person, as, for instance, a trustee, and it appeared at the trial that the legal estate was in the cestui que trust, why should not the Judge amend? All that he has to inquire is, who are the parties to the suit? You say, the plaintiff and the defendant; but that is pure technicality: they may have no interest whatever in it. The expression "for the purpose of determining the question between the parties" means the real parties, not the person who brings or defends the action. Bramwell, B. Suppose the legislature had said that wherever a party comes to try title, which for want of the name of a proper claimant cannot be tried, the Judge shall be at liberty to insert his name if he consented, would there be any injustice in such a provision?] A plaintiff in ejectment must recover on the strength of his own title, and here the original claimant had none. [Bramwell, B. What is the difference between this case and that of an [470] issue of *devisavit vel non*, where, by mistake, the name of a person is inserted who had an equitable title instead of one who had the legal estate?]

Cur. adv. vult.

POLLOCK, C. B., now said—This was an action of ejectment; and at the trial, before my brother Bramwell, the plaintiffs' counsel applied to him to amend the record by adding the names of two trustees as plaintiffs. The amendment was accordingly made, and the plaintiffs obtained a verdict. A rule nisi was granted to set aside the verdict, on the ground that the learned Judge had no power to make the amendment. We are all of opinion that the rule ought to be discharged.

The Common Law Procedure Act, 1852, intended to abolish the old form of proceeding in ejectment; and I confess that I never conceived it very creditable to the administration of justice that there should be a proceeding of that sort, founded on a tissue of facts which had no real existence. At length the legislature interfered, and placed the action of ejectment on the same footing as other actions. In introducing that change, it was necessary to frame clauses especially relating to the action of ejectment. The Act also extended the power of amendment, and I have no doubt the object of the legislature was to place the action of ejectment in the same category as other actions, and to enable amendments to be made in that action as well as in any other.

I cannot assent to the argument, on behalf of the defendants, that it makes a difference that the 35th section speaks of "joining" instead of "adding" the name of a plaintiff. I am by no means prepared to say that the 35th section justifies the amendment; but I am convinced that the 222nd [471] section is sufficient for that purpose. It enables "the superior Courts of common law, and every Judge thereof, or any Judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes;" and it requires that "all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." Therefore, wherever there is any error in the proceeding, whether with reference to the parties to the suit, or the pleadings, or otherwise, if it becomes necessary to correct the mistake in order to determine the real question in controversy, it is competent for the Court, or any Judge thereof, or the Judge at Nisi Prius, to make any alteration for that purpose. I can well understand that a change of parties may be necessary in certain events. It is well known to those concerned in the administration of justice that the mere person suing as plaintiff may not be the real plaintiff, and that the person nominally sued as defendant may not be the real defendant; and I think it is competent in an action of ejectment, as well as in any other action, to make every alteration which may be necessary to try the matter in dispute between the real litigant parties, always providing that no person shall be taken by surprise, and that what is done shall be really and substantially in furtherance of the right and justice of the case.

It has been contended that the expression "in the existing suit" forbids any such construction of the Act, and that "the suit" means the action as brought by and against the parties named in the writ; and that if an alteration is made by introducing any other party as plaintiff or defendant, it is not the same suit. That appears

to me not a sensible and practical, but a purely technical, view of the subject. The expression "in the existing suit" only means [472] "without bringing another action," that is, you may take the record in the existing suit, and make any alteration in the parties or pleadings, so as to meet the justice of the case. It therefore appears to me that the learned Judge was right in making the amendment, and that the rule ought to be discharged.

CHANNELL, B. I am also of opinion that the rule ought to be discharged. It was obtained on the ground that my brother Bramwell had no power to make this amendment. It appears to me that in an action of ejectment, as well as any other action, a Judge at Nisi Prius has power to make any amendment which may be necessary for determining the real matter in dispute. It was conceded that under the old law a declaration in ejectment might have been amended by adding a new demise, but it was contended that under the present form of proceeding the writ in ejectment could not be amended by adding a new plaintiff. At first I entertained some doubt on the subject; and I own I am not disposed to extend the power of amendment to any case in which the legislature has not conferred it, but it seems to me that in this case the jurisdiction is conferred; and all we have to consider is the question of jurisdiction, not whether it was properly exercised. I think, however, that the jurisdiction was wisely exercised, because the real question which the parties went down to try was whether the testator was competent to make a will, and in the course of the trial it appeared that the legal estate was in the trustees named in the will, while the plaintiff in the writ was the mortgagee of the cestui que trust. It therefore became necessary to amend the writ, but still the point is, had the Judge power to make the amendment?

The legislature intended, by the Common Law Procedure [473] Act, 1852, to abolish the fictions in ejectment, and to place that action on the same footing as any other. There are two sections in the Act which require attention, the 35th and 222nd. No doubt the 35th was intended to apply to misjoinders or nonjoinders, and it may be that, looking at that section critically, it is not of itself sufficient to warrant this amendment. I give no opinion on that point, though I am inclined to think that the 35th section alone would not confer the power. But the 222nd section, which is not confined to any particular form of action, was intended to enlarge the power of amendment previously given, and reading the two sections together I think that the power exercised in this case did exist.

Great stress has been laid on the words, "in the existing suit;" and they seem at first to present some difficulty, but when the whole section is looked at the difficulty vanishes. The question "in the existing suit" means the question on the record.

For these reasons I think that the learned Judge had power to make the amendment, and that the rule ought to be discharged.

WILDE, B. I am of the same opinion. While I fully appreciate the critical observations of the defendant's counsel on the construction of the statute, I have nevertheless come to the conclusion that the rule ought to be discharged. I entertain that opinion because I do not think that an act of parliament of such a remedial nature ought to be dealt with in the way in which we have been invited to deal with it. The legislature has given a general power of amendment for the purpose of advancing justice, and I am glad that in construing the enactment a broad and liberal interpretation has been put upon it. Having said thus much, I will only [474] add that I concur with what has fallen from the other members of the Court.

BRAMWELL, B. I state my opinion last because this is an appeal against my order, and I can do so without that prejudice which every one naturally has in favour of an opinion to which he has given utterance, because at the trial I expressed no opinion on the point. It seems to me that I was perfectly right in making the amendment. I am inclined to think that the argument of the defendant's counsel on the 35th section is well founded, and that it does not in terms include the action of ejectment. That being so, we are warranted in looking at the 222nd section, and seeing whether the powers therein given apply to the action of ejectment. I cannot help thinking that, when that section is read, it will be seen that the intention of the legislature was (as I know, as a fact, it was the intention of those who prepared the clause), that whatever general power of amendment had not been before given, either by reason of the necessity of requiring some particular terms or conditions of the amendment, or through omission by inadvertence or otherwise, should be given by the 222nd section.

It is impossible to read that section without seeing that no terms could be larger than those there used. It may well be that a general power of amendment may apply to the case of adding a plaintiff, although there is a special power for that purpose, if such power requires (as in actions of contract or tort) certain conditions to be attached to it; whereas in the action of ejectment no condition is required, but merely the exercise of the discretion of the Judge at the trial. It cannot be, that because there is a special power of amendment by joining a plaintiff in actions of contract or tort, the general power of amendment does [475] not apply to actions of ejectment. If the 35th section does not apply to this case, recourse must be had to the 222nd section, and in having recourse to that section we do not act in opposition to the cases of *Robson v. Doyle* (3 E. & B. 396) and *Wickens v. Steel* (2 C. B. N. S. 488), where the Courts of Queen's Bench and Common Pleas are represented to have said that the 222nd section does not apply to cases within the 35th section. The very argument used by the defendant's counsel was that this case is not within the 35th section; therefore the foundation of the objection that the 222nd section does not apply altogether fails.

But it was further said that although the special enactment as to nonjoinder has no application to the action of ejectment, yet the 222nd section does not enable an amendment to be made by adding a plaintiff. I confess I do not understand that argument. The general purpose of the 222nd section was that the parties should be enabled to try the real question in dispute. Now, what was the real dispute, and who were the real parties? They were the mortgagee of the beneficial devisee, and the heir-at-law of the original devisor, and the question in dispute was whether the second devisor was competent to devise. At the trial it turned out that the dispute could not be tried between them because the devisee had an equitable estate only, and consequently his mortgagee was the wrong person to be on the record. The amendment was made to insert the name of the persons who had the legal estate, but who were not the real parties to the controversy. Their names were inserted, the question between the substantial parties being left to be tried as before. If, instead of an action of ejectment, the plaintiff had stated what his controversy with the defendant was, viz., that he asserted that the devisor was capable of making a will, and [476] made one, and that the defendant denied it, there would have been no occasion for an amendment. I was struck with an observation of my brother Channell, that, if neither the 35th nor the 222nd section applies, the action of ejectment is in a worse position than other actions. That seems to me very unreasonable.

As to the argument that a defendant goes down to try whether the plaintiff on the record has a title, that would be an argument against any kind of amendment, for it might always be said that a defendant goes down to try whether the precise statement made by the plaintiff is true in fact. That however is not so, a defendant goes down to try the real question in dispute. Here the defendant went down to try, not whether the mortgagee or the trustees had the legal estate, but whether the devisor was competent to make a will.

It seems to me that the 35th section does not apply to this case, and it almost follows that the 222nd section does. It further seems to me that there is no reason why the 222nd section should not apply to the action of ejectment; and, therefore, it was competent to make the amendment—that it was properly made, I do not entertain the slightest doubt.

Rule discharged.

[477] M'CANCE v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Nov. 19, 1861.—In an action against a railway Company, the first count of the declaration alleged that the plaintiff employed the defendants to provide trucks for the carriage of the plaintiff's horses, for hire to be paid by the plaintiff, in consideration whereof the defendants promised the plaintiff that the trucks should be reasonably fit and proper for the carriage of such horses. Breach: that the defendants did not provide fit and proper trucks, whereby the plaintiff's horses were injured. Second count: that the defendants having received certain horses of the plaintiff to be carried by railway, in consequence of the defective state of the truck and the negligence and want of care of the defendants, the plaintiff's horses were injured. Plea: payment of 25l. into Court. Replica-

tion: damages ultra. At the trial, it appeared that when the plaintiff delivered the horses to the defendants, he signed at their request a declaration that the value of the horses did not exceed 10l. per horse, and that, in consideration of the rate charged for their conveyance, he thereby agreed that the same were to be carried entirely at the owner's risk. In the course of the journey the horses were injured in consequence of the defective state of the truck in which they were carried. The horses were worth more than 10l. each, and if taken at their real value the damage sustained by the plaintiff was 65l., but if valued at 10l. each the 25l. paid into Court covered the plaintiff's claim. A verdict having been entered for the plaintiff for 40l.: on motion to enter the verdict for the defendants, the Court being at liberty to draw inferences of fact: Held, that the plaintiff having made a wilfully false statement as to the value of the horses for the purpose of inducing, and having thereby induced, the defendants to enter into the contract, was not at liberty to shew their real value, in order to obtain compensation above the amount paid into Court.—Semble, that the declaration of the value of the horses formed no part of the contract, and that even if it were it did not render the contract a conditional contract.—Also, that the stipulation that the horses should be carried entirely at the owner's risk was not unreasonable and void within the meaning of the 17 & 18 Vict. c. 31.

[S. C. 31 L. J. Ex. 65; 7 Jur. (N. S.) 1304; 10 W. R. 154; 5 L. T. 587: affirmed 1864, 3 H. & C. 343.]

The first count of the declaration stated, that the defendants, being the proprietors of a certain railway, and of certain trucks and carriages to carry horses on the said railway for hire, the plaintiff employed the defendants to provide, and the defendants did provide, for the plaintiff certain trucks and carriages to be used on the said railway for the carriage of certain horses of the plaintiff from Edge Hill, near Liverpool, to Wolverhampton, by the defendants for hire to be paid by the plaintiff. And the defendants, in consideration of the premises, promised the plaintiff that such trucks and carriages should be reasonably fit and proper for the carriage of such horses; and further, in consideration of the said premises, promised the plaintiff that the said horses should be carried from Edge Hill, near Liverpool, to Wolverhampton aforesaid within a reasonable time. And although all things happened and times elapsed necessary to entitle the plaintiff to the performance of the said agreement and to maintain the suit, yet the defendants [478] broke their said promise in this, that at the time of the providing of the said trucks and carriages in which the said horses were, under the said contract, conveyed upon the said railway part of the way from Edge Hill aforesaid on the said journey, the said trucks and carriages were not reasonably fit or proper for the carriage of the said horses, or any of them; and that the defendants further made default in this, that they did not, within a reasonable time in that behalf, carry or cause to be carried the said horses or any of them from Edge Hill, near Liverpool, to Wolverhampton as aforesaid; and that by reason of the premises the said horses of the plaintiff were greatly injured and deteriorated in value, and divers of them were killed, and the plaintiff lost and was delayed a long and unreasonable time in his sale of and market for divers others of the same, and was put to great loss and expense in and about the keep, care and doctoring of the said horses, and lost large sums which he would otherwise have made thereby. Second count: that the defendants, being the proprietors of the said railway, as in the last count mentioned, and of trucks and carriages for the conveyance of passengers, horses, cattle and merchandize, as carriers on the said railway, the plaintiff delivered to the defendants, and the defendants received, certain horses of the plaintiff to be within a reasonable time in that behalf carried by the defendants on the said railway from Edge Hill, near Liverpool, aforesaid, to Wolverhampton aforesaid, for hire paid for the same; and that after the said delivery, and while the said horses were on the said journey, and in a certain truck of the defendants on the said railway for the purposes of such carriage, in consequence of the defective state and unfitness of the said truck and of the improper conduct and negligence and want of care of the defendants, the said horses were greatly injured and deteriorated in value and divers of them were killed; and by reason of such negli-[479]-gence of the defendants the carriage of the plaintiff's said horses was delayed for a great and unreasonable space

of time; and that by reason of the premises the plaintiff sustained great loss and damage, as in the first count.

Plea. Payment into Court of 25l.
Replication. Damages ultra. Issue thereon.

At the trial, before Overend, Q. C., sitting as Commissioner at the last Liverpool Summer Assizes, admissions were made as follows:—On Monday, the 8th of July, 1861, the plaintiff delivered three horses, his property, at the defendants' railway station at Edge Hill, to be carried to Wolverhampton, with four other horses belonging to one Francis Keating, who accompanied the plaintiff; the whole to be carried in one truck, which they filled, for 2l. 16s. 6d., and 3s. for use of the cover, which amounts were paid. After the horses had been placed in a truck provided by defendants' servants, Keating went into defendants' office and paid the money, and thereupon received a ticket,(a) [481] and he put his mark, by way of signature, at the

(a) This ticket, so far as material to the present question, was in the following printed form, the words in italics and the figures being filled up in writing:—

London and North Western Railway.
Cattle Department.

No. of Vans.	No. of 13 feet Waggon.	Quantity.	Description.	Rate.	Amount.	Declared Value.	Total Paid.
	15284	7	Horses		£ s. d. 2 16 6		£ s. d.
1		Sheet			3 0		2 19 6

8th July 1861.

Name M'Nance (sic).
Address
From Edge Hill Station, Liverpool,
To W'hampton.

Drovers in charge free. J. W. S., Clerk.

For conditions of carriage see the back thereof.

* * This invoice must be delivered up at the place of destination, in default of which the stock herein named will be detained, and remain at the owner's risk and expense.

[480] On the back were the following printed conditions of carriage:—

The London and North Western Railway Company give public notice that they convey horses, oxen, sheep, calves and pigs in waggons, and by cattle or merchandize trains, subject to the following conditions:—

First. That as the charge of conveyance is per waggon, and as the owner or his servant is required to superintend the loading of the stock, and is allowed to place as many animals in each wagon as he considers may be conveyed with safety, they will not be responsible for loss arising in any way from the overcrowding of such waggons, or for injury done in the loading or unloading thereof, or in consequence of one animal injuring another.

Second. That as a drover is allowed to attend the cattle during transit they will allow such drover to travel free of charge, upon condition that he so travel at his own risk.

Third. That they do not undertake the delivery of cattle in time for any particular fair or market.

And notice is further given, that in pursuance of an Act, 17 & 18 Viet., passed 10th July, 1854, entitled "An Act for the better regulation of traffic on railways and canals," it is provided in clause 7, in reference to the liability of railway or canal

foot of a page in a printed book.(a) The truck was attached to a train at about half-past 11 p.m., and soon after forwarded on the way to Wolverhampton; but on arriving at Warrington it was found that plaintiff's three horses had been injured, and one had soon after to be killed in consequence, and it is admitted that the injuries resulted solely from the defective state of the bottom of defendants' truck. The actual damage to the plaintiff is admitted to exceed the 25l. paid into Court, assuming him to be entitled to recover the full amount of the actual damage he has sustained. Assuming that the valuation of the plaintiff's horses is to be taken at 10l. each, the sum of 25l. paid into Court covers the plaintiff's claim. Horses are sometimes sent by those trucks, but sometimes they are forwarded in horse boxes, each horse being placed in a separate stall; and the rate of carriage per horse in this latter mode is nearly three times as much as when carried in trucks, assuming a truck to be filled. When horses are carried in trucks, the carriage is paid per truck. The seven horses in question, if carried in boxes, would have cost 7l. 3s. 6d.

[482] The plaintiff himself was called, and gave evidence as to the value of the horses injured: that he had purchased them for sums varying from 30l. to 35l. Keating was called for the plaintiff, and stated, that after the horses had been placed in a truck, one of the Company's servants gave him a piece of paper, on which, as he understood, was the number of the horses, the number of the truck and the name of

companies, that under no circumstances shall a greater amount be recovered for loss or injury done to animals beyond the sums hereinafter mentioned, that is to say,

For any horse	.	.	.	£50
„ neat cattle	.	.	.	15 per head.
„ sheep or pig	.	.	.	2 „

unless the person sending or delivering the same shall at the time of such delivery have declared them to be of respectively higher value than is above mentioned, in which case it shall be lawful to demand or receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable per centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge.

Notice is hereby further given that from and after the date hereof a per centage of 5l. will be charged in addition to the usual charges for conveyance by the London and North Western Railway Company, upon any excess on the declared value of horses, oxen or other animals over and above the amount fixed by the aforesaid Act; and notice is hereby further given, that all declarations of the value of horses, oxen, sheep or pigs, when such value exceeds the above sums respectively, must be signed by the owner thereof, or by his agent, before the animals aforesaid can be received by the Company for transmission by their railway.

By Order.

FISHER ORMANDY, Cattle Manager.

(a) The material part of this form was as follows, the words in italics and the figures being inserted in writing:—

London and North Western Railway.

Declaration.

To be signed when horses are conveyed in waggons.

I hereby declare that the value of the 7 horses this day delivered by me to the London and North Western Railway Co., for conveyance in cattle waggons by luggage trains does not exceed 10l. per horse, and in consideration of rate charged for conveyance of such horses, I hereby agree that the same are to be carried entirely at the owner's risk.

his
Jno. ~~X~~ M^cNance, Owner.
mark
or on
owner's behalf.

Witness F. W. Salmon,
July 8, 1861.

the owner of the horses, which paper he (Keating) then took into the office at the station; that he there saw a clerk, to whom he paid 2l. 19s. 6d., including 3s. for a cover, and who gave him a receipt.^(a) After he (Keating) had put three sovereigns on the desk, the clerk asked him to come and sign a paper. Keating said he was not a good penman, so the clerk signed the name, and Keating made his mark. He then got the receipt, but did not read it over, nor was it given him to read. He could read. On cross-examination, he said that he did not know till after this had happened that the Company would not take horses above the value of 10l. in trucks, nor did he know that what he had signed had anything to do with the value of the horses; he thought it was about the loading and unloading. It was not disputed that Keating was acting for M'Cance in this transaction.

For the defendants, their clerk, F. W. Salmon, was called, and gave the following evidence, which was objected to by the plaintiff's counsel as inadmissible, but the objection was overruled and the evidence admitted. "I am in charge of the cattle station at Edge Hill. I recollect booking some horses. Keating came into the office. As with all horses, I went through the usual form. Previous to taking the freight the declaration is in all cases read over, either by me or my assistant. I read it over on this occasion. I said 'Can you write your name?' He said 'No.' I said 'If [483] you cannot write, put your mark,' and he did so. I then received the freight, and the business was transacted. We never carry horses without reading over the declaration and getting it signed. We will not send any horses by cattle trucks until this is done. If they would not sign we would not send the cattle. It would be under the penalty of discharge that I omit to read over this declaration. I never omit it."

It was agreed that 40l. should be the measure of the plaintiff's damages and a verdict was entered by consent for that sum, leave being reserved to the defendants to move to set it aside and enter it for defendants, or a nonsuit, upon the ground that on the evidence and the admitted facts the defendants were entitled to have the verdict entered for them; the Court to draw such inferences of fact as a jury might draw.

Manisty having obtained a rule nisi accordingly,

Brett and C. Russell now shewed cause. First, it is admitted that the plaintiff has, by the defendants' negligence, sustained damage to the amount of 65l., but it is contended that nevertheless the defendants are only liable to the extent of 25l., the amount paid into Court. But the defendants, by paying money into Court, have admitted the contract as alleged in the declaration and the breach of it, and therefore they are liable to the full extent of the damage done. It was no part of the contract that the value of the horses should not exceed 10l. each. It must be taken that the contract is that set out in the declaration, but the defendants now set up a different contract, which they contend is contained in the printed book. [Channell, B. Suppose the defendants had pleaded non assumpsit.] In that case if the statement of the value of the horses forms part of the contract the plaintiff would fail, because [484] the declaration alleges an unconditional contract, whereas the proof would be of a conditional contract: *White v. The Great Western Railway Company* (2 C. B. N. S. 7). Assuming that the statement of the value of the horses forms part of the contract, it annexes a condition to it; but on these pleadings it is not competent to the defendants to set up a conditional contract. If the statement of the value of the horses forms no part of the contract, the defendants can only use it as an admission by the plaintiff that the horses were not worth more than 10l. each, but that does not estop him from shewing that in truth they were of greater value: *Freeman v. Cooke* (2 Exch. 654), Best on Evidence, p. 618. [Wilde, B. The defendants were induced to carry the horses at a low rate of charge by the plaintiff's statement that their value did not exceed 10l. each, why is that not binding on him?] The defendants must prove that it was fraudulent. Secondly, supposing the document containing the declaration of value forms part of the contract, and that the defendants are at liberty to avail themselves of it, according to the judgment of the Court of Exchequer Chamber in *M'Manus v. The Lancashire and Yorkshire Railway Company* (4 H. & N. 327), the stipulation that the horses are to be "carried entirely at the owner's risk" is unreasonable and void by the 17 & 18 Vict. c. 31, s. 7; and if that be so the document is altogether void,

(a) The ticket set out ante, p. 479.

for a condition void in part is wholly void. [Bramwell, B. When a person brings his horses to be carried by railway, the Company say, "There are two rates of charge for the carriage; you can pay which you please; but, if you choose the lower rate the horses must be carried at your own risk:" how is that unreasonable? Pollock, C. B. A person is not obliged to send his horses by railway.] The 17 & 18 Vict. c. 31 has been framed [485] on the assumption that railway Companies have a monopoly which they might use oppressively. [Bramwell, B. I think the statute was never intended to prohibit parties making any contract they thought fit, provided it was in writing and signed by them. Surely a railway Company may say, "We will not carry horses at all," or only upon certain terms. *M'Manus v. The Lancashire and Yorkshire Railway Company* decided that a railway Company may refuse altogether to carry horses, but, if they elect to do so, they must carry upon reasonable terms, and that a condition of non-liability for any injury or damage, howsoever caused, was not a reasonable condition. Here, however, the company say, "We will carry upon one or other of these two terms, either at a higher rate of charge with liability, or at a lower rate of charge without liability." How can that be unreasonable?] In *M'Manus v. The Lancashire and Yorkshire Railway Company*, the majority of the Court of Exchequer Chamber adopted the opinion expressed by Jervis, C. J., in *Simons v. The Great Western Railway Company* (18 C. B. 805, 829) that the true construction of the Act and the result of its provisions is this, viz., "that the Company may make special contracts with their customers, provided they are just and reasonable, and signed; and whereas the monopoly created by railway Companies compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security, that the Courts shall see that the condition or special contract is just and reasonable." In *Beal v. The South Devon Railway Company* (5 H. & N. 875) the condition left the Company subject to liability in two events, gross negligence and fraud.

Manisty and Quain appeared to support the rule, but were not called upon to argue.

[486] POLLOCK, C. B. Without saying whether the condition in the printed book, that the horses "were to be carried entirely at the owner's risk" is a reasonable condition, I am of opinion that the value of the horses has not been declared, as required by the 17 & 18 Vict. c. 31, s. 7. That sort of condition should receive a reasonable construction, and the Act only makes void so much of a condition as is unreasonable. I think, however, that this condition is no part of the contract. It is a declaration of value, which turned out to be false. It was made expressly with a view to induce the Company to carry, that is, to enter into the contract, and it was falsely made to induce them to carry without making an increased rate of charge. According to the reservation of the learned Commissioner who tried the cause, we are at liberty to draw such inferences of fact as a jury might draw, and I am of opinion that when a person makes a declaration of that kind for the purpose of inducing another to act, and he accordingly acts upon it, and the declaration turns out to be false, the person who has made it is so far bound by his statement that it ought not to be imposed on a jury to find, or on a Judge to recommend them to find, any other value than that which the party himself has declared to be the true value. Therefore, in my opinion, whether the declaration of value be part of the contract or not, it is conclusive against the party making it. In an action for goods sold and delivered, where money is paid into Court, and the only question is the value of the goods, it is competent for the defendant to prove that the plaintiff declared to him that the goods would not cost more than a certain sum, and in such case a jury would be perfectly right in finding a verdict for the defendant if the sum paid into Court was equal to the value which the plaintiff said the goods would not exceed.

On this ground, it appears to me the rule ought to be made absolute to enter the verdict for the defendants.

[487] BRAMWELL, B. I am of the same opinion. First, I find, as a fact, that the documents were read over by the railway clerk to the person who acted for the plaintiff, the owner of the horses. I also find that, in point of fact, these documents were signed by that person; and, though I do not mean to say that he was conscious of what was in them, at all events there is a strong *prima facie* case for the plaintiff to rebut. Therefore, it must be taken as a fact that the papers were read to him; and that he signed the document, by which he declared that the value of the horses did not exceed 10l. each, and that they were to be carried without any responsibility on the part of

the Company. But then it is said that that document is a qualification of the contract alleged in the declaration, and that it is not open to the defendants to set up that qualification, because, having paid money into Court, they have admitted the contract as alleged. I assent to the proposition, that where a special contract is stated in a declaration, and the only plea is payment of money into Court, the defendant cannot say that the contract was different from that alleged; and a qualified contract is a different contract from an unqualified one. Whether, if this document were part of the contract, the defendants would be at liberty to say that it was no qualification, is a more doubtful matter. In *Clarke v. Gray* (6 East, 564), the notice by a common carrier that he would not be accountable for more than 5l. for goods, unless entered as such and paid for accordingly, was held not to be a qualification of the contract, but only a limitation of the damages to be recovered in the event of a breach of it. Lord Ellenborough there said, with reference to that stipulation, "Its proper office is to limit the province of the jury in the assessment of damages for a contract broken, and, of course, has no concern with it as long as it is executory, and in the [488] course of its performance." In *Smart v. Hyde* (8 M. & W. 723), where the declaration stated a warranty of a mare, and the defendant pleaded that the mare was sent to a repository for the sale of horses to be sold, according to certain rules, which provided that a warranty of soundness should remain in force until twelve o'clock at noon of the day next after the sale, when it would be complete, and the responsibility of the seller terminate, unless, in the meantime, notice, accompanied by a certificate of unsoundness, were given. It was there held that the plea was good, because it did not deny the warranty alleged in the declaration, but only shewed that it was made subject to a term which had not been complied with. I doubt whether, supposing this declaration of value to be an additional term of the contract, namely, that it was agreed that the horses were of the value of 10l., the defendants could not shew that. It is, however, unnecessary to determine the point, because I think that the declaration of value is no part of the contract, but a mere statement on the faith of which, the defendants entered into the contract. If it were part of the contract, I should think, on the authority of *Smart v. Hyde*, that it would be open to the defendants to set it up; but, being no part of the contract, it is clearly competent to them to set it up as affecting the damages.

With reference to the question whether the stipulation that the horses shall be "carried entirely at the owner's risk" is reasonable or unreasonable, the case of *M'Manus v. The Lancashire and Yorkshire Railway Company* (4 H. & N. 327), has been referred to. By that case, I consider myself bound; and if this case were identically the same, since the contract was there held void, on the ground that it was unreasonable, I should feel myself bound to hold this contract void, as being unreasonable. But it seems to me that if the [489] 7th section of the 17 & 18 Vict. c. 31, be carefully examined, it will be found that, in truth, it is extremely difficult to say that it is by virtue of any proposition of law that such a condition is held unreasonable,—it is so held not as a matter of law, but of fact, with reference to all the circumstances of the case. However, I consider myself bound by the case of *M'Manus v. The Lancashire and Yorkshire Railway Company*, and will therefore assume that the latter part of the statement, that the horses are to be "carried entirely at the owner's risk," is an unreasonable condition. Then it is said that, because that condition is unreasonable, the declaration of the value of the horses is also unreasonable, because the two matters form but one statement, and that, being unreasonable in part, it is unreasonable in the whole. Formerly, questions were raised whether demurrers or traverses were not too large; and there seems a tendency to introduce similar questions with reference to conditions of this kind. But I am clearly of opinion, that if a railway Company puts two conditions in their carrying clause, one of which is unreasonable, they may rely on the other if that be reasonable. I entertain no doubt whatever upon the matter. Therefore, I do not think that the declaration of value is unreasonable on the ground to which I have adverted.

Then it is said that the declaration is unreasonable in itself—that it is unreasonable for a railway Company to require a declaration that a horse is of the value of 10l., if it is, in fact, worth more. I am at a loss to understand that argument. If a person comes to a railway Company with his horses, and there are two modes of conveying them, the one more expensive, the other less, the Company may well say "If you value your horses at 10l. each, so that in no event can you claim more than 10l. on each, we

will take them by the cheap mode of conveyance; if not, we will charge [490] an additional rate." Then the person says, "I value them at 10l. each." We are told that is unreasonable, but I do not know how to deal with such an argument. The person has the option of stating the value at 10l.; he does it for his own advantage, and I cannot understand on what ground he can afterwards say it was unreasonable for the Company to require it. In this case, as on other occasions, a great deal has been said about the monopoly of railways, but, in reply to such an argument, I refer to the judgment of Erle, C. J., in *M'Manus v. The Lancashire and Yorkshire Railway Company*. I think there is not the least ground for holding that the declaration of value is unreasonable, because the Company have a right to say to the owner, "whatever damage we do to your horse 10l. shall be the limit of it, unless you pay an increased rate of charge."

Then how does the case stand? There is a stipulation, or statement, whether a representation or contract is immaterial—by which the plaintiff, with a view to induce the defendants to act (and they have acted) upon it, has said that the value of each horse did not exceed 10l., and he now professes to say, "True it is, I did make that statement, in order that the defendants might act upon it; and true it is, they have acted upon it, but the statement was untrue, and now I want four times as much as the declared value of one of the horses." That is in effect what he is doing. I think that, according to every principle of law, he cannot be allowed to do so. If there be one principle of law more clear than another, it is this, that where a person has made a deliberate statement, with the view to induce another to act, and he has acted, upon it, the former is not at liberty to deny the truth of the statement so made. I think it would be most mischievous if he could. I cannot help saying that, in my opinion, this and other cases of the same description, very forcibly shew the mischief of the decisions [491] pronounced on the 7th section of the 17 & 18 Vict. c. 31. Here is a plaintiff attempting to enforce a claim, to my mind dishonest—a claim unjust to his own knowledge, contrary to his express declaration, and which, unhappily, when he comes into the witness box, he is tempted to support by a false statement; and all this in consequence of a condition of things which holds out to him the possibility of gain by so doing. It is very much to be regretted that anyone should be allowed to say, "True, I have entered into a contract, but it is unreasonable, and by a little colouring of the case, I can make the railway Company liable." However, so it is; but in this case it will not succeed.

For these reasons, I am of opinion that the rule should be absolute to enter the verdict for the defendants.

CHANNELL, B. I am of the same opinion. Subject to certain admitted facts, all questions of law and fact are referred to us, and we are called upon to draw such references as we think the jury ought to have drawn from the facts before us. The substantial question is, whether or no we can draw an inference from the facts that the plaintiff is entitled to recover more than 25l. That sum has been paid into Court, and if it be the measure of damage, it is manifest that the verdict is wrong, and that a nonsuit or verdict for the defendants should be entered. It being then referred to the Court to draw from the evidence such inferences as a jury might have drawn, I am of opinion that the measure of damage which the plaintiff is entitled to recover is 25l. But we have been pressed with a difficulty arising upon the form of the pleadings, the only plea being that of payment of money into Court, which, it is said, admits the contract as alleged in the declaration, and precludes the defendants from setting up any other; and that, in fact, the defendants are setting up a different contract when they rely on the stipulation in the printed book, [492] which declares that the value of the horses does not exceed 10l. each. My present opinion is, that that declaration of value forms no part of the contract, and that, if it be, it does not vary or qualify, in substance, the contract stated in the declaration. It seems to me that it cannot be part of the contract. It is in these words:—"I hereby declare that the value of the seven horses this day delivered by me to the London and North Western Railway Company for conveyance in cattle waggons by luggage trains does not exceed 10l. per horse; and in consideration of the rate charged for the conveyance of such horses, I hereby agree that the same are to be carried at the owner's risk." The last stipulation may be considered part of the terms under which the goods were received and carried; and if the defendants, instead of paying money into Court, had pleaded a plea framed on that stipulation, and had contended that the horses were to be

carried entirely at the owner's risk, considerable difficulty might have arisen. But they do not do that: they admit that they are liable, and pay 25l. into Court; therefore, they do not rely on the stipulation that the goods were to be carried entirely at the owner's risk. But, without going the length of saying that the declaration of value is not part of the contract, it seems to me that it may be treated as a declaration wilfully false to the plaintiff's knowledge, and as one by which the defendants were induced to carry the horses; and then, when they admit that they are liable to the amount paid into Court, the question is, whether the Court, sitting as a jury, can estimate the damage at a greater amount. It is not only a question, but the question, whether we are at liberty to take into consideration this declaration as containing the terms upon which the defendants received and carried the horses; in other words, to determine whether the 25l. paid into Court is sufficient to cover the damage. In the view I take, it is not necessary to consider whether these terms are reason-[493]-able, because if the declaration of value is no part of the contract, the question of reasonableness does not arise. But, supposing it does, I am not prepared to say that the stipulation limiting the liability of the defendants is unreasonable. They make it a condition of receiving and carrying horses that the owner shall declare their value, and, if it exceeds a certain amount, pay an increased rate of charge; but if he wishes the horses carried at a lower rate, they stipulate that it shall be done at the owner's risk. It seems to me that there is nothing unreasonable in that. On these grounds I think the rule should be absolute to enter the verdict for the defendants.

WILDE, B. I am of the same opinion; and I have really very little to add. My judgment is founded on a short ground. The plaintiff bought these horses at prices varying from 30l. to 35l. each, and took them to the railway station, and deliberately declared that they were only of the value of 10l. each. I think he did so in order to get them carried, like cattle, in a common waggon, instead of subjecting himself to the higher charge which he would have had to pay if they had been carried at their real value. That being so, the question for the Court is, whether sitting as a jury we are to give the plaintiff damages upon the supposition that the horses were worth more than 10l. each. I think he is precluded by the statement he has made, with a true knowledge of the fact at the time the contract was entered into. Therefore I agree with the rest of the Court that the plaintiff ought not to recover damages except upon the footing that the horses were only worth 10l. each.

Rule absolute to enter the verdict for the defendants.

[494] HOAD AND OTHERS v. GRACE. Nov. 13, 1861.—The defendant gave to the plaintiffs the following guarantee: "Gentlemen,—As Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account." Held, that the expression "for goods supplied" did not necessarily import a past consideration, and ought to be read "for goods to be supplied." Semble, that if the expression was ambiguous parol evidence would be admissible to shew that the parties meant, not a past, but a future supply of goods.

[S. C. 31 L. J. Ex. 98; 8 Jur. (N. S.) 43; 10 W. R. 85; 5 L. T. 359. Referred to, *Chalmers v. Victors*, 1868, 18 L. T. 482; 16 W. R. 1046.]

Declaration. For that, in consideration the plaintiffs would sell and deliver from time to time goods to Lovel Davis on credit, the defendant guaranteed and promised the plaintiffs, from time to time, to be responsible to them for the due payment of the price of the said goods; and the plaintiffs accordingly, from time to time, sold and delivered goods to the said Lovel Davis on credit, and there is now due to the plaintiffs from him, on account of the said goods, a large sum; and all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiffs to maintain this action: yet neither the said Lovel Davis, nor the defendant, has paid the said sum to the plaintiffs, or any part thereof.

Plea. That the said guarantee and promise of the defendant were in writing, and in the words and figures following, that is to say—"Gentlemen,—As Mr. Davis informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account.—Yours &c., H. T. Grace:" and that, except as aforesaid, there never was any

guarantee or promise by the defendant to the plaintiffs in respect of the matters mentioned.

Demurrer and joinder therein.

Hance, in support of the demurrer. The plea affords no answer to the declaration. Since "The Mercantile Law Amendment Act, 1856" (19 & 20 Vict. c. 97, s. 3), the consideration need not appear on the face of a guarantee. The expression "for goods supplied" is sufficiently ambiguous to let in parol evidence that it was intended to apply to future dealings. The guarantee may be read thus, "in [495] consideration that you will supply goods, I have no objection to guarantee their payment." In *Haigh v. Brooks* (10 A. & E. 309), the guarantee was in these terms—"Messrs. H. In consideration of your being in advance to L. in the sum of 10,000l., for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf.—J. B.;" and it was held that the words of the guarantee did not necessarily imply a past advance, and that evidence might be offered to shew that future advances were contemplated. So in *Goldshede v. Swan* (1 Exch. 154), where the guarantee was, "In consideration of your having this day advanced to our client, Mr. V. D., 750l., we undertake to pay the same on default;" it was held that the guarantee was sufficiently ambiguous to admit evidence that the advance was not a past one, but was made simultaneously with the execution of the guarantee. Again, in *Bainbridge v. Wade* (16 Q. B. 89), the guarantee was:—"I hereby guarantee the payment of any sum or sums of money due to you from L., the amount not to exceed at any time the sum of 100l.," and it was held that evidence was admissible to shew the meaning of the word "due." [Pollock, C. B. Unless the guarantee be read "for goods to be supplied," it is senseless. If the goods have been already supplied, it is not a guarantee, but a promise to pay an existing debt.] In *Butcher v. Stewart* (11 M. & W. 857), the defendant signed the following agreement:—"In consideration of your having released S. from custody, I hereby engage within one month from this date, to pay you the sum 500l.;" and it was held that the agreement might be construed prospectively, thus, "I hereby engage to pay you 500l. within one month, &c., in consideration of your having then released S. from custody." In *Colbourn v. Dawson* (10 C. B. 765), the guarantee was, [496] "I hereby engage to guarantee to A. and Co. the sum of 200l., for iron received from them for C.," and it was held that, if necessary, the words "for iron received" might be explained by parol evidence. Here the expression being ambiguous, the principle of construction "ut res magis valeat quam pereat" applies: *Broom v. Batchelor* (1 H. & N. 255).

Montagu Chambers (Day with him), contra. It appears on the face of the guarantee that it was given for a past consideration. In the cases referred to, there was some expression from which it could be ascertained that future advances were intended. In *Bainbridge v. Wade* though the words "money due" were used, it was provided that "the amount should not exceed, at any time, the sum of 100l.," which clearly imported a future consideration. Here, though the words "for goods supplied" might have been ambiguous if they had stood alone, the parties go on to say, "for payment of your account," which can only mean an existing account. It is conceded that, where the language is ambiguous, parol evidence is admissible to explain it, but it is submitted that here no such ambiguity exists as in the cases cited. In *Broom v. Batchelor* the Court differed in opinion.

Hance replied.

POLLOCK, C. B. I am of opinion that the plaintiffs are entitled to judgment. It is conceded that parol evidence may be given to explain an ambiguity: I think, however, that in this case, there is none. Looking at the matter as a transaction of business, there can be no doubt as to the real meaning of the expression "goods supplied." The words of the guarantee are:—"As Mr. Davis informs me you require some person as guarantee for goods supplied to him [497] by you in his business, I have no objection to act as such, for payment of your account." It seems to me that must mean "for goods to be supplied," because, if the goods were already supplied, no guarantee would be wanted. The words "for payment of your account" mean, "your account when you have supplied the goods." Therefore, either the guarantee is ambiguous, in which case parol evidence may be given to explain it, or it is to be read, as I think it should, as a guarantee for goods to be supplied. A mercantile instrument should be construed with reference to the surrounding circumstances, and if, in this case, the parties had no previous dealing, the words "goods supplied" could only mean

"goods to be supplied." Looking at this document as a mercantile instrument, I think it is plain that it is a guarantee for the future supply of goods, not for goods already supplied.

BRAMWELL, B. I am of the same opinion. Looking at the former cases, there can be no doubt. But it may be said that, on a point of this kind, it is of little use looking at former cases, because one writing can scarcely be proof of the meaning of another. However, I read the guarantee thus: "in consideration of your supplying," or, "if you will supply goods," because, if it means "for goods already supplied by you, and for which he owes you the money, I will be guarantee," in the first place, that is not an apt way of expressing it, and in the next place, it is impossible to suppose that the parties would not have named some period for which the credit was to be given. It is true that, in *Oldershaw v. King* (2 H. & N. 517), the majority of the Court of Exchequer Chamber considered that forbearing to press for immediate payment meant forbearance for a reasonable time, but I confess I am unable to understand that. Then taking into account that, if the defendants' construction were [498] correct, in all probability some time would have been specified, that seems to me to counterbalance the notion that the words "for goods supplied," read grammatically, can only mean supplied in the past tense. If the parties had so intended, I am certain that they would have expressed their meaning differently.

There is another ground, not adverted to, upon which I think the plaintiffs are entitled to judgment. Suppose, in fact, there had been no previous supply of goods by the plaintiffs to the debtor, the words "for goods supplied" could not have their primary meaning; and if not, they must have their secondary. The plea simply states the guarantee, and that there was no other; it does not shew that there was an existing debt for goods supplied, and therefore it does not exclude the possibility of that being the writing, and, nevertheless, the declaration being true, which alleges a guarantee for a future debt.

Upon these two grounds it appears to me that the words "for goods supplied" do not import a past transaction; and, further, I think that, if primarily they did, evidence might be adduced to shew what the parties really contemplated. I confess that I cannot accede to the proposition that a document must be construed ut res magis valeat quam pereat, merely because, if its natural meaning were given to it, the result would be that it would be void. For these reasons I think that our judgment ought to be for the plaintiffs.

CHANNELL, B. It is not necessary to say what amount of proof, as to the meaning of the parties, would have been receivable if the plea had been traversed; but I am clearly of opinion that the plaintiffs are entitled to judgment on this demurrer. I think, however, that the defendant should have leave to amend.

Leave to amend within a week, otherwise judgment for the plaintiffs.

[499] NOTON, MARTIN, AND BOND v. BROOKS. Nov. 18, 1861.—If a patentee, in consideration of a royalty, grants to another a license to use the patent invention, and the latter uses it, he cannot plead, as a defence to an action for the royalty, that the invention was not new, or that the patentee was not the first inventor.

[S. C. 8 Jur. (N. S.) 155; 10 W. R. 111.]

Declaration. For that by an agreement made between the plaintiffs, Thomas Noton and William Martin (therein described as trustees and executors of John Elce, deceased) and John Bond, of the one part, and the defendant, of the other part, reciting that her Majesty's letters patent, bearing date the 26th day of February, 1852, had been granted to the said John Elce, deceased, and the said John Bond, for the sole and exclusive right, privilege, and enjoyment of certain improvements in machinery, applicable for looms for weaving, and in the roller wheel, or boss, containing the patent principle, or tooth, for the term of fourteen years, from the date of the said letters patent. And reciting that the defendant had contracted with the plaintiffs for license and permission, during all the residue yet to come of the said term for which the said letters patent were granted, to make, use, and sell the machinery applicable for looms for weaving, and the rollers, wheels, or bosses, containing the patent principle, or tooth, subject to the payments and conditions therein-after mentioned: The plaintiffs, in consideration of the sums of one shilling for one

roller, one shilling and sixpence for two-roller, and two shillings for three-roller temples, to be paid as thereafter mentioned by the defendant to the plaintiffs, for each and every piece of machinery applicable for looms for weaving, made, used and sold by the defendant; and also, in consideration of the further sum of sixpence, to be paid by the defendant to the plaintiffs, for each and every roller, wheel, or boss, containing the patent principle, or tooth, made, used and sold, or to be made, used and sold, by the defendant, granted and confirmed to the defendant, his executors, &c., for the remainder [500] then to come and unexpired of the said term of fourteen years, full and free license, permission, and authority, to make, use, vend and sell the machinery applicable for weaving, and rollers, or bosses, containing the patent principle, or tooth. And the defendant thereby agreed to pay to the plaintiffs the sums of one shilling for one roller, one shilling and sixpence for two-roller, and two shillings for three-roller temples, for each and every piece of machinery applicable to weaving, and the sum of sixpence for each and every roller, wheel, or boss, containing the patent principle, or tooth, made, used, or sold, by the defendant in pursuance of the license thereby granted, such payments to be made quarterly. And the defendant thereby further agreed to keep correct accounts of all pieces of machinery applicable to weaving, and of all rollers, wheels, or bosses, containing the patent principle, or tooth, by him made or constructed as aforesaid, and of the sales thereof; and, on request, to produce such accounts to the plaintiffs, for their or his examination, and to furnish copies thereof to the plaintiffs, when required by them or him. Averments: that after the making of the said agreement, and in pursuance of the license and permission thereby granted, and before action, the defendant made and sold large numbers of pieces of machinery applicable to weaving, and large numbers of rollers, wheels and bosses containing the patent principle, or tooth, and that, before action, a large sum of money became and was payable from the defendant to the plaintiffs, under the said agreement, for, and in respect of divers quarterly payments of the said sums, so as aforesaid respectively agreed to be paid by the defendant to the plaintiffs, for, and in respect of the said pieces of machinery, rollers, wheels and bosses, so made and sold by the defendant as aforesaid: that, before action, the plaintiffs had in all things performed the said agreement on their part, and that all times had elapsed, and everything had been done, and had happened which were or was neces-[501]-sary to entitle the plaintiffs to the performance of the said agreement by the defendant. Breaches: that the defendant has not paid to the plaintiffs, or either of them, any part of the said sums so payable by him to them, as aforesaid, in respect of the said quarterly payments; nor has the defendant kept correct accounts of the said pieces of machinery applicable to weaving, or of the rollers, wheels, or bosses, containing the patent principle, or tooth, so made by him as aforesaid, or of the aforesaid sales thereof; nor has the defendant, although requested by the plaintiffs so to do, produced such accounts, or any or either of them, to the plaintiffs for their or his examination, or furnished copies thereof to the plaintiffs, or either of them, although required by them so to do.

Third plea. That the letters patent mentioned in the declaration, bearing date the 26th day of February, 1852, were granted for an alleged invention of "certain improvements in machinery for preparing cotton and other fibrous substances, also in machinery, or apparatus, applicable to looms for weaving, and in the tools employed therein," and that the said alleged invention was not, at the date of the said letters patent, any manner of new manufacture within this realm, or a new invention, as to the public use and exercise thereof, in England; by reason whereof the said grant was contrary to law, and the said letters patent were, at the time of the granting thereof, and are, void and of none effect.

Fourth plea. That the said John Elce and John Bond were not the true and first inventors of the said alleged invention, for which the said letters patent were granted; and that the said John Elce and John Bond, by false allegations that they were the true and first inventors of the said alleged invention, deceived her Majesty the Queen, and obtained the grant of the said letters patent; by reason [502] whereof the said letters patent were, at the time of the grant thereof, and are, void and of none effect.

Demurrer to each plea, and joinder therein.

J. A. Russell, in support of the demurrers. The pleas are bad. The defendant has had the benefit of the consideration upon which he made the agreement, viz., the

license to make, use and sell the improved machinery for weaving, for which the patent was granted, and it is no answer to say that the invention is not new or that the patentees were not the first inventors. *Hall v. Conder* (2 C. B. N. S. 22) is an express authority that, in the absence of any allegation of fraud, it must be assumed that the patentees were the first inventors; and that there was no warranty, express or implied, either that they were the true and first inventors within the meaning of the 21 Jac. 1, c. 3, or that the invention was useful or new; but that the contract was for the sale of the patent such as it was, each party having equal means of ascertaining its value and acting on his own judgment. The Court then called on

T. Aston, to support the pleas. The recitals in the agreement contain no admission that the invention was new, or that the patentees were the first inventors. Again, the contract is for the license to use and sell, during the residue of the term, a patent invention, not for a mere article sold and delivered. Moreover, it was essential that the defendant should have a patent invention involving a new principle. In *Morley v. Attenborough* (3 Exch. 500) the distinction is pointed out between the sale of a specific ascertained chattel and an executory contract of sale, where the subject-matter is unascertained. In the former case there is no implied warranty of title, but in the latter it is implied that a good title should be transferred; for unless an article which the pur-[503]-chaser can enjoy as his own, and make full use of, be delivered, the contract would not be performed. This case falls within the principle of the decision in *Gompertz v. Bartlett* (2 E. & B. 849), where it was held that the purchaser of an article was entitled to recover back the price, on the ground that it did not answer the description by which it was sold. Here, the patentees not only undertook to grant, but also to confirm, to the defendant the exclusive right, privilege and enjoyment of certain improvements in machinery for the residue of a term of fourteen years. There was therefore an implied warranty that the defendant should have the benefit of that which the patentees professed to grant during the whole of that term. Then, if the defendant shews that the patentees never had a valid patent right which they could transfer to him, that is a good answer to their claim. *Bowman v. Taylor* (2 A. & E. 278) proceeded on the ground of estoppel; but *Hayne v. Maltby* (3 T. R. 438) is an authority that in this case there is no estoppel. The defendant has only contracted to pay the royalty if he uses an invention involving a patent principle, and it is competent for him to shew that he has not in fact used such an invention, because no valid patent was ever granted. This case is distinguishable from *Hall v. Conder* (2 C. B. N. S. 22), because there the agreement recited that the plaintiff was the inventor of the alleged invention, and had obtained a patent for the use of it. Here the plaintiffs profess to grant and confirm for a certain term an exclusive right which does not exist. [Wilde, B. The declaration does not allege that the patentees had an exclusive right, but only that a patent had been granted to them, and that the plaintiffs granted to the defendants a license to use it. Pollock, C. B. The defendant agrees to pay the plaintiffs a royalty if they will allow him to use their patent invention, and he does use it; then how can he turn [504] round and say that it is worthless? Suppose a person says to another, "Let me use your right of way, and I will pay you sixpence every time I use it," if he used it a hundred times, could he refuse to pay because it turned out that there was no right of way? The plaintiffs claim the remuneration for the permission to do that which the defendant has done.] In *Neilson v. Fothergill* (Webster's Pat. Cas. 287), Lord Cottenham, C., adverted to the point whether, at law, a party is estopped from disputing the patentee's right, after having once dealt with him as the proprietor of that right, and his lordship observed that it appeared, from the authority of *Hayne v. Maltby* (3 T. R. 438) and other cases, "that from the time of the last payment, if the manufacturer can successfully use the patent right of the party claiming the rent, that he may do so in answer to an action for the rent for the use of the patent during that year." [Pollock, C. B. What is there to prevent a person from saying to another, "You have a patent: I do not want to trouble myself about whether it is good or bad; but, so long as you will allow me to use your invention, I will pay you a royalty for the use of it"? Bramwell, B. The consideration for the promise to pay is the permission to use the invention.] If the patent is invalid, this agreement is a contract for the grant of a monopoly, and therefore void by the 21 Jac. 1, c. 3, s. 1. [Pollock, C. B. Be that as it may, so long as the terms of the patent lasts, if the defendant chooses to work under it, he must pay the stipulated price.] He also referred to *Smith v. Neale* (2 C. B. N. S. 67).

Judgment for the plaintiffs.

(d) Pollock, C. B., Bramwell, B., Channell, B., and Wilde, B.

Also, in pursuance of the first before mentioned Act, it is ordered :

That, in any suit or proceeding on the Revenue side of the Court, all rules at side bar and motions of course bear date on the day they are drawn up.

No common information of seizure, nor any writ of delivery, need be signed by a Judge.

That the word "within," in rule 48 of the rules signed on the 22nd June, 1860, be omitted therefrom.

FRED. POLLOCK. W. F. CHANNELL.
SAMUEL MARTIN. JAMES WILDE.
G. BRAMWELL.

26th November, 1861.

[507] MICHAELMAS VACATION, 25 VICT. IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

SARAH JONES v. JOHN DAVIES AND FRANCES his Wife. Dec. 2, 1861.—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that if a husband is possessed of a term of years and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger.

[S. C. 31 L. J. Ex. 116 ; 8 Jur. (N. S.) 592 ; 10 W. R. 464 ; 6 L. T. 444.]

This was an appeal from the judgment of the Court of Exchequer, in discharging a rule to enter the verdict for the plaintiff, pursuant to leave reserved at the trial. The facts sufficiently appear in the report, 5 H. & N. 766.(a)

Garth argued for the plaintiff. The argument was in substance the same as that in the Court below, and the same authorities were cited.

J. Brown appeared for the defendant, but was not called upon to argue.

Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN, J. We are of opinion that the judgment of the Court of Exchequer in this case was correct, and that there was no merger of the term of twenty-one years created by the lease to Davies, but that it is still subsisting, [508] and a bar, as long as it exists, to the plaintiff's right of entry.

It is clear, upon the authorities referred to upon the argument, that the devise in fee to the wife subsequent to the lease for years to the husband, would not operate as a merger of the term, because the husband would have the term in his own right, and the freehold in right of his wife, and, to create a merger, the term and the freehold must exist in one and the same right. It was said, indeed, that if the freehold was acquired by the act of the husband himself, and not by operation of law there might be a merger.

However this may be in some cases, there appears to us to be no ground whatever for the argument that, in this case, the husband acquired an estate of freehold by his own act. The estate was devised to his wife in fee, and no act was required on his part to make it vest in him and his wife, in right of the wife. Whether he assented or not, provided he did not dissent, the estate would vest, as appears clearly from the passage in Co. Lit. 3 a. cited in the case of *Barnfather v. Jordan* (2 Doug. 451).

It was further contended for the plaintiff that, even if the estate in fee devised to the wife would not operate to merge the term for years previously granted to the husband, he had acquired an independent and separate estate of freehold in himself, as tenant by the curtesy, in which the term would merge. We are, however, of opinion in accordance with that of the Court of Exchequer, that, whatever might have been the case had the wife died, the husband during her life has not such an estate of freehold in his own right as would merge the term. It is only upon the death of the wife that the husband becomes tenant by the curtesy, in the proper sense of

(a) Nov. 30. Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., Keating, J., and Blackburn, J.

the term. It is said, in Co. Lit. 30 a., that four things belong to an estate of tenancy by the curtesy [509] namely, marriage, seisin of the wife, issue, and death of the wife. During the life of the wife, he is only what is called "tenant by the curtesy initiate," and, as such, is respected in law for some purposes, which are enumerated by Lord Coke, but he is not tenant by the curtesy "consummate," so as to give him a separate and independent estate of freehold until the death of the wife; and we are not aware of any authority for holding that, until the death of the wife, the tenancy by the curtesy "initiate" would be such an estate of freehold in the husband, separate from and independent of the estate in fee of which he and his wife were seised, in right of the wife, as would merge the term. The judgment of the Court of Exchequer, therefore, will be affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

WHITMORE v. SMITH. Dec. 2, 1861.—Held, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that where an award is made upon all the matters in difference, and is in the required form, and intended by the arbitrators to express their decision, an objection that they adopted the opinion of a third person by which they agreed to be bound, cannot be raised under a plea of nul tiel agard to an action on the award.

[S. C. 31 L. J. Ex. 107; 8 Jur. (N. S.) 514; 10 W. R. 253; 6 L. T. 618. Applied, *Thorburn v. Barnes*, 1867, L. R. 2 C. P. 384; *Bache v. Billingham*, [1894] 1 Q. B. 107.]

This was an appeal from the decision of the Court of Exchequer in discharging a rule to enter a verdict for the plaintiff pursuant to leave reserved at the trial (reported 5 H. & N. 825). The facts stated on the appeal were (so far as material) as follows:—

The plaintiff is the official assignee of W. Bainbridge, and he declared upon an agreement between the plaintiff [510] and the defendant that certain unsettled accounts between the defendant and W. Bainbridge should be taken by one J. Percival and one S. Daniel, and the balance ascertained, &c. (setting out the agreement herein-after mentioned): that afterwards the said J. Percival and S. Daniel took upon themselves the burthen of the said arbitration and reference, and duly made and published their award in writing of and concerning the said premises so referred to them as aforesaid, and did thereby find, award and determine that, at the time of the filing of the petition, there was, and still was, due and owing from the defendant to W. Bainbridge on the balance of accounts between them, brought before the notice and consideration of the said arbitrators and supported by proof, the sum of 364l. 2s., of which the defendant had afterwards due notice; and which sum the plaintiff claimed.

Plea. That the said J. Percival and S. Daniel did not make and publish their award in writing of and concerning the said premises: modo et forma. Issue thereon.

The cause was tried before Bramwell, B., at the Staffordshire Spring Assizes, 1860, when the following evidence was adduced. E. Collis stated that he was attorney for the plaintiff, and also acted as attorney for the bankrupt in the arbitration. At the time of the bankruptcy the bankrupt claimed a sum of 6000l. as due to him from the defendant; and the defendant claimed a sum of about 2000l. as due to him from the bankrupt. W. Morgan acted as the attorney of the defendant in the matter of this claim. After some discussion, the following agreement was drawn up and signed by E. Collis, as the bankrupt's attorney, and W. Morgan as the attorney of the defendant.

"In the Matter of Private Arrangement of W. Bainbridge.

"It is agreed that the accounts between Mr. W. Bain-[511]-bridge and Mr. Gilbert Smith shall be taken by Mr. J. Percival, of Birmingham, and Mr. S. Daniel of the same place, and the balance ascertained: that neither party shall be at liberty to re-open the accounts, and that any balance found due from Mr. W. Bainbridge shall

be proveable on his estate, and that any balance found due from Mr. Smith shall be recoverable by the trustees or trustee under the petition for private arrangement. The transactions of Mr. James Smith to be considered as the transactions of Mr. Gilbert Smith, and in case of any disagreement between the above accountants, they shall have power to nominate an umpire. Dated the 30th of August, 1858.

"EDWARD COLLIS, Attorney for Mr. Bainbridge.

"W. MORGAN, Attorney for Mr. Gilbert Smith."

The registrar acting as Commissioner of bankruptcy in the matter of this petition sanctioned the agreement. Collis, as the petitioner's attorney, attended all the meetings before the arbitrators. Morgan attended the meetings as attorney for the defendant. At the first meeting, the arbitrators, in the presence of Collis and Morgan, arranged to appoint Mr. Rotton as umpire in case of their disagreement. They left the meeting, in order to and did see him upon the subject. Upon their return they stated to the parties present, amongst whom were Collis and Morgan, that Rotton declined to accept the umpirage, and that they had arranged with him that they should consult him upon points arising under the reference as to which they felt a difficulty; but that Rotton should not be called upon to attend the meetings, nor to hear evidence, nor do more than advise them, the arbitrators, upon points on which they felt a difficulty. Collis never went before Rotton, nor did Morgan. Collis was aware that statements were sent by the arbitrators to Rotton.

J. Percival, one of the arbitrators, stated that the award [512] mentioned in the third plea was the award of himself and Daniel. At the first meeting for the purpose of proceeding with the reference, Morgan and James Smith were present. Daniel and witness said that they thought that they had better appoint an umpire. Rotton's name was mentioned. Daniel and witness then went and saw Rotton, and stated to him that they wanted him to be umpire. He at first declined to be so, as he was fearful he could not give time. Daniel and witness then told him that it was not likely to take much time, they only wanted to ask his opinion and advice when they felt any difficulty. He then consented to act on that understanding. Daniel and witness then returned and stated to the parties what had taken place, and no dissent to the arrangement was expressed or suggested by Morgan. During the reference witness and Daniel took Rotton's opinion upon two occasions. Once they left the room where the reference was being proceeded with for the purpose of taking Rotton's opinion on a question on what terms an adjournment should take place; and Morgan and the parties were informed and knew that witness and Daniel did so, and waited in the room for their return. No objection was ever made by Morgan or either of the parties to its being done. On another occasion witness and Daniel consulted Rotton on a question about the reception of evidence. After the meetings were closed witness and Daniel agreed to take Rotton's opinion upon certain points. Those were matters upon which they felt a difficulty, but which they did not discuss between them, nor attempt to agree upon, but agreed to be bound by the opinion of Rotton. They made an award in favour of the plaintiff.

Dowdeswell argued for the plaintiff (a) (Nov. 30). First, [513] the award is good, notwithstanding the arbitrators adopted the opinion of a third person, without exercising their own judgment. If a barrister was arbitrator, and some question of chemistry or science arose, it might be necessary for him to consult a chemist or scientific person and act upon his opinion. So, if a layman was arbitrator, and a difficult question of law arose, as for instance of merger, it might be necessary for him to consult a conveyancer. There is no case in which it has been held that an award is vitiated because an arbitrator has adopted the opinion of a competent person. Here the arbitrators only consulted the third person as to part of the matters referred to them. [Crompton, J. They exercised a judicial mind upon the whole matter, admitting something to influence them, perhaps improperly.] It was merely an incidental question upon which they consulted the third person, and he having given his opinion they adopted it. [Blackburn, J. A legal arbitrator might properly consult an eminent chemist on a question of chemistry and adopt his opinion, but here the two arbitrators take the opinion of a third person without exercising any independent judgment of their own.] A local Court of law has frequently an assessor and adopts

(a) Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., Keating, J., and Blackburn, J.

his opinion. A superior Court adopts the opinion of another Court of co-ordinate jurisdiction without exercising its own judgment on the point before it. The Court of Admiralty consults and adopts the opinion of the Trinity Masters. If the doctrine contended for by the other side were to prevail, scarcely any award could be upheld. In Russell on Arbitration, p. 205, 2nd ed., it is said that though an arbitrator may not delegate his authority, "the cases are numerous to shew that an arbitrator may submit a material question affecting the merits of the case to another, and, after hearing his opinion, adopt it as his own, upon the credit which he gives to the judgment and skill of the person to whom [514] he refers." When it was objected to the award that the arbitrator had not exercised his own judgment respecting the valuation of some timber, but had referred it to another, Lord Alvanley, M. R., said, "That alone is not sufficient to prove the award bad, for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he choose to adopt it." *Emery v. Wase* (5 Ves. 846). [Willes, J. *Anderson v. Wallace* (3 Cl. & F. 26) decided that under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock and property of a partnership, it is no objection to their award that they have availed themselves of the assistance of such person in deciding on the partnership accounts.] *Eads v. Williams* (4 De Gex, Mac. & G. 674) is distinguishable, because there the arbitrators, having consulted the umpire, instead of forming their own judgment, and, if disagreeing, leaving the matter to be determined by him, made an award according to his opinion, although one of them considered it wrong.

Secondly, the objection is not available under the plea of nul tiel agard, for the defendant cannot plead misconduct of the arbitrators in avoidance of the award: 1 Wms. Saund., p. 327 a., note (3). The reasons for the decision in *Wills v. Maccarmick* (2 Wills. 148) are strictly applicable to this case. It was there said that, in an action on an award, nothing dehors the award can be given in evidence, for all the plaintiff is prepared to prove at the trial is the submission and award. *Braddick v. Thompson* (8 East, 344) decided that partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond conditioned for the performance of the award; but is only matter for application to the equitable jurisdiction of the Court to set aside the award. *Adcock v. Wood* (6 Exch. 814, in error, 7 Exch. 468) is an express authority that a plea of nul tiel agard merely puts in issue the fact that such an award as that declared on was made concerning the premises, and does not put in issue the validity of the award. *Wade v. Dowling* (4 E. & B. 44) is relied upon by the other side. That case decided that where a matter is referred to the award of three arbitrators, or any two, and two only sign, at different times and places, what purports to be an award, that is not in pursuance of the submission; and in an action on the award the defendant is entitled to the verdict on a plea that no award was made. That decision, however, is only in affirmation of the principle that when a joint act is to be done the parties must do it together.

Gray (Field with him), for the defendant. First, the award is not in accordance with the submission. The parties never agreed that the arbitrators should act on the opinion of a third party, without exercising any judgment of their own. Persons who submit matters in difference to an arbitrator do so on condition that he shall decide those matters, and that the award shall be his award. When arbitrators consult scientific persons it is either for the purpose of acquiring knowledge on abstruse subjects so as to be enabled to make their award, or it is implied from the nature of the case that they should have power to do so. Suppose two persons agreed to state a case for the opinion of a barrister and to be bound by it, if the barrister, from press of business, handed over the case to a friend, who [516] wrote an opinion which the barrister signed, would the parties be bound by it? Here the arbitrators, instead of deciding themselves, agree to be bound by the opinion of a third person. That is, in effect, constituting him the arbitrator. It makes no difference that his decision relates only to part of the matters submitted to the arbitrators. Suppose a reference in respect of a claim of 20,000l., and an award made upon the opinion of a third person as to 19,190l. Or suppose a reference of three matters in difference, and a decision as to one upon the opinion of a third person. The principle is that the parties are entitled to have that for which they have stipulated, viz., the decision of the arbitrators. *Anderson v. Wallace* (3 Cl. & F. 26), the arbitrators

were authorized to call in a competent person to assist them in the valuation of the partnership property. *Eads v. Williams* (4 De Gex, Mac. & G. 674) is an express authority that though an arbitrator may consult a person of skill and experience, his award must be the act of his own mind: if it is not, it is immaterial whether he thinks it right or wrong. In *Wade v. Dowling* (4 E. & B. 44) Erle, J., said, "The award is the mental act: it is indicated by signing." Where matters in difference are referred to three arbitrators, or any two of them, two of such arbitrators cannot delegate their authority to the third: *Little v. Newton* (2 Man. & G. 351). [Crompton, J. Suppose there are three arbitrators, and one of them signs the award although he does not agree with the other two, would the award be void? It would not be his award because he has signed his name to it; that is merely evidence of his mind. Suppose a person puts a paper before an arbitrator, and he signs it by mistake, that is not his award because it is not his mind, but it is otherwise if he intended to sign what [517] he did sign. Both on principle and authority this award is void.

Secondly, the objection may be raised under the plea of nul tiel agard. A plea of "no award" means no valid award; therefore, under such a plea, it may be shewn that the award is not warranted by the submission: *Fisher v. Pimbley* (11 East, 188): or that the arbitrator has not awarded on all the matters referred to him: *Dresser v. Stansfield* (14 M. & W. 822), *Roberts v. Eberhardt* (3 C. B. N. S. 482), *Armitage v. Coates* (4 Exch. 641), Bullen and Leake's Precedents of Pleadings, 288, note (b). [Crompton, J. The parties bargain that an arbitrator shall give his honest opinion, but if he gives a corrupt opinion, can it be said that it is no award?]

Dowdeswell replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILLES, J. This was an action to recover an amount awarded. Plea, nul tiel agard.

The submission was to two arbitrators, and in case of difference to an umpire to be appointed by them. They appointed one Rotton, but he declined the appointment, upon the ground that he did not wish to attend the meetings, or hear the evidence. The parties, being informed of this, agreed that the arbitration should proceed, and that, in case of difficulty arising, the arbitrators might ask the advice of Rotton.

Difficulties did arise as to certain items, upon which the arbitrators, in order to save time, without any discussion [518] between themselves, agreed to ask and be bound by the advice of Rotton, which they accordingly did; and, adopting his opinion, they formally made their award against the defendant.

At the trial, the learned Judge, upon the ground that the parties were entitled to the independent opinion of the arbitrators, and that the opinion which they adopted, and acted upon, was that of Rotton, held that there was no such award as the submission required, and so that the defendant's plea was made out. Leave was reserved for the plaintiff to move to enter a verdict for him, and a rule granted by the Court below for that purpose was, after argument, discharged.

The plaintiff appealed from that decision, and the case was ably argued on Saturday last, by Mr. Dowdeswell, for the plaintiff, and Mr. Gray for the defendant.

The Court took time to consider, and we are now all of opinion that the rule to enter a verdict for the plaintiff ought to be made absolute.

Whether the award was subject to be set aside for misconduct of the arbitrators, by an application to the Court of which the submission might be made a rule (12 & 13 Vict. c. 106, s. 154), depends upon the question of fact, whether in acting upon Rotton's opinion they did more than the parties themselves consented to (see *Anderson v. Wallace*, 3 Cl. & F. 26), and upon that question we need not pronounce any opinion; because, assuming that it ought to be answered in the affirmative, the question still remains, whether the objection can be raised by plea, and we are of opinion that it cannot.

The award was made upon all the matters in difference referred, and no more: it was made in the requisite form, and it was intended by the arbitrators to express their decision, adopting the opinion of Rotton. It was, therefore, such an [519] award as the declaration alleges; and the plea of no such award is negatived by the facts. In truth, this objection, assuming it to be well founded, is one of a sort which ought to be brought forward whilst the matter is fresh, in the manner and within the period prescribed by the statute of Wm. 3 in cases which fall within its provisions, or by

the practice of the Courts in other cases within their summary jurisdiction; a jurisdiction now extending over a large number of cases, which formerly belonged exclusively to the Court of Chancery (see Com. Dig. Arbitrament (A.), *Nichols v. Roe*, 3 Mylne & Keen, 431).

The importance of maintaining this distinction will be obvious, when it is considered that, upon an application to the equitable jurisdiction of the Court, a person who had taken a benefit under the award could not be heard to object, at least not without giving up the benefit; that upon such application, the alleged defect of this award might be cured by abandoning the peccant items; or that the Court might, in its discretion, send back the matter for reconsideration by the arbitrators; whilst, upon the plea, the award must be held good, or bad, simpliciter, without regard to any of these equitable considerations.

The judgment must therefore be reversed, and a verdict entered for the plaintiff.

Judgment reversed.

[520] IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

EDWARDS AND ANOTHER, Assignees of Maurice, a Bankrupt v. GABRIEL, PHILLIPS AND ROBY. Dec. 2, 1861.—Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that notice to an execution creditor that his debtor has filed a petition for arrangement under the 76th section of “The Bankrupt Law Consolidation Act, 1849,” is notice of an act of bankruptcy within the meaning of the 133rd section, provided an adjudication of bankruptcy is filed within two months after the petition for arrangement is dismissed.

[S. C. 31 L. J. Ex. 113; 8 Jur. (N. S.) 592; 10 W. R. 95. Distinguished, *In re Boocock*, [1916] 1 K. B. 821.]

This was an appeal from the decision of the Court of Exchequer in discharging a rule to enter the verdict for the defendants, pursuant to leave reserved at the trial. The pleadings and facts sufficiently appear in the report, 6 H. & N. 701.

Gray now argued for the defendants.(a) The notice of the 9th of July was not notice of a prior act of bankruptcy within the meaning of the 133rd section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106). It is conceded that Maurice committed an act of bankruptcy on the 9th of July, but until his petition was dismissed, which was not until the 7th of August, the defendants had no notice of that act of bankruptcy. There was an act of bankruptcy on the 9th of July, only by reason of the petition being dismissed on the 7th of August. By the 211th section of the Bankrupt Law Consolidation Act, 1849, a trader unable to meet his engagements with his creditors may present a petition to the Court of Bankruptcy, praying that his person and property may be protected from process until further order, and the Court, on such petition, shall have power to grant such protection. [521] By section 218, after the approval and confirmation of the resolution of three-fifths in number and value of the creditors who have proved debts to the amount of 10l., to accept the proposal of the petitioning trader, all his estate and effects shall vest in the official assignee (if such shall be required by virtue of the resolution, &c.). The 223rd section provides that in certain cases the petition shall be dismissed; and it enumerates other cases in which the Court may adjudge the petitioner a bankrupt and adjourn all further proceedings in the matter into the public Court. But upon an adjudication of bankruptcy under that section, the title of the assignees does not relate back to the petition, but only to the adjudication of bankruptcy: *Nicholson v. Gooche* 5 E. & B. 999; *Ex parte Harrison* (26 L. J. Bank. 30); *Monk v. Sharp* (2 H. & N. 540). Here the defendants could not have notice of an act of bankruptcy when it was uncertain whether the petition would be dismissed. [Blackburn, J. The petition cannot be followed by an adjudication of bankruptcy until it is dismissed, but when the adjudication takes place, why is not notice of the petition notice of

(a) Before Wightman, J., Williams, J., Willes, J., Keating, J., and Blackburn, J.

an act of bankruptcy ?] If it cannot be affirmed that there ever will be an adjudication of bankruptcy, notice of the petition cannot be notice of an act of bankruptcy. It is true that the 76th section declares that the filing of the petition shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed at the time of filing such petition, provided a petition for adjudication shall be filed within two months after such petition shall have been dismissed, but it does not follow that notice of the petition is notice of an act of bankruptcy at the time the petition was filed. In *Follett v. Hoppe* (5 C. B. 226) and *Green v. Laurie* (1 Exch. 335) the act of [522] bankruptcy was complete when the trader filed his declaration of insolvency, so that notice of it was notice of an act of bankruptcy. But here a petition is filed upon which no adjudication of bankruptcy can take place until after the petition is dismissed, and until the expiration of two months the creditor cannot tell whether it ever will be. The effect of the decision of the Court of Exchequer is to place creditors in a different position from that contemplated by the bankrupt law. If a creditor has notice of an act of bankruptcy complete in itself, he may petition for an adjudication of bankruptcy, but in this case he has no such remedy. The 133rd section renders valid all executions *bonâ fide* executed by seizure, unless the creditor had notice of a prior act of bankruptcy. [Wightman, J. Here he had notice of a prior act of bankruptcy when he had notice of the petition. The filing the petition is not an act of bankruptcy by relation, it is a positive act of bankruptcy, and if a petition for adjudication is filed within two months it becomes conclusive.] It is the dismissal of the petition which gives it its quality of an act of bankruptcy. The distinction is between the filing of the petition being evidence of an act of bankruptcy and notice of the filing being notice of an act of bankruptcy. [Wightman, J. The same argument would arise on the 68th section.] In *Coppendale v. Bridgen* (2 Burr. 814), (which followed *Cooper v. Chitty* (1 Burr. 20), and was decided at a time when a notion prevailed that a sheriff who, without notice, sold the goods of a bankrupt before commission, but after the act of bankruptcy, was not liable in trover), Lord Mansfield said that if the sheriff had paid the money to the plaintiff, before the act of bankruptcy was complete by the trader lying in prison two months, the sheriff would have been excused, "because he was [523] under an invincible ignorance of that event." So here the defendants were under an invincible ignorance whether the petition would be dismissed. In *King v. Leith* (2 T. R. 141), the defendant paid over the money to the bankrupt after express notice that he was in prison. [Wightman, J. In that case the defendant could not, at the time he received the notice, have made the trader a bankrupt.] How can notice of a petition be notice of an act of bankruptcy, when it cannot be predicated whether the petition itself will ever be followed by adjudication of bankruptcy?

Honyman (with whom was H. James) appeared for the plaintiffs, but was not called upon to argue.

WIGHTMAN, J. We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. The only question is whether the execution creditor had notice of a prior act of bankruptcy at the time of the execution. The 133rd section of the 12 & 13 Vict. c. 106 protects all executions against the goods and chattels of any bankrupt *bonâ fide* executed and levied by seizure and sale, notwithstanding any prior act of bankruptcy, provided the person at whose suit such execution shall have issued had not, at the time of such execution, notice of any prior act of bankruptcy. The question then is, whether the execution creditor, before the process was executed, had notice that the execution debtor had committed an act of bankruptcy by filing a petition for arrangement. We are of opinion that he had. The 76th section enacts that the filing by a trader of a petition for arrangement "shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing [524] such petition; provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed." It seems to us that when the event occurs, the statute makes the filing of the petition a conclusive act of bankruptcy from the time it was filed, and that here the execution creditor had notice of that act of bankruptcy. It was said, however, that it was uncertain whether there would be any act of bankruptcy, because it was uncertain whether a petition for adjudication would be filed. It is true that it was a contingent act of bankruptcy; but, when once the event occurred, it became, from the time of filing the petition, a complete act of bankruptcy,

and of that the execution creditor had notice. It seems to us to come within the very terms of the statute. The execution creditor had notice of an act of bankruptcy, because, by the 76th section, the filing the petition is conclusive evidence of an act of bankruptcy at the time it was filed. When once the adjudication took place, it had relation back for all purposes. The question depends upon the Act, not upon the cases cited, and for these reasons we think that notice of the filing of the petition for arrangement was notice of a prior act of bankruptcy, and that the judgment of the Court below must be affirmed.

Judgment affirmed.

[525] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

CRUGER v. DUNLOP AND ANOTHER.^(a) June 25 [1862].—A deed of arrangement, under the 224th section of the Bankrupt Law Consolidation Act, 1849, which provided for the winding up of a trader's estate by him under the superintendence of inspectors, contained a clause that the estate, with the exception of such allowances and payments of effects or monies to the debtors respectively as the inspectors or inspector for the time being might, in their or his discretion, authorize and direct, but not exceeding in quantity or amount the allowance which might have been made to the debtors out of their estate and effects under the statute relating to bankrupts in case a petition for adjudication of bankruptcy had been filed against them on a certain day and they had been thereunder adjudicated bankrupts, and which allowances and payments to the quantity and amount aforesaid, or to any less quantity or amount the said inspectors or inspector for the time being may direct and authorize, shall be administered as nearly as circumstances will admit, having regard to the provisions hereof, upon the principles and according to the rules and practice of the bankruptcy law, and as if such petition for adjudication of bankruptcy had been filed, and such adjudication made as aforesaid: Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the deed was void.

[S. C. 10 W. R. 801.]

This was a proceeding in error on the judgment of the Court of Exchequer for the plaintiff.^(b)

The declaration was on two bills of exchange drawn by the plaintiff and accepted by the defendant.

The defendant pleaded a deed of arrangement, under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106).

The replication set out the deed in *hæc verba*, and concluded with an averment that the plaintiff had not executed it. The deed contained provisions similar to those in the deed in *Irving v. Gray* (3 H. & N. 34). The defendant demurred to the replication.

[526] Mellish (Beresford with him) argued in support of the demurrer.^(a)² The question is, whether the deed set out in the replication is such a deed of inspection as, under the 224th section of "The Bankrupt Law Consolidation Act, 1849," is binding upon the creditors who have not signed it. The deed is similar to that in *Irving v. Gray* (3 H. & N. 34), which was held valid by the Court of Exchequer: but in a

^(a)¹ This and the three following cases relating to the bankrupt law were decided on the days they respectively bear date, but are published early on account of their importance.

^(b) Not reported. The case came on for argument in the Court of Exchequer in Trinity Term, June 3, 1861, when the Court, considering that they were concluded by their decision in *Snodin v. Boyce*, 4 H. & N. 391, gave judgment for the plaintiff without hearing the argument, in order that the question might be determined by a Court of error.

^(a)² In Easter Vacation (May 17). Before Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating J., and Mellor, J.

subsequent case of *Snodin v. Boyce* (4 H. & N. 391) an objection was raised which was not taken in *Irving v. Gray*, viz., that the deed provided for the distribution of the debtor's estate in the same manner as if he had become bankrupt, and on that ground the Court of Exchequer held the deed void, because a deed of arrangement must provide for the distribution of all the debtor's estate, and by the 17 & 18 Vict. c. 119, s. 25, a bankrupt is entitled to retain certain excepted articles. This is not a deed of assignment for the benefit of creditors, but a deed for winding up the affairs of the debtor and distributing the assets under inspection. It is made between the debtor of the first part, the inspectors of the second part, and the several persons whose names and seals are subscribed and affixed of the third part. It recites a resolution of the creditors that the deed of inspectorship should be a deed of arrangement within the meaning of the 224th section of the Bankrupt Law Consolidation Act, 1849; consequently it was intended to be a good deed within that section. It is declared to be made in pursuance of the resolutions of the creditors, and it contains a covenant by the debtor with the inspectors to get in his estate and divide the proceeds among his creditors. Then it is agreed and declared: (d) First, that the said estate, [527] with the exception of such allowances and payment of effects or monies of the said debtor as the said inspectors or inspector for the time being may in their or his discretion authorize and direct, but not exceeding in quantity or amount the allowances which might have been made to the said debtor out of his estate and effects under the statutes relating to bankruptcy, in case a petition for adjudication of bankruptcy had been filed against him on the 22nd January, 1858, and he had been thereunder adjudicated bankrupt, &c., shall be administered as nearly as circumstances will admit, having regard to the provisions hereof upon the principles and according to the rules and practice of the bankrupt law in England, and as if such petition for adjudication of bankruptcy had been filed, and such adjudication made as aforesaid. Then, does the statute render it essential that the whole assets of the debtor should be distributed, without any exception of such allowances and payments of effects or monies of the debtor as the inspectors may in their discretion authorize and direct, but not exceeding in quantity or amount the allowances which might have been made to the debtor out of his estate and effects under the statutes relating to bankrupts. This case differs from *Snodin v. Boyce*, because here the allowances are in the discretion of the inspectors, and as the intention was that the deed should be valid, it would be their duty to exercise that discretion so as not to violate the power conferred upon them by the Act. By the 194th section the Court may make such allowance to the bankrupt, until he shall have passed his last examination, as shall be necessary for the support of himself and his family. By the 195th section a bankrupt who shall have obtained his certificate shall be allowed a per centage on the net produce of his estate, increasing in proportion to the dividend; and by the 196th section one partner may receive allowance [528] although the other is not entitled. By the 17 & 18 Vict. c. 119, s. 25, a bankrupt is allowed to retain such articles of household furniture, and tools, implements of trade, and other like necessaries as he shall specify and select, not exceeding in the whole the value of 20l. There is nothing in the language of the 224th section which can be construed as meaning that under deeds of arrangement a trader shall not be entitled to the same allowances as in bankruptcy, and therefore the question is, whether such a construction can be imported into the section on the ground that it must necessarily have been the intention of the legislature. The 225th, 226th, and 227th sections lead to no such inference. By the 228th section the creditors under a deed of arrangement are to have the same rights as to set-off, mutual credit, lien and priority, and joint and separate assets are to be distributed in like manner as in bankruptcy. It is as much for the benefit of the creditors as the trader that these allowances should be made, for the trader is thereby enabled to devote his whole time and attention to collecting the assets and increasing the dividend. If a trader is unable to meet his engagements, the sooner he winds up his estate the less is the loss to his creditors; it has therefore been the policy of the legislature to offer a sort of premium for early winding up, and that policy equally applies to composition with creditors as to bankruptcy. In *March v. Warwick* (1 H. & N. 158), all the wearing apparel of the debtor and his family was excepted from the assignment. *Cooper v. Thornton*

(d) This clause is set out at length in 3 H. & N. 46.

(1 E. & B. 544) was decided before the 17 & 18 Vict. c. 119 passed. Moreover, assuming that a deed of arrangement would be void if the inspectors were obliged to make the same allowances as in bankruptcy, under this deed it is a matter entirely in their discretion.

[529] Aspland, for the plaintiff. This deed is void on several grounds: First, the Bankrupt Law Consolidation Act, 1849, does not enable a bankrupt to retain any excepted articles, and the 17 & 18 Vict. c. 119, s. 25, in terms applies to bankruptcy, not to arrangement with creditors. The 224th section of the Bankrupt Law Consolidation Act, 1849, requires that a deed of arrangement should provide for the distribution of the whole of the trader's property and effects among his creditors. It enacts, that every deed of arrangement between a trader and his creditors, signed by six-sevenths in number and value of those creditors whose debts amount to 10l. "touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, &c. shall be effectual and obligatory upon all the creditors." According to the plain and literal meaning of those words, a deed relating to any one of those matters, and which releases the trader from his liabilities, must be founded upon the entire distribution of his estate. The enactment does not say that any part of his estate shall be distributed, and therefore it must mean that there shall be a distribution of the whole. By this deed the trader would be entitled to the same allowance as a bankrupt under the 194th & 195th sections of the Bankrupt Law Consolidation Act, 1849, and the deed contains an express provision empowering the inspectors to pay the debtors for their services: Clause 2 (3 H. & N. 47), and also a provision enabling them to carry on any business of their own: Clause 29 (3 H. & N. 70). *Drew v. Collins* (6 Exch. 670), *Ex parte Wilkes* (5 De Gex, M'N. & G. 418), *Tetley v. Taylor* (1 E. & B. 521), and *Fisher v. Bell* (12 C. B. 363), are express authorities that a deed of arrangement under the [530] 224th section is not obligatory on the creditors who have not executed it, unless it provides for the distribution of the whole of the debtor's estate. There is a wide distinction between the distribution of the assets and the application of the assets. Secondly: by the 197th section, if the bankrupt's estate pays 20s. in the pound and leaves a surplus, the Court may order such surplus to be paid to the bankrupt, after the creditors have received interest on their debts; but this deed, by section 12, provides that the surplus shall belong to the debtors, and there is no provision that interest shall be paid to the creditors. Thirdly: the non-executing creditors are either not bound by the covenant not to sue, because they are not in terms referred to, or if included, it is unreasonable and void as against them. The deed should contain a covenant which can operate in bar to an action: *Tabor v. Edwards* (4 C. B. N. S. 1). [Willes, J., referred to *Gardner v. Chapman* (8 C. B. N. S. 317).] Fourthly: the deed empowers the inspectors to make advances on account of any mercantile operations undertaken by the debtors: (clause 4) (3 H. & N. 49). Fifthly: the deed empowers the inspectors to give bail for the debtors, and to bring and defend actions, and pay the costs out of the estate: (clause 4) (3 H. & N. 49). Sixthly: the deed is void, because it does not contain an assignment of the debtor's property to trustees, but only a covenant to assign, if called upon by the inspectors; and the debtors would only be bound to assign so much of the estate as remained after the allowances to them: (clause 21) (3 H. & N. 62).

Mellish, in reply. Looking at the 224th section, it is evident that the legislature had in view an ordinary deed for winding up the affairs of a trader under inspection, and that they intended that the deed, when executed by six-[531]-sevenths in number and value of the creditors, whose debts amounted to 10l., should be obligatory on all the other creditors. The inspectors are bound to exercise their discretionary powers in conformity with the Act; if they do not, the creditors have a remedy under the 229th section. By the 226th section, when the trustee, or inspector, is satisfied that creditors of the requisite number, and value, have signed the deed, he may certify the same to the Court, and such certificate shall be filed with the registrar of the Court, and shall thereupon be *prima facie* evidence in all Courts of law and equity, that such deed of arrangement has been so signed. *Ex parte Wilkes* (5 De Gex, M'N. & G. 418) was not the case of a deed of arrangement, but a deed by which the debtor covenanted to pay his debts in full, by instalments, within three years, and the creditors who executed the deed covenanted not to sue him in the meantime. Though the 12th clause (3 H. & N. 53) does not in terms provide that, in case of a surplus, interest

shall be paid to the creditors, yet it must be read in connection with the first clause (3 H. & N. 46), which requires the estate to be administered according to the bankrupt law, and, it being part of the bankrupt law that creditors should have interest, the inspectors would be justified in allowing it. It is said that the covenant not to sue is not binding on the non-executing creditors, but when six-sevenths in number and value of the creditors, whose debts amount to 10l., have signed the deed, it is as obligatory on the rest as if they had signed it. *Legg v. Cheesborough* (5 C. B. N. S. 741), in which it was held that a covenant not to sue did not apply to a non-executing creditor, turned on the language of that particular deed. [Crompton, J. Is it not going beyond the Act to say that the inspectors may make these allowances?] They are necessary for enabling the debtors to wind up [532] their estate. Though the debtors are allowed to carry on their business, they are bound by their covenant to assign their property when required by the inspectors. It is therefore sufficiently protected against future creditors, for a notice to assign would create a covenant in equity, whether an assignment is executed or not.

Cur. adv. vult.

The judgment of the Court was now delivered by

CROMPTON, J. The Court are of opinion that, under the authorities affecting the question in this case, the deed ought to be considered as invalid, and I am by no means prepared to differ from them, though I have entertained some doubts whether the case might not have been brought under the authority of *Irving v. Gray* (3 H. & N. 34). Such doubts, however, are not strong enough to make me disagree from the rest of the Court, in affirming the decision of the Court below.

Judgment affirmed.

MEMORANDUM.

In this Vacation, the Honourable Sir Hugh Hill, Knight, resigned his office of a Judge of the Court of Queen's Bench, on account of illness. He was succeeded by John Mellor, Esq., of the Inner Temple, one of her Majesty's Counsel, who was first called to the degree of the coif, and gave rings with the motto, "Lex ratione probata." In the following term he received the honour of knighthood.

[533] EXCHEQUER REPORTS. HILARY TERM, 25 VICT.

OPPENHEIMER AND ANOTHER v. JAMES GRIEVES.(a) April 30, 1862.—A composition deed made after "The Bankruptcy Act, 1861," took effect, and by which the creditors, parties thereto, covenant not to sue the debtor for a certain period, cannot be pleaded in bar to an action commenced, before the Bankruptcy Act, 1861, took effect, by a creditor who has not executed the deed.

[S. C. 31 L. J. Ex. 375; 10 W. R. 541.]

The declaration (which was dated the 9th of August, 1861), was for goods sold and delivered.

Plea. That before and at the time of the accruing of the causes of action in the declaration mentioned, and thence continually hitherto, the defendant hath been a debtor to divers persons, his creditors, in divers large sums of money: that since the commencement of this action, and since the passing of "The Bankruptcy Act, 1861," and since the 11th day of October, 1861, that is to say, on the 12th day of October, 1861, a certain deed was made and entered into between the defendant of the first part, W. Buss and Sophia his wife and Joseph Grieves of the second part, and his said creditors of the third part, relating to the debts and liabilities of the defendant and his release therefrom; by which deed, after reciting that the defendant had for some time previously been carrying on business as a merchant, and had on the 18th day of July past suspended his payments, and on the 8th day of August instant a meeting [534] of his creditors was held, at which meeting the following resolution was adopted, videlicet:—At a meeting of the creditors of James Grieves, held at, &c., the statement

(a) This and the two following were decided on the days they respectively bear date, but are published early on account of their importance.

of affairs having been read, it was proposed by Mr. Chadwick and seconded by Mr. Sinclair : That a composition of 12s. 6d. in the pound be accepted, payable by instalments of 3s. in the pound at three months, 3s. at six months, 2s. do. at nine months, 2s. do. at twelve months, 2s. 6d. do. at fifteen months from this date, &c. And reciting that the said W. Buss agreed to become a surety for the said James Grievés for the payment of the said last instalment. And that, in pursuance of the said resolution, the said James Grievés had made and given to the said creditors respectively four several promissory notes for payment of the said first, second, third and fourth instalments of the said composition at the several times appointed by the said resolution ; and he had also drawn upon the said W. Buss, and the said W. Buss had accepted bills of exchange in favour of the same several creditors respectively for payment of the said fifth instalment at the time appointed for payment thereof by the said resolution : It was by the said indenture witnessed, that in pursuance of and for the purpose of carrying into effect the said resolution and agreement, and in consideration of the premises, each and every of them the said several persons, parties thereto of the second and third parts respectively, did by those presents give and grant unto the defendant full free and absolute liberty and licence to conduct and manage his business and affairs for the period of fifteen calendar months to be computed from the 12th day of October, 1861 ; this present letter of licence nevertheless to be determinable as hereinafter is provided : And further, that every the creditors respectively, and their executors, &c., would not during the said period of fifteen calendar months (unless the said letter of licence shall pre-[535]-viously be determined, sue, arrest, prosecute, impede or molest the defendant in the management of his said business or affairs, or seize or possess himself of, or attach or intermeddle with his goods, estates, property or effects, or any part thereof, for or in respect of the debts then due and owing to them respectively, or any part thereof ; and that in case any of them, the said creditors respectively, or the executors, &c., should act contrary to the agreement lastly thereinbefore contained, the defendant, his executors, &c., should be and he and they is and are thereby thenceforth and for ever acquitted, exonerated and discharged of and from all and every the debts, claims and demands which were due and owing to the person or persons who, or whose partners, executors, &c., should act contrary to the said agreement, and all actions, suits and proceedings to be had or taken for or in respect of the same ; and that in every such case the said letter of licence and agreement might be pleaded in release of and in bar to all and every such debts, claims, demands, actions, writs and proceedings as effectually and beneficially as if a release or acquittance for the same had been given under the hand and seal, or hands and seals, of the person or persons who or whose partners, executors, &c., should act contrary to the same agreement. (The plea then set out other clauses of the deed not material to the present question.) Averments : that the defendant and the several parties to the said deed executed the same on the 12th day of October, 1861, and that all things have happened and been done which are necessary to render the said deed and the letter of licence therein contained valid and effectual, and to entitle the defendant to the benefit of the said letter of licence, and that nothing has happened to determine the said letter of licence, but the same has continually been and is of full force and effect : that a majority in number representing three-fourths in value of all the credi-[536]-tors of the defendant whose debts respectively amounted to 10l. and upwards, did, before the execution thereof by the defendant, in writing, assent to and approve of the said deed : that the execution of the said deed by the defendant was made in the presence of and was then duly attested by J. Stevens, an attorney : that within twenty-eight days from the day of the execution of the said deed by the defendant, the same was produced and left (having been first duly stamped) at the office of the Chief Registrar of the Court of Bankruptcy for the purpose of being registered, and together with the said deed there was delivered to the Chief Registrar an affidavit by the defendant that a majority in number representing three-fourths in value of the creditors of the defendant whose debts amounted to 10l. or upwards had in writing assented to and approved of the said deed, and also stating the amount in value of the property and credits of the defendant comprised in the said deed : that the said deed before registration had impressed upon it and bore the ordinary and ad valorem stamp duties as in "The Bankruptcy Act, 1861," provided : that the date, names and descriptions of the parties to the said deed, not including the creditors, together with a short statement of the nature and effect thereof was, within

forty-eight hours after the deed was left with him as aforesaid, entered in a book kept by the said Registrar exclusively for the purposes of such registration, and a copy of the said entry was published in the *London Gazette* within four days after the making of the said entry; and the said deed on being so registered had a memorandum thereof written on the face of it, stating the day and the hour of the day at which the same was brought to the Chief Registrar for registration; and the Chief Registrar did give a certificate of the filing and registration of the said deed under his hand and seal of the said Court.

Demurrer and joinder therein.

[537] J. Brown in support of the demurrer. The deed set out in the plea is no bar to this action, which was commenced before the 11th of October, 1861, the day on which "The Bankruptcy Act, 1861," took effect. The plaintiffs had a good cause of action at the time they commenced it, and from thence up to the time of the execution of the deed. The creditors, who are parties thereto, "grant to the defendant full, free, and absolute liberty and licence to conduct and manage his business and affairs for the period of fifteen calendar months, to be computed from the 12th of October, 1861;" and further, that they will not, during the said period of fifteen calendar months, "sue, arrest, prosecute, impede, or molest the defendant in the management of his said business or affairs, or seize or possess himself of, or attach, or intermeddle with his goods, estates, property or effects, or any part thereof, for or in respect of the debts then due, and owing to them respectively." The plaintiff has not sued the defendant after the deed was executed, but has merely continued an action previously commenced. The words "will not sue," mean "will not commence an action." The deed should have expressed, in clear language, an intention to stop actions then pending. It makes no provision for the costs of such actions, and as to them the plea can be no bar. Moreover, if the deed afforded any defence, it should have been pleaded in bar of the further maintenance of the action. Secondly: "The Bankruptcy Act, 1861," does not apply to actions pending at the time it took effect. Where the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature express a clear intention to vary the relation of the litigant parties to each other: *Hitchcock v. Way* (6 A. & E. 943). *Marsh v. Higgins* (9 C. B. 551), decided that the 225th section of the Bankrupt Law Consolidation Act, 1849, had [538] not a retrospective effect, so as to deprive a creditor of his right to continue an action duly commenced by him before that Act came into operation. *Moon v. Durden* (2 Exch. 22) is also an authority that a statute ought not to be construed so as to defeat a vested right of action, unless the legislature has expressed a clear intention that it should have a retrospective operation. He also argued that the deed was not valid under the 192nd section of "The Bankruptcy Act, 1861," as it did not provide for the distribution of all the debtor's property amongst his creditors.

Hannen, in support of the plea. It was the intention of the legislature that deeds entered into between a debtor and his creditors, under the 192nd section of the Bankruptcy Act, 1861, should have a retrospective operation. If not, the enactment would be inoperative as to all debts due at the time it took effect. There is no difficulty as regards the costs, for the plaintiffs might confess the plea, and thereupon they would be entitled to the costs of the cause up to the time it was pleaded: Plead. Reg. Gen. Hil. T. 1853, r. 22, 23. [Bramwell, B. The letter of licence can only be pleaded as a release if a creditor sues the defendant. Here the plaintiffs have taken no step since the deed was executed; then what right has the defendant to plead a release?] If the defendant did not plead it, the plaintiffs would obtain judgment. [Martin, B. The deed operates on the debt, the action is only a step to recover it. If we give judgment for the defendant, the plaintiffs would not only lose their debt, but also the 12s. 6d. in the pound.] The plea is good, because it shews that something has arisen, since the commencement of the action, which disentitles the plaintiffs to recover their debt. By the Common Law Procedure Act, 1852, s. 68, "any defence arising after the commencement of any action shall be pleaded according to the fact, with-[539]out any formal commencement or conclusion." In *Le Bret v. Papillon* (4 East, 502), the defendant pleaded, in bar of the action, that the plaintiff, who was an alien at the time of action brought, was, at the time of plea pleaded, an alien enemy, and though the Court held that the plea was ill-pleaded in bar, yet, as it appeared by the record that the plaintiff was an alien enemy, they gave judgment

that he be barred from further having or maintaining his action. [Bramwell, B. You say we must not give judgment for the plaintiff; then must we not give judgment for the defendant?] This plea discloses a temporary disability in the plaintiffs to sue for their debt. It is similar to a plea of the outlawry of a plaintiff after action brought, in which case the judgment for the defendant is, not that the writ abate, but only *quod loquela remaneat quousque*, &c.: Com. Dig. Abatement (E. 2), 8; citing 8 Rep. 69 a. In *Gibbons v. Vouillon* (8 C. B. 483), it was held that a covenant not to sue for a limited period was pleadable in bar. [Bramwell, B. What would be the form of a judgment for the defendant in this case?] "That the action be suspended until the expiration of the fifteen months." In *Lady Faulkland v. Stanion* (12 Mod. 400), Lord Holt said, "when the cause of action accrues to the plaintiff, at a time at which he is under the disability of an outlawry, there the plea of outlawry in abatement shall quite overthrow the writ, and, after removal thereof, he must begin *de novo*; but, where the disability of outlawry comes after the cause of action accrued, there the plea of outlawry is only a temporary disability, which does not abate the writ, but is only *quousque*, and, after removal thereof, he may recontinue the action by resummons," &c. Another instance of a temporary suspension of a suit was, "parol demurrer," (d) which occurred [540] where an infant heir was sued on the specialty debt of his ancestor, and pleaded his nonage in suspension of the proceedings until he arrived at full age. [Martin, B. If the creditors who executed the deed had sued the defendant, the covenant not to sue might have been pleaded as a release, but *Legg v. Cheeseborough* (5 C. B. N. S. 741) is an authority that it does bind the creditors who do not execute the deed. It is a matter for consideration, whether it is not the proper course, in cases of this kind, to apply to the Court of Bankruptcy to stay the proceedings, under the 198th section of "The Bankruptcy Act, 1861."]

J. Brown was not called upon to reply.

Per Curiam. (b) We are all of opinion that the plea is no bar to the action. If the defendant can amend he may have liberty to do so, otherwise there must be judgment for the plaintiff.

Amendment within a week, otherwise judgment for the plaintiff. (c)

[541] MARIA WALTER v. ADCOCK AND SPOKES. May 7, 1862.—A deed made between a debtor and a majority in number representing three-fourths in value of his trade creditors whose debts respectively amount to 10l. and upwards, whereby the debtor covenants to pay a composition on a certain day, and in consideration thereof the creditors release him, is not, under the Bankruptcy Act, 1861, binding on the creditors who do not execute it.—A deed of composition which does not convey any part of the property of the debtor is not valid under that Act:—Per Pollock, C. B., and Martin, B.—*Semble*, per Wilde, B., *aliter*.

[S. C. 31 L. J. Ex. 380; 8 Jur. (N. S.) 518; 10 W. R. 542; 6 L. T. 583. Referred to, *Brooks v. Jennings*, 1866, L. R. 1 C. P. 483.]

The declaration, (a) in substance, stated that, on the 13th November, 1856, E. Baxter, by deed, covenanted with the plaintiff that he would pay to her the sum of 300l. with interest, after the rate of 7l. per cent., in manner following (that is to say), the sum of 10l. 10s. 8d., being half a year's interest, on the 12th May, 1857; and the further sum of 310l. 10s. 8d., being the principal sum and another half-year's interest, on the 13th November following. And the defendants did, by the said deed, covenant with the plaintiff that if default should be made by E. Baxter in payment of the interest of the said sum of 300l. on the days and times thereinbefore mentioned, the defendants would, on demand, pay to the plaintiff the interest. And the defendants did thereby covenant with the plaintiff that the said E. Baxter should and would pay the premiums for keeping a policy of insurance on foot; and that in case the said E. Baxter should neglect to pay the annual sum to be paid in respect of the policy, it should be lawful for the plaintiff to pay it; and the said E. Baxter and the

(d) Abolished by the 11 Geo. 4 and 1 Wm. 4, c. 47, s. 10.

(b) Pollock, C. B., Martin, B., Bramwell, B., and Wilde, B.

(c) No amendment was made, the case having been settled.

(a) It appeared by the record that the writ issued on the 11th of December, 1861.

defendants, some or one of them, would repay the plaintiff such sums of money as should be so paid by her for the purpose of keeping on foot the said policy. Averments: that default was made by E. Baxter in payment of the interest on the said sum of 300l., that payment of the interest was demanded by the plaintiff of the defendants, that the plaintiff has done all things necessary, &c., to entitle her to be paid the same, and to entitle her to the performance of the covenant of the defendants as to the policy of assurance. Breaches: nonpayment of [542] the interest, and sums paid by plaintiff for keeping on foot the policy of assurance.

Plea by the defendant Adcock. That after the making of the said deed, and after the accruing of the causes of action in the declaration mentioned, the defendant entered into a certain deed of composition with his creditors, which said deed was and is in the words and figures following:—

"This indenture, made the 12th day of December, 1861, between Edward Adcock of &c., pork pie maker, of the first part, and the several other persons whose names and seals are hereunto subscribed and set, being respectively creditors of the said Edward Adcock, of the second part: Whereas the said Edward Adcock has for many years past carried on business as a pork pie maker at, &c., and in the course of such business has become indebted to the said several persons parties hereto of the second part in the several sums of money set opposite to their names in the first column of the schedule hereunder written. And whereas the said Edward Adcock, being unable to pay the said several sums of money in full has proposed to pay to his said creditors a composition of 5s. in the pound in full discharge of their said several debts, by one instalment on the 1st day of March next, which the said creditors have respectively agreed to accept: Now this indenture witnesseth that, for the considerations aforesaid, he the said Edward Adcock doth hereby for himself, his heirs, executors and administrators, covenant with the said parties hereto of the second part, and each and every of them, their and each and every of their heirs, executors and administrators, that he the said Edward Adcock will, on the 1st day of March next, pay unto each and every of them the said parties hereto of the second part, a composition of 5s. in the pound on the amount and in full discharge of their respective debts. And this indenture also witnesseth that, in consideration of the said covenant, they the said several creditors parties hereto [543] of the second part, do, and each and every of them doth by these presents, acquit, release and for ever discharge the said Edward Adcock, his heirs, executors and administrators, estates and effects, of and from the several debts set opposite to their respective names in the first column of the schedule hereunder written, and of and from and against all actions, suits, claims and demands whatsoever for on account or in respect of any other cause, matter or thing in anywise relating to the premises: Provided always that if the said Edward Adcock shall make default in payment of the said composition on the said 1st day of March next the release hereinbefore contained shall be void and of no effect. As witness the hand and seals of the parties.

"EDWARD ADCOCK (L.S.).

"Signed sealed and delivered by the said Edward Adcock, in the presence of
"G. W. GREENWOOD, 99 Chancery Lane, Solicitor."

"The Bankruptcy Act, 1861.

"This deed or instrument was brought into the office of the Chief Registrar of the Court of Bankruptcy for registration on the 20th day of December, 1861, at the hour of twelve o'clock at noon on that day, and was duly registered pursuant to the provisions of the Bankruptcy Act, 1861.

"T. W. SMITH,

"Clerk to the Chief Registrar."

And the defendant says that the said creditors who executed the said deed were a majority in number representing three-fourths in value of all his creditors whose debts amounted respectively to 10l. and upwards, and that the said creditors, parties to the said deed, in writing assented to and approved of the said deed; and that all the conditions required by the Bankruptcy Act now in force concerning deeds of composition were complied with and fulfilled by the defendant, so that the said deed became, and the [544] defendant says that the same did become and was binding on all the creditors of the defendant, including the plaintiff.

The defendant Spokes pleaded a similar plea, except that the consideration for

the release was stated to be the payment of a composition of 5s. in the pound to the parties to the deed, which was alleged to have been paid before its execution by them. Demurrers and joinders therein.

Rochefort Clarke, in support of the demurrers. Both pleas are bad. The deed being set out in terms, the allegation that all conditions required by the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, concerning deeds of composition, were fulfilled is of no avail, if it appears by the deed itself that it is invalid. This is not, upon the face of it, such a deed as is contemplated by the 192nd section of the Bankruptcy Act, 1861. It relates only to debts incurred in the course of the debtor's business, and it is merely an agreement by three-fourths of his creditors to accept a composition of 5s. in the pound. The 192nd section is headed "As to trust deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor." It enacts that "every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts and liabilities of the debtor, and his release therefrom, or the distribution, inspection, management and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same," provided certain conditions be observed, &c. That means a deed relating to all the debts and all the liabilities, not merely to trade debts. The enactment does not enable a limited number of creditors to bind the rest by executing a deed relating solely to their own debts. The deed must provide for the [545] distribution of the whole of the debtor's estate and amongst all his creditors; and every creditor should have an opportunity of being a party to it. Here a certain number of the creditors, it may be the members of the debtor's family, execute a deed, without consulting the other creditors, or giving them an opportunity of being parties to it, and thereby release all claims on the debtor's estate. [Martin, B. The statute clearly contemplates the bankrupt's property being dealt with by the deed. The fifth condition requires that, together with the deed, there shall be delivered to the Chief Registrar an affidavit by the debtor, or a certificate by the trustee, that a majority in number, representing three-fourths in value of the creditors of the debtor whose debts amount to 10l. or upwards, have in writing assented to or approved of such deed, and also stating the amount in value of the property and credits of the debtor comprised in such deed. Then, by the 195th section, no deed whatever shall be registered unless, in addition to the ordinary stamp duty, it also have a stamp denoting a duty computed at the rate of 5s. upon every 100l. of the sworn or certified value of the estate or effects comprised in, or to be collected or distributed under such deed. By this deed, the creditors, parties to it, upon payment to them of 5s. in the pound, release the debtor, not only from the debts set opposite their names, but also from all actions "in respect of any other cause, matter or thing in anywise relating to the premises." Therefore, if those creditors can bind the rest there would be a release, not only of the existing debts but of all debts future and contingent; and the release would operate on the defendant's covenant to repay the plaintiff the future premiums of insurance. That is so unreasonable that unless we are compelled by the clear words of the Act, we ought not to sanction it. Bramwell, B. How could the plaintiff get the 5s. in the pound on his debt? He has no means [546] of getting it. Suppose a person lent another 1000l. for three months, and at the expiration of that period applied for repayment, he might be met with this answer, "Your debt is released by a composition deed which my other creditors have executed on receiving 1s. in the pound on their debts." [Martin, B. This deed is nothing more than a covenant entered into in December to pay 5s. in the pound in March. The debtor retains possession of all his property by merely covenanting, not with the plaintiff, but with the other creditors, to pay them the composition.] Registration can give no validity to such a deed, though want of registration may render it invalid. [Bramwell, B. The deed provides that if the debtor shall make default in payment of the composition on the 1st of March, the release shall be void. But suppose he paid the creditors who executed the deed and not the plaintiff; he might say, "I made no default for I never covenanted to pay you." Should not the composition purport, on the face of it, to be made, not with the particular creditors, but with the whole body of creditors?] The 153rd and 154th sections, which contemplate proof in respect of unliquidated damages, and for premiums upon policies of insurance, shew that there should be some reasonable arrangement with regard to contingent debts,

whereas this deed, if valid, will extinguish the plaintiff's right to recover future premiums. The clauses in the Act beginning with the 185th and ending with the 200th, are headed, "As to change from bankruptcy to insolvency." By the 187th section the Court of Bankruptcy may examine on oath the bankrupt, and any of the creditors in support of or in opposition to the deed of arrangement, and satisfy itself that its terms are reasonable and calculated to benefit the general body of creditors. This deed is so unreasonable that it never could have been the intention of the Act that dissenting creditors should [547] be bound by it; *Ex parte Wilkes* (5 De Gex, M'N. & G. 418). The same observations apply a fortiori to the other plea.

Milward, for the defendant Adcock. The deed is not confined to trade debts, but extends to all the debts and liabilities of the debtor. It does not recite a partnership and that the partners are unable to meet their engagements, but only that a sole trader had become indebted. That would comprehend all his debts. The covenant is with the parties of the second part, that is, all the creditors who choose to execute the deed. With respect to the argument that it never could have been intended that the dissenting creditors should be bound by a deed of this description, if the legislature has considered that a majority in number representing three-fourths in value of the creditors are competent to decide what is beneficial for the general body of creditors, the Court will not interfere with their discretion. Under the Bankrupt Law Consolidation Act, 1849, arrangements with creditors were often defeated by technicalities, and it was difficult to carry them into effect. The legislature has now given to three-fourths, instead of six-sevenths, of the creditors the power of binding the rest. [Martin, B. The 192nd section says, "every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on his behalf," and the second condition says, "if a trustee or trustees be appointed," they shall execute the deed. Therefore it is clear that the legislature has contemplated the absence of a trustee.] Under the old law if the debtor retained the smallest portion of his property the deed was void, but now the arrangement may be in respect of a part only, for the 194th section speaks of a deed by which a debtor conveys or covenants or agrees to convey his estate and effects, "or the principal part thereof," for the benefit of his creditors. The [548] whole scope of the recent Act is to give greater facilities for arrangements with creditors. The 192nd and eight following sections relate to three classes of deeds:—trust deeds, where the property of the debtor is conveyed to trustees for the benefit of creditors; composition deeds, where the debtor retains his property, and undertakes to pay his creditors a certain share in the pound; and inspectorship deeds, where the debtor winds up his estate under the superintendence and control of inspectors. [Martin, B. Do you contend that the deed binds all the creditors whether they execute it or not?] In form it relates only to those who execute it, but the statute renders it binding on all. [Pollock, C. B. The 192nd section can only apply to cases in which some property is comprised in the deed, because, by the 7th condition, "immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees." The statute was intended to give effect to the doctrine of *cessio honorum*. If the legislature meant to alter the law they would have done so in plain terms.] The 192nd section says "every deed or instrument made or entered into between a debtor and his creditors," that is, every deed, being either a trust deed, a composition deed, or an inspectorship deed. It then says, "relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters," &c. That section is similar in terms to the 224th section of the Bankrupt Law Consolidation Act, 1849; but there, instead of the words "his release therefrom, or the distribution" &c., the words are "his release therefrom, and the distribution" &c. In *Tetley v. Taylor* (1 E. & B. 521) the Court of Exchequer Chamber held that the word "and" necessitated the distribution of the whole of the debtor's [549] estate. [Martin, B. That decision did not depend upon the word "and," but was founded on the general scope of the Act.] Under the former Act it was necessary that the deed should be entered into between the trader and his creditors, and signed by or on behalf of the requisite number of creditors; the present Act does not require that the creditors should be parties to the deed. By the first condition, in section 192, they may assent to it in writing. The second condition clearly contemplates a case where no trustee is appointed, and in that event it is difficult to see how the debtor's

estate could be conveyed. The words in the fifth condition "the amount in value of the property and credits of the debtor comprised in the deed," afford an argument in favour of the defendant, as it shews that all the debtor's property need not be included in the deed. [Pollock, C. B. If the words had been "the property, if any, comprised in the deed" there would have been some weight in the argument. Martin, B. Perhaps it is not necessary that all the debtor's property should be conveyed, as under the former Act, but there must be a dealing with the principal part of it.] By the seventh condition, immediately on the execution of the deed possession of all the property comprised in it is to be given to the trustees; but, suppose there are none. [Pollock, C. B. The 195th section which imposes a stamp duty of 5s. in every hundred pounds, in addition to the ordinary stamp duty, shews that some property must be conveyed, for it does not say that the stamp shall be impressed "if necessary."] The duty is imposed on the value of the estate or effects comprised in or to be collected "or distributed under such deed." The latter words shew that the property need not be conveyed. [Pollock, C. B. If a mere covenant to pay had been contemplated, an ad valorem duty would probably have been imposed on the amount covenanted to be paid.] By the 197th section, after the registration of the deed, "the debtor [550] and creditors, and trustees, parties to such deed, or who have assented thereto, or are bound thereby, &c., shall respectively have the benefit of, and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt." Under the 153rd and 154th sections the amount of future premiums might be valued, and the plaintiff might receive the composition in respect of them. By the 185th section which is headed "As to change from bankruptcy to arrangement," three-fourths in number and value of the creditors may resolve that the estate may be wound up under a deed of arrangement, composition, or otherwise. That section must be read together with the 192nd, and if composition deeds were excluded from it, full effect cannot be given to the 185th section.

Macnamara, for the defendant Spokes. It is no longer necessary that deeds of arrangement should provide for the distribution of the debtor's estate because the former decisions proceed upon clauses which are repealed, and on language not found in the substituted section. The arrangement clauses in the Bankruptcy Act, 1861, are framed with the intention of giving debtors larger powers of arrangement with their creditors than they formerly possessed. That appears by the report of the Commissioners: Shelford's Bankrupt Law, pp. 621, 624. The state of the law was not satisfactory to the mercantile community. The legislature considered that a debtor and his creditors might be safely left to make their own arrangements, but the effect of the decisions was to narrow their powers. The objection in *Telley v. Taylor* (1 E. & B. 521), that the deed did not provide for the distribution of the whole of the trader's estate, is not available under the Bankruptcy Act, 1861. That is not only a Bankruptcy Act, but also an Insolvency Act, and deals with a class of persons who usually have no property [551] to give up to their creditors. The word "composition" is not found in the arrangement clauses of the Bankrupt Law Consolidation Act, 1849. The 224th section of that Act uses the word "and" in the conjunctive, while in the Bankruptcy Act, 1861, the word "or" is substituted in the disjunctive. The 224th section did not render a deed of arrangement binding absolutely, but only subject to certain conditions, one of which was that the creditors were to have the same rights of set-off, mutual credit, lien, and priority; and there was also to be distribution of joint and separate assets in like manner as in bankruptcy. That condition is not found in the Bankruptcy Act, 1861. Again, the 229th section of the former Act enabled a creditor who was dissatisfied with the administration of the estate to apply to the Court, which assumed that the estate was to be administered. Moreover, where it was intended that there should be a composition, plain words are used, as in the 230th and 231st sections, with respect to composition after adjudication of bankruptcy. In *Larpen v. Bibby* (5 H. L. Cas. 481) it was not necessary to decide whether a deed of arrangement must provide for the distribution of the whole of the debtor's estate, because there the deed was executed before the Bankrupt Law Consolidation Act, 1849, passed. The clauses of the Bankruptcy Act, 1861, headed, "As to change from bankruptcy to arrangement," and commencing with the 185th, shew that the legislature intended that some arrangements should be more stringent than others, for the Court is to satisfy itself that the terms are reasonable and calculated to benefit the creditors. In that case three-fourths in number and value of

the creditors present or represented at a meeting bind the rest (sect. 185), as the arrangement is under the superintendence of the Court. The conditions are only applicable where the facts [552] admit of their application, and must be construed *reddendo singula singulis*. The publication required by the 193rd section is notice to every creditor, and is so treated by the 198th. The 197th section shews the large powers vested in the creditors; for by a provision in the deed, they may oust the Court of Bankruptcy of their jurisdiction. By the 190th section of the Bankrupt Law Consolidation Act, 1849, the Court may order payment of a dividend with interest. [Bramwell, B. Suppose the plaintiff had applied for payment of the composition, the debtor might have said, "I never intended that you should have any benefit under the deed." Must not the deed shew upon the face of it an intention that the estate should be distributed amongst all the creditors?] This is the ordinary form of a composition deed: Forsyth on Composition, p. 230, 3rd ed. By the 197th section all parties bound by the deed may have the benefit of it, although they have not executed nor assented to it. [Wilde, B. The creditors who execute the deed are in a better position than those who do not. The effect of the deed is this—in consideration of the payment of the composition to those creditors who have executed the deed, and of an application to the Court of Bankruptcy for payment by those who have not, the debtor shall be released. This is in fact an attempt to force a composition on certain creditors; and the legislature could never have intended that the creditors who did not execute the deed should be in a worse position than those who did.] It would be matter of replication if the debtor was not ready to pay the plaintiff, or she could not get the composition out of the Court of Bankruptcy. Where the legislature intended that all the estate and effects of the debtor should be conveyed for the benefit of creditors, there is an express provision for the purpose: sect. 200. In *Irving v. Gray* (3 H. & N. 34) there was no express assignment by the [553] debtor of his estate, but only a covenant to assign it, and it was held that the deed was not invalid on that ground. In *Macnaught v. Russell* (1 H. & N. 611) it was held that the deed bound the creditors who were not parties thereto.

POLLOCK, C. B. The plaintiff is entitled to judgment. The question turns upon the construction of the recent Bankruptcy Act, 24 & 25 Vict. c. 134, with reference to the deed set out in the plea, and I am of opinion that it is not a deed within the Act so as to bind the creditors who have not executed it. I am fully aware of the difficulty and importance of the subject, and, upon the best consideration I can give it, it appears to me that the proposition of Mr. Milward cannot be correct, viz., that a deed which provides for no surrender of any part whatever of the debtor's property, but which is executed by a majority in number, representing three-fourths in value of his creditors whose debts amount to 10l. and upwards, binds the rest of the creditors to accept a mere covenant to pay a composition. The whole law of bankruptcy and insolvency is connected with the doctrine, to be found in almost all codes, of *cessio bonorum*. When a man is unable to pay his debts he is required to give up his property. The surrender of property is the basis of the bankrupt law. That was expressly laid down by Jervis, C. J., in *Tetley v. Taylor* (1 E. & B. 521, 540), and I find the same view expressed in my judgment in *Drew v. Collins* (6 Exch. 670). It is admitted that, until the recent statute was passed, a deed of arrangement was not obligatory on the creditors who had not executed it, unless it provided for the distribution of the whole of the trader's property amongst all his creditors; and looking at this statute with all the consideration in my power, I think it possible that the legislature may have intended that a person in insolvent circumstances should be [554] enabled, without giving up his property, to execute a deed and thereby covenant to pay his creditors a composition within a certain time. But I find nothing in the Act to justify us in saying that the legislature really intended to make so important an alteration in the law, without having expressed that intention in language which made it clear beyond all doubt. If such had been the intention of the legislature, I think there would have been some intimation that the law was to be altered. I do not say that it is altogether impossible that any such alteration of the law was intended; but, if it were, I think there would have been something in the Act to plainly indicate it. I say nothing whatever upon the reasonableness or unreasonableness of these provisions; I have not formed my opinion upon the deed being more or less reasonable. Very likely it was the intention of the legislature to give to a majority of the creditors in number and value greater power of arrangement with their debtor than they

formerly possessed. The legislature may have considered that persons must be presumed to be acquainted with their own business, and that the maxim, *cuique in arte sua credendum*, applied; but I think that if such an alteration of the law was intended it would have been expressed in clear and explicit terms, instead of being, as here, contradicted by other provisions.

The question principally turns upon the meaning of the 192nd section of the Bankruptcy Act, 1861, and it is whether a majority in number representing three-fourths in value of the creditors whose debts respectively amount to 10l. and upwards, can make an arrangement which shall bind the dissenting creditors, and by which no creditor at the moment gets anything but a covenant by a person avowedly insolvent that he will pay a composition within a certain period. In my opinion, the heading of the 192nd section refers to two classes of deeds only. The section says that every [555] deed or instrument made or entered into between a debtor and his creditors, "or a trustee on their behalf, relating to the debts and liabilities of the debtor and his release therefrom," &c. The latter words seem to me to apply to trust deeds for the benefit of creditors. The section then proceeds "or the distribution, inspection, management and winding up of his estate, or any of such matters," shall be as binding on all the creditors as if they had executed the same, provided certain conditions are observed. By the second condition, "If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same." It is therefore possible that a trustee may not be appointed by such a deed, but in some other manner. By the seventh condition, "Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees." This deed contains no such provision. It seems to me that the legislature, when they framed that condition, never contemplated a deed which left the debtor in undisputed possession of his property, and that the creditors who execute it have no right to say, "we will not interfere with the debtor's property, we will take nothing but a covenant by the debtor to pay a composition, and we will bind the rest of the creditors." By the sixth condition, "Such deed or instrument shall, before registration, bear such ordinary and ad valorem stamp duties as are hereinafter provided." That is explained by the 195th section, which says that no deed shall be registered unless, in addition to the ordinary stamp duty, it is impressed with a stamp denoting an ad valorem duty, at the rate of 5s. upon every hundred pounds. There is not the least intimation in the Act that any deed required to be registered would not require an ad valorem stamp, which this deed would not. By the 197th section, this deed if not registered [556] would not be binding. That section is unintelligible unless some property is assigned which may require the protection of the Court. It is difficult to see how this deed can be considered within the Act.

For these reasons I think that the plaintiff is entitled to judgment upon the demurrer to the plea of the defendant Adcock. With respect to the plea of the defendant Spokes, it is only necessary to say that a *fortiori* it is bad.

MARTIN, B. I am of the same opinion. The declaration sets out a deed whereby the defendants covenanted with the plaintiff in a certain event to pay her interest on a sum of 300l., and also that if she paid certain premiums for keeping on foot a policy of assurance, they would repay her the amount. The declaration goes on to allege that the defendants have not paid the interest, and that, although the plaintiff has paid the premiums, the defendants have not repaid her the amount. The defendants, having failed to pay the monies which they covenanted to pay, the defendant Adcock pleads a deed purporting to be made between himself of the first part and the several persons whose names and seals are thereunto subscribed and set, being his creditors, of the second part. The deed recites that for many years he carried on business as a pork pie maker, and in the course of such business became indebted to the several persons parties thereto of the second part. It is clear, therefore, that he contemplated an arrangement with his trade creditors in respect of the debts mentioned in the schedule. The deed then goes on to recite that, being unable to pay those debts in full, he has proposed to pay a composition of 5s. in the pound on a future day, which the creditors have agreed to accept. He then covenants that he will pay the composition on the day named, and in consideration thereof the creditors, parties thereto [557] of the second part, release him, subject to a proviso that if the composition is not paid on the day named the release shall be void. Such a deed cannot, in

my opinion, be an answer to this action. It is nothing more than a covenant by a debtor with a certain number of his trade creditors to pay them 5s. in the pound on a certain day; and that is said, by force of law, to bind the other creditors. It seems to me this is not such a deed as falls within the provisions of the Bankruptcy Act, 1861.

The Bankrupt Law Consolidation Act, 1849, contained clauses which underwent the consideration of all the Courts. Upon the best consideration we could give them, we held that all the debtor's property should be made available for all his creditors. It seems to me that was founded on reason and the sense of the matter; for sense points out that when a debtor becomes unable to pay his creditors, the proper course is to give up to them all his property, inasmuch as it would be competent to them to obtain judgment and take it in execution. The bankrupt and insolvent law are framed on the same principle, viz., that the debtor's property shall vest in trustees for the benefit of all the creditors: it is merely the *cessio bonorum*. The law of all countries provides that if a man is unable to pay his debts his property shall be made available for his creditors. That law prevailed in *Tetley v. Taylor* (1 E. & B. 521), where the Court of Exchequer Chamber came to the same conclusion as this Court in *Drew v. Collins* (6 Exch. 670). *Tetley v. Taylor* was an extreme application of the law, which had better have been avoided if any other construction could have been put upon the Act. But the Judges of this country are not at liberty to deviate from the true construction of an act of parliament because they think another construction would be better. In *Tetley v. Taylor* the judgment of the Court of Queen's Bench was [558] deliberately reversed by the Court of Exchequer Chamber, four most eminent Judges being parties to that decision, and there was no appeal to the House of Lords. *Larpernt v. Bibbey* (5 H. L. Cas. 481) was decided on another point, but Parke, B., intimated that he adhered to the opinion he expressed in *Tetley v. Taylor*. In *Ex parte Wilkes* (5 De Gex, Mac. & G. 418) Knight Bruce, L. J., said—We cannot, upon language so far from clear, so much otherwise than plain, as that before us, ascribe to parliament an intention to be grossly unjust. I think it could not have meant to bind any dissenting creditor by a deed so defective, so ineffectual and so delusive as that before us without intending gross injustice. Therefore, under the Bankruptcy Law Consolidation Act, 1849, we have the judgment of the Court of Exchequer Chamber and of a Court of equity that a deed of composition must provide for the distribution of the debtor's property; and if any change in the law was intended, there being now a new enactment, we should expect to find it expressed in clear and intelligible language. I think, however, that the legislature never intended to say that a debtor might retain his property and relieve himself from his debts by a mere covenant to pay a composition to a certain number of creditors. The 5th and 7th conditions of the 192nd section point out that the legislature intended that the debtor's property should be made available for his creditors. It is suggested that under a deed of this kind some person may become surety for payment of the composition. That certainly might raise a difficulty, and perhaps a provision for the retention by the debtor of some of his property might be valid under the recent enactment; but the effect of this deed is to allow the debtor to retain all his property and exclude all his creditors but three-fourths in number and value, and the consequence would be that he might con-[559]-tract fresh debts, and his new creditors might seize the whole of his property, and thus deprive the other creditors of payment. For these reasons I am of opinion that the plaintiff is entitled to judgment on both pleas.

BRAMWELL, B. Upon the question whether a deed of composition must contain an assignment of the debtor's property, I offer no opinion. The difficulty I have is this—if the old law was intended to continue why was any alteration made in the language used? If the law was intended to be altered why was not the alteration made in plain and unambiguous language? However, it is perfectly clear that the plaintiff is entitled to judgment. The 192nd section says, "every deed or instrument made or entered into between a debtor and his creditors." That means all his creditors, but the section proceeds "or any of them." That cannot mean any of them to the exclusion of the rest, because it would follow that a debtor might enter into an arrangement with some of his creditors by which the others would be bound though they received no benefit. That would be senseless. In my opinion "any of them," means as trustees for the rest, that is, not on behalf of any of them, but on behalf of the whole. The section proceeds, "relating to the debts or liabilities of the debtor,"

that is, to all his debts, "his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to, and had duly executed the same." That applies only to deeds which comprehend all the creditors and might be consistently executed by all. In fact it means a deed for the benefit of all the creditors. It is impossible to suppose that the legislature meant that a debtor might enter into a deed of arrangement with some of his creditors to [560] the exclusion of the rest, and yet bind them. This deed is made between the debtor of the first part, and the several persons whose names and seals are thereunto subscribed and set, being respectively his creditors, of the second part. It does not say "on behalf of the general body of creditors," or "as the creditors generally." It then recites that the debtor carried on business as a pork pie maker, and in the course of such business has become indebted to the parties of the second part. That has reference to his trade debts only. The deed then recites "that the debtor being unable to pay the several sums of money in full has proposed to pay his said creditors a composition of 5s. in the pound in full discharge of their several debts." That must mean his trade creditors. The debtor then covenants with the parties of the second part that he will, on the 1st of March next, pay them a composition of 5s. in the pound, and in consideration thereof they release him from his debts. Suppose, instead of this covenant, there had been an assignment of the debtor's property to a trustee for the benefit of the creditors, a creditor who had not executed the deed but was desirous of taking the benefit of it might have insisted on his right to execute it, or stand in the position of the creditors who had. But under this deed could any creditor but a trade creditor make such a claim? Certainly not: the answer would be, "you are not included." If not, he cannot be bound by a deed under which he takes no benefit. Since it is said, that as there are no words of negation the deed is not intended to be confined to the trade creditors, it is necessary to see whether it is intended to apply to the other creditors. It would be singular if those creditors should not be entitled to any benefit under the deed unless three-fourths in number and value of the trade creditors executed it. Had the deed been for the benefit of all the creditors, the plaintiff might [561] have applied to the Court of Chancery, and so have obtained the benefit of it, although some only of the creditors had executed it. It seems to me clear that a composition deed under the Bankruptcy Act, 1861, to be binding upon creditors who have not executed it, must appear on the face of it to be a deed of which any creditor may have the benefit, and may execute without repugnancy. For these reasons I think that the plaintiff is entitled to judgment on both pleas.

WILDE, B. I was at Chambers when the plaintiff's case was argued, and therefore I am not prepared to give judgment; neither do I say that on some of the points I have formed an opinion different from the rest of the Court. There is, however, a general question of great importance, upon which I wish to say a few words, viz., whether deeds which do not convey the debtor's estate, or the principal part of it, are within the Act. It has been contended that no such conveyance is necessary. It has been shewn, by what has fallen from the Bench, that under the former Act it was necessary that a deed of arrangement should convey all the debtor's estate, in order to bind dissentient creditors. My present impression is that there is no such necessity under this Act, which has been passed to get rid of that state of the law. It is true that the change is not pointedly enacted, but the language of the recent Act is studiously different from that of the former, and therefore I should come to the conclusion that the recent Act was intended to make an alteration in the law. It is said that such a provision would be unjust and unreasonable, but the views of the law and trade do not always coincide. It is true there is no security that the creditors may get anything, but it is equally true that in order to get more it is often better to leave the property in the hands of the debtor; indeed it is our common knowledge that creditors are often content [562] to take a composition without security, and to leave the debtor in the control and disposition of his property. In some cases it is obviously for the interest of the creditors to do so.

For these considerations I think it probably may have been intended by the legislature to give a larger operation to deeds of arrangement; and I am not prepared to say that a composition deed, in other respects within the Act, is invalid because it contains no assignment of the debtor's property.

I have expressed this opinion because I think that the question must before long be raised for the decision of a Court of error.

Judgment for the plaintiff.

BOTTOMLEY AND OTHERS v. HEYWARD. June 14, 1862.—An order for the protection of the property of a trader, under the 211th section of the Bankrupt Law Consolidation Act, 1849, does not operate to disentitle a judgment creditor to the benefit of a *fi. fa.* levied by seizure of the goods of the trader before the presentation of his petition.

[S. C. 31 L. J. Ex. 500.]

The declaration (in substance) stated that the plaintiffs, by the judgment of the Court of Exchequer, recovered against one J. Davies 100l. 8s. 4d., and thereupon the plaintiffs sued out of the said Court a writ of *fieri facias* directed to the sheriff of Montgomeryshire (setting out the writ), and the said writ was indorsed with a direction to levy 100l. 8s. 4d. and 1l. 10s. for costs of execution, together with interest, &c., and the plaintiffs caused the said writ so indorsed to be delivered to the defendant, as and then being the sheriff of Montgomeryshire, to be executed: and the defendant, as and being such sheriff, by virtue of the said writ duly levied of the goods and chattels of the said J. Davies the money and interest so indorsed upon the writ: Yet the defendant has not paid the said money and interest to the plaintiffs, and falsely returned to the said Court that the said J. Davies had not any goods and chattels in the de-[563]-fendant's bailiwick whereof he could cause to be made the money and interest so indorsed upon the writ, &c. The second count stated the recovery of the judgment, and the suing out and delivery of the writ to the defendant, to be executed, as in the first count, and proceeded to allege that the defendant, by virtue of the writ, seized and took in execution certain goods and chattels of the said J. Davies whereof the defendant could and might and ought to have levied the monies so indorsed upon the writ and directed to be levied; but the defendant wrongfully, and without the consent of the plaintiff, withdrew from and relinquished possession of the said goods and chattels so seized and taken in execution without levying thereout, and did not levy thereout the said monies so indorsed upon the writ and directed to be levied, &c.

Plea. That after the said judgment was so recovered, and after the said writ of *fieri facias* was so sued out and delivered to the defendant as aforesaid, the said J. Davies, as and being a trader within the true intent and meaning of "The Bankrupt Law Consolidation Act, 1849," and being unable to meet his engagements with his creditors, and being desirous of laying the state of his affairs before them under the superintendence and control of the Court of Bankruptcy, and of submitting himself to the jurisdiction of the said Court in manner in the last mentioned Act mentioned, and within the proper jurisdiction in that behalf, did, on &c., duly present a petition to the Court of Bankruptcy for the Liverpool District for an arrangement between such trader and his creditors, under the provisions of the last mentioned Act with respect to arrangements between debtor and creditor under the superintendence and control of the Court, and praying that his person and property might be protected from all process until further order, and that such proposal as he might be able to make, [564] or such modification thereof as by three-fifths in number and value of his creditors might be determined, might be carried into effect under the superintendence and control of the said Court: that there was duly filed with the said petition such affidavit in support thereof as is required by the said Act: that on and in compliance with such petition, the said district Court, on, &c., by an order under seal dated, &c., and in pursuance of the said statute, did thereby duly grant such protection as aforesaid, and direct that the person and property of the said J. Davies should be protected from all process from the date thereof until the 10th day of August then next, at twelve o'clock at noon, or until further order: that such order for protection, afterwards and whilst one E. Breese, as the officer of the defendant as such sheriff as aforesaid, by virtue of a warrant to him directed in that behalf by the defendant as such sheriff as aforesaid, and acting in the execution of the said writ of *fieri facias*, had seized and was in possession of the said goods and chattels of the said John Davies, was, on &c., served on the said E. Breese as such officer as aforesaid. (The plea then stated that

the order for protection was enlarged until the 3rd of September. It then set out another order of the Court, whereby it was ordered that E. Breese should within two days from the service thereof deliver to the said J. Davies the goods belonging to him, or in default thereof a warrant for the committal of E. Breese to gaol for such contempt should issue. The plea then stated that the order for protection was enlarged until the 1st of January, 1862, and that the orders at the time of making the said return were in full force, and that the time for such protection had not elapsed.) Wherefore, and in pursuance of such several orders, the said E. Breese, as such officer as aforesaid, and the defendant as such sheriff as aforesaid, withdrew from and relinquished possession of the said goods and chattels [565] as in the said declaration mentioned, and delivered up the same as ordered as aforesaid, as they lawfully might and did for the cause aforesaid: that the said J. Davies had not, at the time of the delivery of the said writ to the defendant, nor at any time since such delivery up to the time of the commencement of this suit, and thence hitherto, any goods and chattels save and except those so seized as in this plea above mentioned, whereof he could or might or ought, as such sheriff as aforesaid, to have made and levied the monies so directed to be levied as aforesaid, or any part thereof.

Demurrer and joinder therein.(a)

Montague Smith (J. Brown with him) argued for the plaintiff. This question is, what is the effect of an order for protection under the 211th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), where the sheriff has levied by seizure before the order was made. First, the order does not operate as a supersedeas of the execution. By section 211, which is headed "And with respect to arrangements between debtors and their creditors under the superintendence and control of the Court," any "trader unable to meet his engagements with his creditors, may present a petition to the Court praying that his person and property may be protected from all process until further order," &c. That is merely an order for protection from process and can have no greater effect than a vesting order in bankruptcy or insolvency, which vests the property in the official assignee, subject to the right of the execution creditor. There is a special provision with respect to the person of the trader, but not as to his property. The [566] 211th section proceeds to enact that "the Court shall have power to grant such protection, and may renew the same from time to time, &c., and, if the petitioner be in prison or in custody for debt, may" (except in certain cases) "order his immediate release." It is clear therefore, as regards the person of the debtor, the order for protection has not a retrospective operation. By the 213th section, the Court must appoint an official assignee, "and upon sufficient cause shewn may, if it shall think fit, direct that the estate and effects of the petitioner, or any part thereof, shall be possessed and received by such official assignee, or be taken possession of by the messenger of the Court." The order cannot protect property already seized under a *fi. fa.* The execution is executed by the mere act of seizure, and the sale cannot be stopped by any subsequent proceedings. In *Giles v. Grover* (9 Bing. 128, 240, 244), where it was held that the goods of a debtor seized under a *fi. fa.*, but not sold, might be taken under an extent, in chief or in aid, Littledale, J., in delivering his opinion, reviews the authorities as to the effect of seizure with reference to bankruptcy, and observes that the decisions upon the statute 21 Jac. 1, c. 19, s. 9, "shew that as soon as goods have been seized under the *fi. fa.*, that is considered in law as being an execution executed, and the sale is but a formal part of the execution of the process, and has therefore no further effect on the goods in respect of the alteration of the property in them." Formerly, when the fiat had relation to the act of bankruptcy, the sheriff, if sued in trover, pleaded the writ; but the 133rd section of the Bankrupt Law Consolidation Act, 1849, rendered valid all executions against the goods of any bankrupt, *bonâ fide* executed and levied by seizure and sale before the date of the fiat, provided the person at whose suit the execution issued had not notice of any prior act of bankruptcy. [567] In *Woodland v. Fuller* (11 A. & E. 859), a *fi. fa.* was lodged with a sheriff who issued his warrant thereon, and afterwards on the same day a vesting order was made under the 1 & 2 Vict. c. 110, s. 37, by the Insolvent Debtors' Court, transferring the estate of

(a) The plaintiffs, so far as the plea related to the second count, new assigned, and upon the new assignment there were other pleas, replications and cross-demurrers, which raised substantially the same question.

the insolvent to the provisional assignee, who took possession thereof, and it was held that the sheriff might nevertheless seize it under the writ. Secondly, the order affords no answer to the first count, which alleges that the sheriff "duly levied" on goods of the debtor and falsely returned nulla bona.

Gray, for the defendant. The words in the first count "duly levied" mean a seizure, not a sale; if they mean a sale, the plea is an answer, because it shews that there was no sale. The sheriff having been served with the order for protection, had no right to sell the goods. The 133rd section of the Bankrupt Law Consolidation Act, 1849, only rendered valid, as against the assignees, an execution executed by seizure and sale. The order for protection had a retrospective operation so as to divest the right of the execution creditors to the goods. Notice to an execution creditor that his debtor has filed a petition for arrangement under the 211th section of the Bankrupt Law Consolidation Act, 1849, is notice of an act of bankruptcy within the meaning of the 133rd section, provided an adjudication of bankruptcy is filed within two months after the petition for arrangement is dismissed: *Edwards v. Gabriel* (6 H. & N. 701. In error, ante, p. 520). So here the proceedings upon the petition might, under the 223rd section, terminate in bankruptcy; and if the sheriff sold the goods, he would in that event be liable to the assignees. It is impossible for the sheriff to tell whether or no bankruptcy will supervene; and he has no other course than to stay the execution. [Martin, B. Where a [568] person has a vested right, a statute ought not to be construed so as to deprive him of that right, unless its language is plain and unambiguous.] No effect can be given to the language of the Act, without holding that the order operates on the execution, for otherwise the property of the debtor would not be protected from the process. [Pollock, C. B. If the petitioner is in prison, the Court may order his release, but no power is given to the Court to stay an execution against his goods.] The power to grant protection from process against his property is without limitation, but the power to release him from custody is either absolutely or on condition. If the Court had directed the official assignee to take possession of the goods he might have done so, and the sheriff could not have proceeded to sell them. [Martin, B. Suppose the petition is dismissed, what is to become of the goods? The statute does not say that they shall be restored to the sheriff.] When the protection ceased the sheriff might retake them. But assuming that the sheriff ought not to have relinquished possession of the goods, the return of nulla bona is under the circumstances true. If the effect of the order is to prevent the sheriff from selling the goods, what other return could he make? [Martin, B. That the goods remained in his hands for want of buyers.] Secondly, if the order operated to protect the goods from process, the plea is an answer to the first count, for there were no goods upon which the sheriff could levy.

Montague Smith, in reply, cited *Foster v. Allanson* (2 T. R. 479).

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B. The questions in this case arose upon [569] demurrers, and the substantial one, upon which all the others depend, was whether a protection of the property of a trader under the 211th section of the Bankrupt Act, 1849 (12 & 13 Vict. c. 106), operated to disentitle a judgment creditor to the benefit of a fieri facias levied by seizure upon the goods of the trader before the presentation of his petition. We think it does not. The section enacts that the trader may present a petition to the Court praying that his person and property may be protected from all process until further order, and the Court shall have power to grant such protection and to renew it from time to time. *Primâ facie*, these words are to be read as prospective and not retrospective, and would therefore mean that the protection was to be from process subsequently put in force; and we find nothing in the enactment upon this head to give it a retrospective operation. The section proceeds to provide for the case of the petitioner being in prison, but nothing whatever is to be found with respect to goods in the hands of the sheriff under a fieri facias, and if the legislature intended that the official assignee, or the messenger, should take possession of the goods under the 213th section, free from the lien of the execution, we think that some provision would have been made for the restoration of the goods to the sheriff in the event of the petition being dismissed, but there is none such. The 133rd section was referred to by the learned counsel for the defendant as shewing, that in order to protect an execution against the title of assignees it must be executed and levied by seizure and

sale; and no doubt this is so, but no such words are to be found in the 211th section, and we do not think we can supply them. The general principle of law is that "vigilantibus jura subveniunt," and we think a construction cannot be given to the enactments of the legislature which would deprive a creditor of a right actually existing and [570] vested in him unless they be clear and direct upon the point. There were some cases cited not bearing directly upon the question, but there is nothing to be found in any of them at all at variance with the view above expressed. We therefore think the plaintiffs entitled to our judgment.

Judgment for the plaintiffs.

CROFT v. STEVENS. Jan. 16, 1862.—A tradesman received a letter in the name of the defendant containing an order for goods. The goods were sent and returned by the defendant, on the ground that he had not ordered them. At his request the tradesman sent him the letter containing the order, when he wrote to the tradesman stating that in his opinion, and he firmly believed, the letter was written by the plaintiff. Held, that the statement, having been made *bonâ fide*, was a privileged communication.

[S. C. 31 L. J. Ex. 143; 10 W. R. 272; 5 L. T. 683. Referred to, *Stuart v. Bell*, [1891] 2 Q. B. 359.]

Libel. The first count of the declaration stated that Messrs. Rickards and Co., being iron merchants and manufacturers, received a certain order purporting to come from the defendant, which order was contained in a letter sent to the said Messrs. Rickards and Co., and was in the words and figures following (that is to say):—"Major Stevens will thank Mr. Wood to send a government-pattern target to 3 Hanover Square, on Wednesday evening at eight o'clock. Cash on delivery.—M. S. May 28." And the said Messrs. Rickards and Co. forwarded a government-pattern target to the defendant, pursuant to the said order, which the defendant returned to them, on the alleged ground that he had not given the said order. And the defendant falsely and maliciously wrote and published of the plaintiff, in a letter sent and addressed to the said Messrs. Rickards and Co., the defamatory words following (that is to say):—"Gentlemen,—With reference to your letter desiring you to send me an iron target" (meaning by the last mentioned letter the said letter containing the said order), "I beg to say, that on comparing that and other letters with letters in the office in the handwriting of Dr. Croft" (meaning the plaintiff), "I have no hesitation in saying, as my firm opinion, that all the letters are in his handwriting" (meaning to express an [571] opinion that the said letter containing the said order was in the plaintiff's handwriting, and that the plaintiff had written the said order fictitiously, and for the purpose of deceiving the said Messrs. Rickards and Co., and meaning also that certain other fictitious letters of a similar nature had been written by the plaintiff); "If you take proceedings, I am willing to state this on oath. I give you Dr. Croft's address opposite.—Yours obediently,
"W. B. STEVENS."

Second count. "That the defendant falsely and maliciously wrote and published of the plaintiff, and concerning the order in the first count mentioned, in a letter sent to the said Messrs. Rickards and Co., the defamatory words following (that is to say):—

"Gentlemen,—Agreeably to the request contained in your communication of this day, I beg to return the inclosed letter alluded to" (meaning the letter in the first count mentioned, containing the order therein mentioned), "and which I firmly believe to be written by Dr. Croft;" (meaning to express the defendant's belief that the plaintiff had written the said letter fictitiously, and for the purpose of deceiving the said Messrs. Rickards and Co. under the circumstances in the first count mentioned).

Third count. That the defendant falsely and maliciously wrote and published of and concerning the order in the first count mentioned, in a letter sent to the said Messrs. Rickards and Co., the defamatory words following (that is to say):—

"Gentlemen,—I return Dr. Croft's" (meaning the plaintiff) "letter. You are quite welcome to tell Dr. C." (meaning the plaintiff) "that your accusation was founded on my expressing my opinion, founded on comparison of his letters, that the letter to you, ordering the target, was in his handwriting, and I still adhere to

that opinion" (meaning to say that the defendant still adhered to the opinion that the letter in the first count mentioned had been written [572] by the plaintiff fictitiously, and for the purpose of deceiving the said Messrs. Rickards and Co. under the circumstances in the first count mentioned).

Plea. Not guilty.

At the trial, before Williams, J., at the last Croydon Summer Assizes, it appeared that the plaintiff was the promoter of a volunteer regiment called "The 1st Middlesex Artillery Volunteers," of which he had been appointed captain. The defendant was honorary secretary and adjutant to the regiment. Dissensions arose between the plaintiff and some members of the regiment, in consequence of which he retired. Shortly after, numerous letters, purporting to be written by the defendant, were received by tradesmen, servants and other persons, containing orders for goods of various kinds, to be delivered at the head quarters of the regiment in Hanover Square, and making appointments to meet the tradesmen at that place. Amongst other letters was the one set out in the first count of the declaration, purporting to be written by the defendant to Messrs. Rickards and Co., and containing an order for a government pattern target. The target was sent, and returned by the defendant on the ground that he had not given the order, and he requested to see the letter containing it. The letter was sent to him, and in the course of his communications with Messrs. Rickards and Co. he wrote the alleged defamatory letters set out in the declaration.

It was submitted, on behalf of the defendant, that these letters were privileged communications. The learned Judge left it to the jury to say whether the defendant had written the letters *bonâ fide* and without malice, believing the statements contained in them to be true. The jury found in the affirmative, and a verdict was entered for the plaintiff with 5*l.* damages, leave being reserved to the defendant to move to enter the verdict for him, if the Court should be of [573] opinion that the letters to Messrs. Rickards were privileged communications.

Shee, Serjt., in last Michaelmas Term, obtained a rule nisi accordingly; against which

Hawkins (Kennedy, with him) shewed cause. The letters were not privileged communications, inasmuch as; they were not written in answer to any inquiry by Messrs. Rickards and Co. whether the defendant knew the handwriting of the letter containing the order, but they were a voluntary statement of matter reflecting on the plaintiff. [Martin, B. The jury have found that they were written by the defendant *bonâ fide*, and therefore they are merely the expression of his opinion. Wilde, B. I doubt whether they are libellous, but if they are, the communication was privileged.] They impute to the plaintiff that he has been guilty of the discreditable act of writing an order for goods in the defendant's name. [Martin, B. Suppose a letter is written to a tradesman in the name of a certain person, containing an order for goods, and, when they are sent, the person says that it is not his handwriting but he believes it to be the handwriting of A. B., surely that is a privileged communication. Wilde, B. Messrs. Rickards and Co. had an interest in ascertaining in whose handwriting the letter was.] They did not ask the defendant: he applied to them for the letter containing the order, and upon its being sent to him wrote the defamatory matter. [Pollock, C. B. All the defendant says is, "that letter is not in my handwriting, but I think it is in the defendant's." Martin, B. *Toogood v. Spyring* (1 C. M. & R. 181) is an authority in point. There Parke, B., in delivering the judgment of the Court, said:—"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience [574] and welfare of society; and the law has not restricted the right to make them within any narrow limits."]

Shee, Serjt., and Watkin Williams, appeared in support of the rule, but were not called upon to argue.

Per Curiam.(a) The rule must be absolute to enter the verdict for the defendant.
Rule absolute.

(a) Pollock, C. B., Martin, B., and Wilde, B.

TREGELLES AND ANOTHER v. SEWELL. Jan. 11, 1862.—Plaintiffs bought of the defendant “300 tons Old Bridge rails at 5l. 14s. 6d. per ton, delivered at Harburgh, cost, freight and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance; a dock company’s weight note or captain’s signature for weight to be taken by buyers as a voucher for the quantity shipped.” Held, in the Court of Exchequer (and affirmed in the Exchequer Chamber), that, according to the true construction of the contract, the defendant did not undertake to deliver the iron at Harburgh, but that when he put it on board a ship bound for that place and handed to the plaintiffs the policy of insurance and other documents, his liability ceased and the goods were at the risk of the purchaser.

[Discussed, *Calcutta and Burmah Steam Navigation Company v. De Mattos*, 1863, 32 L. J. Q. B. 330; 1864, 33 L. J. Q. B. 220; *Biddell Brothers v. E. Clemens Horst Company*, [1911] 1 K. B. 960. Referred to, *Heilbutt v. Hickson*, 1872, L. R. 7 C. P. 450. Principle applied, *Dupont v. British South Africa Company*, 1901, 18 T. L. R. 24. See *Arnhold, Karberg & Company v. Blythe, Green, Jourdain & Company*, [1916] 1 K. B. 495.]

The declaration stated, that the defendant agreed to sell and deliver to the plaintiffs, and the plaintiffs agreed to buy of the defendant, 300 tons of Old Bridge iron rails (excluding Barlow’s section) at 5l. 14s. 6d. per ton, to be delivered at Harburgh, cost, freight and insurance, payment by net cash in London, less freight, upon handing bill of lading and policy of insurance; a dock company’s weight note or captain’s signature for weight to be taken by the buyers as a voucher for the quantity shipped. And the plaintiffs duly paid the defendant the price of the said goods, and did all things necessary on their part, and all things happened which were necessary to entitle them to have the said goods delivered to them at Harburgh, according to the [575] said contract, and a reasonable and proper time for the said delivery elapsed before this suit: Yet the defendant did not deliver the said goods according to the said contract, but only delivered a part thereof, and the residue, amounting to twenty-one tons, have never been delivered to them, &c.

Pleas. First: that the defendant did not agree as alleged. Secondly: that the defendant agreed to sell to the plaintiffs, and the plaintiffs agreed to buy of the defendant, 300 tons Old Bridge rails (excluding Barlow’s section) at 5l. 14s. 6d. per ton, delivered at Harburgh, cost, freight and insurance, payment by net cash in London, less freight, upon handing bill of lading and policy of insurance; dock company’s weight note or captain’s signature for weight to be taken by buyers as a voucher for the quantity shipped: that the said 300 tons Old Bridge rails herein mentioned are the same 300 tons Old Bridge rails in the declaration mentioned, and that save upon the terms aforesaid the defendant did not agree to sell to the plaintiffs the said 300 tons Old Bridge rails in the declaration mentioned: that the defendant duly shipped the residue of the goods in the declaration mentioned, consigned to the plaintiffs at Harburgh, on board a ship called “The Roelina Oesten” for delivery to the plaintiffs at Harburgh; and the said ship with the said goods on board afterwards set sail from London for Harburgh: that the defendant duly obtained the bill of lading of the said goods, and effected a policy of insurance on the said goods for the said voyage from London to Harburgh: that, in pursuance of the said agreement, the defendant handed the said bill of exchange and policy of insurance to the plaintiffs, who accepted the same; and thereupon in London and in pursuance of their said agreement paid to the defendant a large sum, to wit, 107l. 2s. 2d., being the price of the said goods at the rate aforesaid, less the amount of freight payable in respect of their transmission by the said vessel to [576] Harburgh on the said voyage, and of which said bill of lading and policy of insurance the plaintiffs have thenceforth continually retained the possession: that Harburgh aforesaid was and is the Harburgh in the declaration mentioned, and is in parts beyond the seas, to wit, in Holland.

The plaintiffs joined issue on the first plea.

Demurrer to second plea, and joinder therein.

The demurrer came on for argument in Michaelmas Term, 1860 (Nov. 14), when the Court ordered the argument to stand over until after the trial of the issue in fact.

The issue in fact was tried before Martin, B., at the London Sittings after Trinity

Term, 1861, when the following facts appeared. The plaintiffs and defendant were iron merchants in London, and the action was brought to recover damages for the non-delivery of a balance of twenty tons, one quarter and eighteen pounds of iron rails, pursuant to the following contract:—

“70 Cornhill, London,
“4 March, 1858.

“Bought for Account of Messrs. Tregelles and Taylor, from John Sewell, Esq.,

“300 tons Old Bridge rails (excluding Barlow's section) at Five pounds, fourteen shillings and sixpence (5l. 14s. 6d.) per ton, delivered at Harburgh, cost, freight and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance; a dock company's weight note or captain's signature for weight to be taken by buyers as a voucher for the quantity shipped.

“Commission to buyers $\frac{1}{2}$ %.

“WILLIAM RICHARDSON, Broker.”

On the 18th March, 1858, the defendant shipped on board the “Roelina Oestra,” a vessel then lying in the port of London and bound for Harburgh, the twenty tons, one [577] quarter and eighteen pounds of iron rails, and received from the master the usual bill of lading, making the same deliverable at Harburgh unto order or assigns on payment of freight, &c. On the same day the defendant effected, at his own expense, a valued policy for 132l., on the iron so shipped; it being insured free from particular average, unless the ship should be burnt, sunk or stranded. On the 25th March, the defendant handed to the plaintiffs the bill of lading indorsed in blank, together with the policy, and the plaintiffs then paid the defendant in London 107l. 2s. 2d., being the price of the iron less 7l. 10s. 2d. for freight payable under the bill of lading. The vessel left London on the 28th March, 1858, with the iron rails on board, bound for Harburgh, and having encountered a storm was obliged to put into the port of Delfzyl. In order to raise funds to repair the vessel and enable her to prosecute her voyage, the captain executed a bottomry bond on the ship, cargo and freight. On the completion of the repairs the ship again put to sea, and arrived at Harburgh with the iron on board in July, 1858. The amount due on the bottomry bond not having been paid, the holders instituted legal proceedings; and a judicial decree of execution was obtained against the ship and cargo, including the iron in question, under which they were sold and the proceeds paid to the bondholders.

The defendant's counsel objected that the contract did not support the declaration; and they tendered evidence as to the mercantile meaning of the contract. The learned Judge was of opinion that the contract did support the declaration, and he refused to admit the evidence tendered, on the ground that the construction of the contract was a question of law for the Court; and his lordship directed a verdict for the plaintiffs for an amount of damages agreed on, reserving leave to the defendant to move to enter the verdict for him if the Court should be of opinion that the contract did not support the declaration.

[578] Shee, Serjt., in last Michaelmas Term obtained a rule nisi accordingly, or for a new trial, on the ground that the learned Judge ought to have received evidence as to the meaning, in mercantile usage and understanding, of the contract.

O'Malley (with whom was L. Kelly) shewed cause. If the contract be read, according to the plain meaning of the words, as a letter, or other document, not a mercantile contract, its meaning is this:—“I undertake to pay 5l. 14s. 6d. for every ton you deliver to me at Harburgh.” The defendant's interpretation of the contract is, that the words “delivered at Harburgh” do not mean that the goods are to be delivered at Harburgh, but that the 5l. 14s. 6d. per ton is to include every charge up to their delivery at Harburgh. If that construction be adopted there is no place of delivery; and the words “delivered at Harburgh” apply only to what is to be paid, not to the delivery of the goods. Besides, if the words “delivered at Harburgh” refer only to what is included in the 5l. 14s. 6d., viz., all charges up to the delivery at Harburgh, the words “cost, freight and insurance” are superfluous. [Wilde, B. On the other hand, if the meaning is “to be delivered at Harburgh,” what necessity is there for insurance?] The goods are to be paid for in London, and the purchaser has a right to say “I will not pay for goods to be delivered at Harburgh, unless you give me some security, beyond your personal security, that you will perform your contract: let me have a policy of insurance and I will advance you the money before the bargain

is complete." Again, the words "upon handing bill of lading and policy of insurance; a dock company's weight note or captain's signature for weight to be taken by buyers as a voucher for the quantity shipped," point to the distinction between the shipping and the delivery. The purchaser in effect says, "I will not accept as a fulfilment of your con-[579]-tract anything else than a delivery at Harburgh, but for the purpose of securing me the money I advance, and of ascertaining that the goods are really shipped, I must have not only a policy of insurance but proof that the goods covered by it have been put on board." If that construction be put upon the contract, the whole is consistent. [Martin, B. Suppose the contract was this:—"The defendant agrees to sell to the plaintiffs, and the plaintiffs agree to buy 300 tons Old Bridge rails at 5l. 14s. 6d. per ton, cost, freight and insurance, delivered at Harburgh;" might not that mean that the 5l. 14s. 6d. was to be the price of the iron, including the freight, insurance and costs up to the delivery at Harburgh, the payment being by net cash in London?] However that might be, the words "delivered at Harburgh" following the words "5l. 14s. 6d. per ton," mean for every ton delivered at Harburgh. [Channell, B. If the contract had been "bought 300 tons Old Bridge rails, delivered at Harburgh," it would be the same as "to be delivered at Harburgh." It is immaterial that the words "to be" are omitted. Martin, B. Payment is to be made in London, and in general persons do not pay until they get that which they have bought. Then the purchaser was to have a policy of insurance, which is usually considered as equivalent to the goods. You must contend that, though the vendor has parted with the goods and the policy of insurance, he is nevertheless liable in the case of loss to return the purchase money.] The insurance is not to be effected by the purchaser, but the vendor is to choose the underwriter, and the purchaser would have to depend on the solvency of the person whom he might select. The policy is not to be a security for the goods delivered, but for the money advanced. The transaction resembles the deposit of title deeds as a security for a loan. There is a pre-payment which to some extent is a loan. [Martin, B. This is in reality an action for money [580] had and received; but the fact that the money was to be paid in London, and that the captain's signature for weight was to be conclusive, are strong circumstances to shew that the contract was to be completed in London, and if so, according to the ordinary rule, money paid under a contract cannot be recovered back.]

Shee, Serjt., and Hodgson, appeared to support the rule, but were not called upon to argue.

POLLOCK, C. B. It is for the Court to say what is the meaning of this contract, and I am of opinion that the real contract between the parties is this: The plaintiffs buy of the defendant 300 tons of iron rails, and the price is to be paid in London. The rails are to be shipped for Harburgh. Then, what is the seller to do? He is to insure them and pay freight for them to Harburgh, and when he has done that, and is in a condition to hand over the bills of lading and the policy of insurance, he is entitled to receive the price. In general, where the purchase money has been paid, it cannot be recovered back unless the contract has failed. The question is, what is the meaning of this document, supposing it had been expanded and the parties had inserted in it all conditions, and had anticipated unforeseen accidents for which they did not provide because they did not contemplate every contingency (although it would not be worth while, in the ordinary commerce of the world, that that should be done). It seems to me that the document may be thus explained:—"I buy of you: you are to ship and insure the goods which are to go to Harburgh, and if you do all that I will pay you for them in London." That being done, the question is whether the seller is bound to refund the money paid as the price of the goods. In the absence of any evidence as to what the parties meant, the [581] general principle must prevail, viz., that where money is paid under a contract it cannot be recovered back unless it is clear that such was the intention of the parties. For these reasons I think that the rule ought to be absolute to enter the verdict for the defendant.

There will also be judgment for the defendant on the demurrer.

MARTIN, B. I am also of opinion that the verdict ought to be entered for the defendant. At the trial I entertained a strong impression that the plaintiffs' counsel were right, but my view has been altered by considering that a document of this kind ought to be construed according to the known practice of merchants in respect of such transactions. Now the contract is this:—The defendant agrees to sell, and the plaintiffs agree to buy, "300 tons Old Bridge rails at 5l. 14s. 6d. a ton." Assuming

the stipulation with respect to the delivery of the goods was not inserted in the contract, it would go on, "payment by net cash in London, less freight, upon handing bill of lading and policy of insurance; a dock company's weight note or captain's signature for weight to be taken by buyers as a voucher for the quantity shipped." If that had been the contract, I apprehend it would mean exactly what the parties would be expected to agree to. There was a sale of goods in London, to be shipped for Harburgh, but the transaction, as regards the vendor and vendees, was to be completed in England. The goods were to be put on board by the vendor, and he was to receive a dock company's receipt for the weight, or the signature of the captain, and he was to take that to the vendees, who were then to pay him at the rate of 5l. 14s. 6d. a ton, deducting the amount of the freight. That would be a common and ordinary transaction. Then the question is whether the insertion of the words, "delivered at Harburgh, [582] cost, freight and insurance" leads to a different conclusion. It seems to me that their more natural meaning is the true meaning, and that when 5l. 14s. 6d. was mentioned the parties were desirous of ascertaining beyond all doubt what was included in that amount. It is as if they had said:—"Take notice, the 5l. 14s. 6d. is to cover the cost of the iron, the freight from London to Harburgh, and the premium on the policy of insurance." It is argued that this gives the vendor the power of selecting an underwriter, and he might possibly select one who would not be responsible in the event of a loss. But no one contemplates the insolvency of an underwriter; it is after the contract is made that any difficulty arises. We ought not to assume that a contract would be made with a man who could not perform his part of it. We must consider this policy as a merchant would do, viz., as a substitute for the goods. Taking the whole contract together, though it is by no means clear, and there may be a reasonable doubt as to its meaning, yet giving it the best construction I can, I think the meaning which I now attach to it is correct. The difficulty I had was whether this was not a contract for goods to be delivered at Harburgh. I give my judgment upon the point raised at the trial, on the ground that this is substantially an action to recover back money paid under a contract because the consideration has failed. I treat it as an action for money had and received, in which the plaintiff must shew that the goods were not delivered according to the contract, to entitle him to recover back the price. On consideration I think the true meaning of the contract is this, "When you, the defendant, have performed what you were bound to do, and put the goods on board a ship destined for Harburgh, and handed me the bill of lading and a policy of insurance, I will pay you 5l. 14s. 6d. per ton, less the freight." The defendant having done all he was bound to do, is entitled to keep the money he got. The construction [583] of a written document must depend upon the writing, and no parol evidence is admissible to alter it.

CHANNELL, B. I am also of opinion that the rule ought to be absolute. The action is brought to recover compensation for an alleged breach of contract by the defendant, as the seller of these goods. I do not stop to consider the form of action—whether it is substantially an action for money had and received, or an action to recover damages for the breach of contract in not delivering the goods at Harburgh. In whatever way the action is considered, if the defendant's construction of the contract be correct, he is entitled, upon the leave reserved, to have the verdict entered for him. I give no opinion as to whether parol evidence is admissible to explain the contract, because that point was not argued. The question is, what is the true construction of the contract? No doubt the parties contemplated the delivery of the goods at Harburgh. The defendant was to be the seller and shipper of the goods, and their price was not to exceed 5l. 14s. 6d. per ton, including freight and insurance. It is consistent with that that there should be a stipulation that the defendant, upon complying with certain conditions, should be paid the cost price and insurance in London. He has expressly stipulated for it, and he has a right to retain the money paid, although the goods may not have been delivered at Harburgh. It is said that the contract must be construed as if it contained a stipulation that the money paid was to be recovered back in the event of the goods not being delivered at Harburgh. In my opinion that is not the right construction. The cost price, less freight, is to be paid in London, on the defendant handing over the bill of lading and policy of insurance. When those conditions were performed the defendant was entitled to be paid, and the plaintiffs have [584] no right to recover back the money because the goods have not been delivered at Harburgh.

WILDE, B. I have come to the same conclusion. One construction of this document is, that the defendant agreed to deliver the goods at Harburgh; the other construction is that he only bound himself to put the goods on board a ship for Harburgh, and hand over the bill of lading and policy of insurance. The question is, which of these two constructions is right? Adopting the plaintiffs' construction, we should not expect to find any stipulation for payment until the delivery of the goods at Harburgh; and supposing any advance was made, we should expect to find the goods remaining in the hands of the seller, at his risk, and that he would retain the policy of insurance. On the other hand, if all the defendant undertook was to ship the goods for Harburgh, we should expect to find that the plaintiffs would pay the money at once, and have handed to them the bill of lading and policy of insurance. In my opinion this was not an advance, but a pre-payment. There are all the elements of an immediate sale as soon as the goods were shipped and the documents handed to the purchaser.

Rule absolute, to enter the verdict for the defendant.

Judgment for the defendant on the demurrer.

The plaintiffs having appealed to the Exchequer Chamber, against the decision of the Court of Exchequer in making the above rule absolute, and having also taken proceedings in error upon the judgment for the defendant upon the demurrer,

[585] Lush (O'Malley and L. Kelly with him) argued for the plaintiffs.^(a) The argument was in substance the same as in the Court below. *Covas v. Bingham* (2 E. & B. 836) was cited.

Hodgson appeared for the defendant, but was not called upon to argue.

WIGHTMAN, J. We are all of opinion that the judgment of the Court below must be affirmed, both with respect to the rule and the demurrer. In the declaration the contract is stated as if the plaintiffs agreed to buy 300 tons of iron rails, "to be delivered at Harburgh," whereas it appears by the second plea that the plaintiffs agreed to buy 300 tons of iron rails, "delivered at Harburgh." The question then is, what is the construction of the contract? We are of opinion that the true construction is this—the plaintiffs are to buy and pay for the iron at the rate of 5l. 14s. 6d. per ton, and that is to include cost, freight, and insurance, the defendant undertaking to insure upon the voyage to Harburgh. Upon the delivery of the goods on board, a dock company's weight note or captain's signature for weight is to be a voucher for the quantity shipped; and payment is to be made by net cash in London, less the freight, upon handing to the plaintiffs the bill of lading and policy of insurance. Therefore, as soon as the defendant shipped the iron, and delivered to the plaintiffs the policy of insurance and other documents, he did all that he was required by the contract to do, and the risk between London and Harburgh was a risk which the plaintiffs incurred. It is not that the defendant undertakes to deliver the iron at Harburgh at all events, but that the plaintiffs shall have the benefit of the policy [586] of insurance. The liability of the defendant ceased when the documents were handed over.

Judgments affirmed.^(a)²

EMMERTON v. MATHEWS. Jan. 14, 1862.—A salesman who sells, in a public market, meat which is afterwards found to be unfit for human food, but which he had no means of knowing, or reason to suspect, was other than good and wholesome meat, is not liable to an action upon an implied warranty, or for money had and received; nor is he liable, though the market is within the city of London, to an action upon the statute 14 & 15 Vict. c. xci., s. 52.

[S. C. 31 L. J. Ex. 139; 8 Jur. (N. S.) 61; 10 W. R. 346; 5 L. T. 681. Discussed, *Jones v. Just*, 1868, L. R. 3 Q. B. 202; *Ward v. Hobbs*, 1877, 2 Q. B. D. 334: reversed 3 Q. B. D. 150. Explained, *Smith v. Baker*, 1878, 40 L. T. 261; *Wallis v. Russell*, [1902] 2 Ir. R. 604.]

Declaration. For that the defendant, by warranting certain meat to be fit for human food, sold the same to the plaintiff; whereas the same was not fit for human

¹ (a) June 23. Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles J., and Blackburn, J.

² (a) See instances of contracts in somewhat similar language: *Couturier v. Hastie*,

food. Whereby the plaintiff lost the money he paid to the defendant for the said meat, and the profit he would have made by selling the same to customers, &c.

Pleas. First: that the defendant did not warrant as alleged. Secondly: that at the time of the alleged warranty the said meat was fit for human food. Issues thereon.

At the trial, before the Common Serjeant, at the Mayor's Court, London, the following facts appeared (as stated in the judgment of the Court). The plaintiff was a butcher, or retailer of meat, and the defendant was a salesman in Newgate Market, within the city of London.

A salesman is a person who sells on commission the meat consigned to him by his employers. The carcase in question had been sent to him for sale in the usual course of his business. It was publicly exposed for sale in Newgate Market: it looked bright to the eye, and appeared to be good meat. The plaintiff saw it and bought it, believing it to be such. It was taken to his shop, cut up, and several joints were retailed to different customers. On being cooked it became black and had a very bitter taste; and it must be [587] taken as a fact in the case that it was not fit for human food. The defect, however, was such that it could not be detected so long as the meat was raw, and appeared only on its undergoing the process of cooking. There was no evidence that the defendant knew, or had the means of knowing, or had any reason to suspect, that the beef in question was other than good, wholesome meat, fit for human food. The plaintiff bought it on his own inspection, and there was no actual warranty, nor was anything said about the quality.

These were the facts as proved. The learned counsel for the defendant objected that there was no evidence of any warranty. It was then agreed by the counsel on both sides that there was no fraud on the part of the defendant, and no knowledge of any defect. A verdict, by consent, was entered for the plaintiff, and leave was reserved to the defendant, by the learned Common Serjeant, to enter a nonsuit. The plaintiff was to be at liberty to amend the declaration in any way, if the Court should be of opinion that any cause of action existed under the circumstances.

D. D. Keane having obtained a rule nisi accordingly,

J. C. Day shewed cause in last Michaelmas Term (Nov. 23). The plaintiff is entitled to recover either upon an implied warranty, or in a special action on the 14 & 15 Vict. c. xci. s. 52, or for money had and received. It is admitted that there was no express warranty, but upon the sale of meat in a public market by a dealer, he impliedly warrants that it is fit for human food. The law prohibits the sale of meat unfit for human food, and where the law prohibits the sale of an article of a particular quality, a person who, in violation of the law, sells it, is responsible in damages, for there is an implied warranty that the article is not of that quality which the law forbids to be sold. By the [588] statute *Judicium Pilloriæ*, 51 Hen. 3, stat. 6, A.D. 1266, a jury shall inquire "if any butcher do sell contagious flesh, or that died of murren. Also they shall inquire of cooks that seethe flesh or fish with bread or water, or any otherwise, that is not wholesome for man's body, or after that they have kept it so long that it loseth its natural wholesomeness, and then seethe it again and sell it; or if any do buy flesh of Jews, and then sell it to Christians." Also, by a statute of uncertain date, of the reigns of Hen. 3, Edw. 1, or Edw. 2, c. 7, "A butcher that selleth swine's flesh measled, or flesh dead of the murrain, or that buyeth flesh of Jews and selleth the same unto Christians, after he shall be convict thereof for the first time, he shall be grievously amerced; the second time he shall suffer judgment of the pillory; and the third time he shall be imprisoned and make fine; and the fourth time he shall forswear the town." Again, by "The City of London Sewers Act, 1851," 14 & 15 Vict. c. xci. s. 52, "If any butcher, dealer in meat, or other person, shall expose or offer for sale in any shop, stall, warehouse, building, or other place, any unsound or unwholesome meat, &c., every person so offending shall, for every offence, forfeit a sum not exceeding 40s.; and such meat, &c., shall and may be seized, carried away, and dealt with by the inspectors of slaughter-houses and meat in such manner as is hereinbefore provided touching the seizing and disposal of unsound meat." It is immaterial that the party exposing the meat for sale did

not know that it was unwholesome ; for the statute has prohibited the sale of such meat ; and where the law requires that a commodity exposed for sale shall be of a particular quality, there is an implied warranty that it is of that quality. [Channell, B. As a matter of public policy, the authorities may seize unwholesome meat, but it does not follow that the person who exposes it for sale is liable to the penalty if he did not know that it was [589] unwholesome.] In Keilwey's Rep. 91 (22 Hen. 7), Frowike said "that no man can justify selling corrupt victual, but an action on the case lies against the seller, whether the victual was warranted to be good or not. But if a man sells me cloth or other thing, knowing the cloth to be bad, there I am deceived 'per so notice demesne ;' and in that case, because 'quod ipse fuit sciens,' though he sold it without warranty, still he shall be punished by writ on the case. But if he did not know it, he shall not be punished unless he has warranted the article to be good." That distinction between the sale of victuals and other commodities has always prevailed. [Martin, B. In *Burnby v. Bollett* (16 M. & W. 644, 654), Parke, B., in delivering the judgment of the Court, observed that the authorities lead to the conclusion that there is no difference between the sale of victuals for food and other articles, except that dealers in victuals are not merely responsible under the same circumstances as the dealers in other articles, but are also liable to punishment for selling corrupt victuals.] In the Year Book, 9 Hen. 6, 53, pl. 37, Martin and Babington said that warranty of soundness by a seller of provisions was unnecessary. In that case a scienter was alleged in the declaration. In the Year Book, 11 Edw. 4, 6, pl. 10, where the action was for deceit upon the sale of cloth, the same distinction was taken as to the sale of victuals and other commodities. There Brian said :—"If I sell a man twenty sheep to kill, if they are unsound, although I warrant them, he shall not have an action of deceit on the warrantie, for until they are dead I am not able to know that they are rotten, &c., but if I sell mutton for food which is unsound, he shall have an action of deceit, although I did not warrant it." Nele said : "In your case the cause is that it is prohibited by the law that a man sell corrupt victuals." Again, in *Roswel v. Vaughan* (Cro. Jac. 196), Tanfield, C. B., and [590] Altham, B., were of opinion that "if a man sell victuall which is corrupt, without warranty, an action lies, because it is against the commonwealth." In 4 Inst. sect. 54, p. 261, Lord Coke says :—"This Court of the leet may inquire of corrupt victuall as a common nuisance, whereof some have doubted, both for that it is omitted in the statute of the leet, and of the weak authority of the book of 9 H. 6, where Martyn saith that it is ordained that none shall sell corrupt victuall. And Cottismore held opinion that it is actio popularis, whereupon it is collected that the conusance thereof belongs to the leet. And Martyn and Neal (11 Hen. 4), agreeing with him, said truly, for by the statute 51 Hen. 3, Stat. pillor', et tumbrel', et assiss' panis et cervis, and by the statute made in the reign of Ed. 1, intituled Stat. de pistoribus et brasiatoribus et aliis vitellariis, it is ordained that none shall sell corrupt victuals." *Burnby v. Bollett* (16 M. & W. 644) is distinguishable, because there the seller of the meat was not a person dealing in the way of his trade. *Morley v. Attenborough* (3 Exch. 500), recognises the distinction between a sale of goods by a dealer and an ordinary individual. *Hill v. Balls* (2 H. & N. 299), in which it was held that the defendant was not liable for selling a glandered horse, was decided on the ground of the defect of the declaration. [Pollock, C. B. I have no doubt it is an indictable offence to expose a glandered horse for sale at a fair.] In the text books it is stated that in contracts for provisions it is always implied that they are wholesome ; and, if they are not, an action on the case lies to exact damages for the deceit : 3 Black. Com. 165. The defendant has his remedy against the person who employed him to sell the meat.

D. D. Keene, in support of the rule. The defendant is [591] not liable, inasmuch as there was no express warranty, and he had no knowledge that the meat was unfit for human food. The object of the legislature has been to prevent persons selling food which they must of necessity know is corrupt. Here there can be no violation of the law, because there is no guilty knowledge. In the statute 51 Hen. 3, stat. 6, the sellers of corrupt meat are placed in the same category with persons using false weights and measures. The term "macegrievs" in the passage from Britton, cited by Lord Coke in 4 Inst. c. 54, p. 261, and translated "macellarii, butcher," means "such as wittingly buy and sell stolen flesh, knowing the same to be stolen : " *Termes de la Ley*. The word "carnifex," in the 51 Hen. 3, stat. 6, translated "butcher," means the person who kills the animal. All those are persons who must have had a guilty

knowledge. In *Burnby v. Bollett* (16 M. & W. 644, 654), the Courts say that "dealers in victuals are liable to punishment for selling corrupt victuals by virtue of an ancient statute (certainly if they do so knowingly, and probably if they do not), and are therefore responsible civilly to those customers to whom they sell such victuals for any special or particular injury by the breach of the law which they thereby commit." There is no authority that they are liable at common law. [Martin, B. What is the defendant's liability under the 52nd section of the 14 & 15 Vict. c. xci. ?] He is not liable to an action, though he might be liable to have his meat seized. The 24th section empowers the commissioners to appoint "inspectors of slaughter-houses and meat," who, by the 26th section, are authorized to enter slaughter-houses and inspect the condition of the meat, and if it shall appear to them unsound, unwholesome or unfit for the food of man, to seize it, for the purpose of being further inspected by competent persons, and if then found unwholesome, &c., [592] it shall be burned or destroyed. According to the argument for the plaintiff, a butcher would be liable to the penalty imposed by the 52nd section, although he had no reason to suspect that his meat was unwholesome. The case in the Year Book, 9 Hen. 6, 53, pl. 37, proceeded on the ground of fraud, for Martin said, "You have deceived the plaintiff to your own knowledge" (*de vre conis' demen*). No authority is quoted for the position laid down in 3 Black. Com. 165. In *Fitz. Nat. Brev.* vol. 1, p. 94, note, it is said: "Note a diversity between selling corrupt wines to merchandize, for there an action on the case does not lie without warranty; otherwise, if it be for a tavern or victualler, if it prejudice any." To constitute a liability there must be a guilty knowledge; here the parties are in *pari infortunio*.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. This case comes before us on a point reserved by the Common Serjeant.

It was an action on an alleged warranty that a carcase of beef, sold by the defendant to the plaintiff, was fit for human food. (His lordship then stated the facts as above set forth, pp. 586-7, and proceeded.) The questions that arise in the case are, first, is the count on the warranty sustainable? And, if not, secondly, can a count for money had and received be made available? We do not suggest any action for deceit, because, it being admitted that there was no fraud, and that the defendant acted *bonâ fide*, obviously no such action could be maintained. On the first point, as nothing passed at the time of the sale about the quality of the meat, the question is, whether there is by law a warranty, under the circumstances of this case, that the carcase sold by the defendant to the plaintiff, first, was fit for [593] human food, and, secondly, was free from any such defect as it turned out to have. The undoubted general law is, that, in the absence of all fraud, if a specific article be sold, the buyer having an opportunity of examining and selecting it, the rule of "caveat emptor" applies: see *Chanter v. Hopkins* (4 M. & W. 399), *Parkinson v. Lee* (2 East, 314), *Morley v. Attenborough* (3 Exch. 500); and the plaintiff has to establish that, in the case of a salesman dealing with a retail butcher, there is an exception to the general rule, and that there is an implied warranty that the meat is fit for the purpose for which probably it is bought.

There was no evidence as to the time when the business of a salesman of meat commenced in London; probably it is (comparatively speaking) modern; at present it is very considerable. Since the introduction of railways, large supplies of slaughtered meat arrive from the country, to be disposed of by salesmen, the nature of whose occupation is well known to those that deal with them.

We have taken time to consider our judgment, because it was contended on the argument that in all cases of the sale of articles to be used as food for man the law implied a warranty that they were fit for that purpose. Another ground was that it was penal to expose meat for sale which was unfit for human food. In support of this view our attention was called to the statute 51 Hen. 3 and another, Edw. 1, not printed in the statute book, but referred to in 4th Institute, 261; also to a more recent act of parliament, 14 & 15 Vict. c. xci. (local and personal), called "The City of London Sewers Act, 1851;" and it was argued that, the contract being illegal, the money might be recovered back, or a count might be framed on the statute.

Any legal point which in the remotest degree bears upon [594] the public health and the general safety of the community is deserving of the fullest consideration; but, having given that consideration, we are of opinion that there is no case that at all governs the present—none of the cases cited at the bar decide this case, though in

Burnby v. Bollett (16 M. & W. 644) all the law is collected, and the matter was much discussed; and that a salesman offering for sale a carcase with a defect, of which he is not only ignorant, but has not any means of knowledge (the defect being latent), is not liable to any penalty, and does not as a matter of law impliedly warrant that the carcase is fit for human food, and is not bound to refund the price should it turn out to be so; and we think the count suggested would be bad on demurrer. The result is that the rule to enter a nonsuit will be made absolute.

Rule absolute.

SPARROW v. PARIS. Jan. 14, 1862.—A declaration stated that, in consideration the plaintiff would ship goods on board a certain vessel, the defendant guaranteed that the said vessel should sail with, if not before, any other vessel in the berth for Havana, under a penalty of forfeiting one half the freight of the goods. It then averred that the plaintiff had performed all conditions precedent, and all things had happened, &c., entitling him to maintain the action; and assigned, as a breach, that the said vessel did not sail with or before any other vessel in the berth for Havana, and by reason of the premises the plaintiff became entitled to the half freight. The defendant pleaded payment into Court of 10l., and the plaintiff replied damages ultra. At the trial it appeared that the whole freight exceeded 20l., but no actual damage was proved.—Held: First: that the half freight was liquidated damage and not a penalty.—Secondly: that the defendant by paying the money into Court admitted that the plaintiff was entitled to recover it.

[S. C. 31 L. J. Ex. 137; 8 Jur. (N. S.) 391; 5 L. T. 799. Distinguished, *Wallis v. Smith*, 1882, 21 Ch. D. 276. Referred to, *Willson v. Love*, [1896] 1 Q. B. 631.]

Declaration. That, in consideration the plaintiff would ship certain goods on board of the vessel "Nueva San Francisco" for Havana, the defendant guaranteed and promised that the said vessel should and would sail with, if not before, any other vessel in the berth for Havana on the 11th of November, 1859 (the ship "Secundina" alone [595] excepted), under penalty of forfeiting one half the freight of the said goods. Averments: that the plaintiff has performed all conditions precedent, and that all things have happened and times elapsed entitling him to a performance of the defendant's contract, and enabling him to maintain the action, and that he had delivered goods to the defendant to be carried as aforesaid. Breach: that the "Nueva San Francisco" did not sail with or before any other vessel in the berth for Havana on the 11th of November, 1859 (the ship "Secundina" alone excepted), but therein made default, and by reason of the premises the plaintiff became entitled to half the freight aforesaid, and was otherwise damaged by reason of the delay on the part of the defendant in forwarding the said goods.

Plea. Payment into Court of 10l. Replication: damages ultra. Issue thereon.

At the trial, in October, 1861, before the learned Assessor of the Passage Court at Liverpool, it appeared that a vessel in the berth other than the "Secundina" sailed for Havana on the 11th of November, 1859, before the "Nueva San Francisco." The plaintiff proved by the production of the bills of lading that the freight, which was payable at Havana, was 54l.; but there was no evidence that the plaintiff had sustained any actual damage from the other vessel having sailed before the "Nueva San Francisco."

It was submitted on behalf of the defendant that, by the terms of the contract, the half freight was not recoverable as liquidated damage, but was in the nature of a penalty, and that as no actual damage had been proved, the defendant was entitled to the verdict. The learned Assessor was of that opinion, and the plaintiff elected to be nonsuited.

Leofric Temple, in last Michaelmas Term, obtained a rule to set aside the nonsuit and for a new trial, on the ground of misdirection; the learned Assessor having directed the [596] jury that the "penalty" in the guarantee was a penalty and not liquidated damage.

Deighton shewed cause in the same term (Nov. 22 and 23). The true construction of the contract is, that if the defendant's vessel does not sail with or before any other vessel in the berth for Havana, on the day named, he will carry the goods shipped by

the plaintiff for one half the amount of the freight. It is not that the plaintiff shall be entitled to sue the defendant for one half the freight, but that the defendant will only demand from the plaintiff one half the freight. According to the plaintiff's construction, if any vessel sailed for Havana before the defendant's the plaintiff would have a right to sue the defendant for half the freight although none had been earned. [Pollock, C. B. The defendant, by paying money into Court, has admitted the contract and the breach of it.] The freight was payable at Havana, and if the construction of the contract be that one half the freight shall be stopped, or, if paid, returned, there is no allegation that any freight has been paid. [Martin, B. The declaration alleges that the plaintiff has performed all conditions precedent, and that all things have happened and times elapsed entitling him to a performance of the defendant's contract and enabling him to maintain the action.] Assuming, however, that the words "under the penalty of forfeiting one half the freight" are equivalent to saying that the defendant shall pay a sum of money equal to one half the freight, the question is, whether that sum is in the nature of a penalty or liquidated damage. If it be treated as a contract to pay a stipulated sum, it is most unreasonable, for if the vessel sailed only a few minutes after, but arrived at Havana before any other vessel, so that in fact no damage could have been sustained, the plaintiff would be entitled to recover one half the freight. [Martin, B. [597] What is there unreasonable in a shipowner saying "my ship shall sail with the first ship for Havana on a particular day; if not I will forfeit half the freight?"] The interest of the shipper is not in the sailing, but that the vessel shall arrive at Havana before any other. The plaintiff in effect says, "If I sustain any damage by reason of your vessel not sailing at the stipulated time, you shall compensate me." [Bramwell, B. That argument would equally apply if the vessel sailed upon the 12th or 13th or 14th of November, so that the damages would vary according to the day on which the vessel sailed.] Where a sum is fixed by the parties to be paid on one event, and the exact damage is incapable of estimation, that sum may be recovered as liquidated damage; but where a sum is to be paid in the event of several different matters, to none of which the sum mentioned is precisely fixed, it is to be taken as a penalty notwithstanding the agreement declares that it shall be recoverable as liquidated damage: *Galsworthy v. Strutt* (1 Exch. 659); 1 Wms. Saund. 58, note. [Channell, B. It makes no difference whether the parties use the term "liquidated damage" or "penalty." The question is, whether the sum named is a security for one or several matters.] Here, the sum named is a security for the performance of several events, viz., that the vessel should not sail after the first, or the second, or the third, or the fourth, &c., vessel in the berth for Havana, and the damage which the plaintiff would sustain would vary accordingly. In *Betts v. Burch* (4 H. & N. 506) the stipulation was, that "in the event of either of the parties not complying in every particular set forth in the agreement, he should forfeit and pay the sum of 50l.;" and that was held a penalty and not liquidated damage. There the judgment of Bramwell, B., proceeded on the ground that the agreement was within the 8 & 9 Wm. 3, c. 11, s. 8; and this agreement is also within that statute.

[598] Leofric Temple, in support of the rule. The question depends on the intention of the parties, and if the Court can see from the whole agreement that they meant that the half freight should be paid as liquidated damage, it must be so treated, notwithstanding the word "penalty" is used. The sum named was intended to secure the performance of one event, viz., the sailing of the vessel with the goods on board before any vessel then in the berth for Havana, except one. If this be not liquidated damage, it would be necessary to send to Havana and ascertain the state of the market at the time the vessel ought to have arrived. [Martin, B. If the shipowner has received at Havana only half the freight, he is not liable to this action; if he has received the whole, he is liable.] Immediately a ship sailed before the defendant's vessel he became liable to pay the half freight.

Cur. adv. vult.

The judgment of the Court was now delivered by

BRAMWELL, B. In this case the declaration stated that, in consideration the plaintiff would ship goods on a certain vessel, the defendant undertook that no more than one ship should sail before her from her port of loading to her port of destination, or he would forfeit half freight. It averred that the plaintiff shipped the goods as agreed, that more than one ship did sail from her port of loading for her port of

destination before she did, that all things had happened to entitle the plaintiff to recover the half freight, and the defendant had not paid it. The defendant pleaded payment into Court of 10*l*. At the trial it was shewn by the plaintiff that the whole freight was more than 20*l*., but he proved no actual damage. The learned Assessor ruled that the half freight was not recoverable, that actual damage only could be recovered, and none being shewn, and 10*l*. being paid [599] into Court, the defendant was entitled to a verdict. The plaintiff obtained a rule nisi for a new trial, and we are of opinion it must be made absolute.

A great many points were made,—that if the agreement meant in substance what the plaintiff said it did, and the defendant was to return half the freight, or half was to be stopped at the port of destination, or being paid then it was to be returned, it did not appear that these events had happened. The answer to which is, that whatever may be the effect of the agreement, if in some event the plaintiff can get back half the freight, the declaration is sufficient, and no evidence was required, for the declaration alleges that whatever was necessary to entitle the plaintiff has happened, and the defendant admits that by paying money into Court.

The question then is: Is this a sum of money recoverable? Is it, as popularly expressed, a penalty or liquidated damages? We think it is recoverable, and that whether we seek a solution of the question in the statute 8 & 9 Wm. 3, c. 11, s. 8, or elsewhere. It is a sum payable on one event. It is not a sum to secure the performance of several matters. This is the distinction on which the question turns,—the names the parties give the money, penalty or liquidated damages, are immaterial. Mr. Deighton, indeed, ingeniously argued, that here several events were secured, viz., that the ship should not be second, nor third, nor fourth, and so on. But if this argument availed, it would equally have availed in those cases where liquidated damages have been held recoverable for carrying on trade within limited distances. In fact one event only is secured. There must therefore be a new trial.

Rule absolute.

[600] **EDWARD DUKE v. ASHEY AND OTHERS.** Jan. 16, 1862.—The plaintiff granted to the defendant a lease of certain premises for twenty-one years from the 29th of September, 1854, “subject nevertheless to an indenture of lease bearing date the 19th October, 1847, and made between D. of the first part, J. D. and B. D. of the second part, and K. of the third part, whereby the said premises were demised to K. for a term of twenty-one years, determinable and subject to the covenants and agreements therein mentioned.” The defendant having paid rent under his lease: Held, in an action of ejectment for breaches of covenant, that the defendant was estopped from setting up the prior lease.

[S. C. 31 L. J. Ex. 168; 8 Jur. (N. S.) 236; 10 W. R. 273.]

Ejectment to recover possession of a dwelling-house and premises, situate at Brighton, in the county of Sussex.

At the trial, before Blackburn, J., at the last Lewes Summer Assizes, it appeared that the action was brought to recover possession of a beer-house at Brighton. On the 19th of October, 1847, G. Duke, J. Duke, E. Duke (the plaintiff) and R. Duke, the former of whom was devisee for life, and the latter executors of the will of Sarah Duke, demised the premises in question to one Keeping for a term of twenty-one years, from the 11th of October, at a rent of 70*l*. a year, determinable by notice at the end of seven or fourteen years. The lease contained the usual covenants to repair, with a right of re-entry for breach of them. In the year 1853, the plaintiff became entitled to the premises in question under the will of Sarah Duke, and the defendants, who had succeeded to a brewery at Brighton, together with the possession of the premises in question, applied to the plaintiff to grant them a lease. The plaintiff was unable to determine the existing lease by notice in consequence of not being able to find Keating, the lessee, and it was agreed between the plaintiff and the defendants that he should grant them a lease subject to the existing lease. Accordingly, on the 20th December, 1854, the plaintiff granted to the defendants a lease of the premises in question for twenty-one years, from the 29th September then last, at the rent of 80*l*. a year. The habendum contained the following provision:—“Subject nevertheless to a certain indenture of lease, bearing date the 19th day of October, 1847, and

made between G. Duke of the first part, [601] J. Duke, E. Duke and R. Duke of the second part, and W. Keeping of the third part, whereby the said premises were demised to the said W. Keeping, his executors, &c., for the term of twenty-one years, from the 11th day of October then instant, determinable and subject to the covenants and agreements therein mentioned." It was admitted that the covenant to repair was broken, and that rent had been paid by the defendants to the plaintiff, under the lease to them.

It was objected, on behalf of the defendants, that the plaintiff could not recover, because there was an outstanding term in Keating. The learned Judge directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit; the Court to have power to draw inferences of fact.

Lush, in last Michaelmas Term, obtained a rule nisi accordingly, against which

Bovill (with whom was C. Pollock) appeared to shew cause; but the Court called on

Lush and Hannen to support the rule. A plaintiff in ejectment must recover on the strength of his own title, unless the defendant is estopped from disputing it. Here it appears by the defendants' lease that there is an outstanding term; and there can be no estoppel where the defect of title appears on the face of the instrument on which the plaintiff relies. The clause in the habendum, "subject nevertheless to a certain indenture of lease," &c., was no doubt inserted to protect the plaintiff against warranty of title; but it also operates to prevent an estoppel. If the plaintiff is to have the benefit of that clause, the defendants ought also to be allowed to take advantage of it. [Martin, B. The doctrine of estoppel between landlord and [602] tenant is of a different kind from estoppel properly so called. Its object is to create a sort of specific performance. Wilde, B. The landlord puts the tenant in possession, and the tenant takes possession from the landlord: those facts, taken together, constitute an estoppel in the tenant against denying his landlord's title. Pollock, C. B. If the defendants had obtained an assignment of the prior lease, the case might be different. The question is, whether, when a person accepts a lease, admitting upon the face of it some infirmity of title in the lessor, the doctrine applies that there is no estoppel where all the facts appear. I do not think that that technical doctrine of estoppel applies to the case of landlord and tenant. Suppose a mortgagor in possession grants a lease, could the lessee dispute his title because the legal estate is in the mortgagee?] The lessor, in effect, says:—"I let you the premises, but I have already let them to another person; if you obtain a surrender of that lease, you will have a valid title; if not, you will take subject to the title of the former lessee." [Martin, B. The defendants have paid rent under the second lease, and that is conclusive.]

C. Pollock referred to *Bayley v. Bradley* (5 C. B. 396).

Per Curiam.(b) The rule must be discharged.

Rule discharged.

[603] SWAN v. THE NORTH BRITISH AUSTRALASIAN COMPANY (LIMITED). Jan. 27, 28, 1862.—The plaintiff, the registered owner of 1000 shares in a Joint Stock Company in which the shares could only be transferred by deed, executed by both transferor and transferee, employed a broker to sell for him some shares in another Company, which were also transferable by deed only. The broker represented to the plaintiff that it was necessary for him to execute ten blank forms of transfer. The plaintiff accordingly signed, sealed and delivered to the broker ten forms of transfer in blank to be filled up by him for the transfer of the shares in the other Company. The broker only used eight of the blank forms for that purpose, and, having stolen the certificates from a box deposited at a bank for safe custody, he feloniously filled up the two remaining forms as transfers respectively of 500 of the plaintiff's 1000 shares in the first mentioned Company, and having forged the attestations he delivered the transfers, together with the certificates, to bonâ fide purchasers for value, and on their being presented to the Company they removed the plaintiff's name from the register of shareholders and placed thereon the names of the purchasers. Held, that the

(b) Pollock, C. B., Martin, B., and Wilde, B.

transfers were void, and that the plaintiff was not estopped by his negligence from insisting that the property in the shares did not pass under them: Per Martin, B., and Channell, B. Pollock, C. B., and Wilde, B., *dissentientibus*.—Negligence, to operate as an estoppel, must be the proximate cause of the loss: Per totam Curiam.—The doctrine of estoppel by executing instruments in blank is confined to negotiable instruments, and does not apply to deeds: Per Martin, B., and Channell, B. Pollock, C. B., and Wilde, B., *dissentientibus*.

[S. C. 31 L. J. Ex. 425; 10 W. R. 841: affirmed 1863, 2 H & C. 175.]

The first count of the declaration stated that the defendants, before and at the time of committing of the grievance, &c., were and still are a Joint Stock Company within and duly incorporated under the Joint Stock Companies Acts, 1856, 1857, and by the rules and regulations of the said Company, made in pursuance of the said Acts, the person or persons registered as the holder of any share in the said Company can only transfer the same by deed duly executed by both transferor and transferee and attested. That, before and at the time of the committing of the said grievances, the plaintiff purchased and became and was the transferee and holder and proprietor of 1000 shares in the said Company, respectively numbered, &c., and the name of the plaintiff was duly entered on the register of shareholders of the said Company as a shareholder thereof in respect of the said 1000 shares, according to the provisions of the said statutes in that behalf. Yet the defendants before this suit, and whilst the plaintiff was such shareholder and proprietor as aforesaid, wrongfully and without the authority or knowledge and against the will of the plaintiff, and contrary to the said Acts, rules, and regulations, removed his name from the said register of shareholders in respect of the said 1000 shares and entered on the said register the names [604] of divers other persons as proprietors thereof; and thereby the plaintiff has been deprived of the said shares and of the means of selling and transferring the same, and of divers large sums payable thereon as dividends for and in the years 1858, 1859, 1860 and 1861, and which dividends the defendants have hitherto refused to pay to the plaintiff. Second count. That the defendants being an incorporated Joint Stock Company, and the shares in the said Company being transferable by deed only, as in the first count hereinbefore mentioned; and the plaintiff being the transferee and proprietor of the said 1000 shares numbered as aforesaid; and the name of the plaintiff being entered on the register of shareholders as in the said count mentioned, the defendants before this suit, and whilst the plaintiff was such holder and proprietor as aforesaid, wrongfully and without the authority or knowledge and against the will of the plaintiff, and contrary to the Acts, rules and regulations in the first count mentioned, removed the name of the plaintiff from the said register in respect of the said shares. Whereupon the plaintiff requested the said Company to replace the name of the plaintiff on the said register as the holder and proprietor of the said shares, which it was and is the duty of the defendants to do. And the plaintiff says, that he was and is personally interested in having his name replaced on the said register as aforesaid, and that he sustains damage by the nonperformance by the defendants of their said duty to replace the plaintiff's name on the said register as aforesaid. Yet the defendants have refused and still refuse so to do. And the plaintiff claims a writ of mandamus commanding the defendants to replace on the register of shareholders of the said Company the name of the plaintiff as a shareholder therein from the time his name was so removed as aforesaid from the said register in respect of the said 1000 shares.

Pleas. First, to first count: that the plaintiff was not, at the time of the committing of the said grievances in that count [605] mentioned, the transferee, or holder, or proprietor of the said shares in that count mentioned, or any or either of them or any part thereof, as in that count alleged. Secondly, to the second count: that the plaintiff was not, at the time of the committing of the grievances in that count mentioned, the transferee or proprietor of the said shares, or any or either of them or any part thereof, as in that count alleged. Thirdly, to the whole declaration: that the defendants are not guilty as alleged. Issues thereon.

The cause came on to be tried before Martin, B., at the London Sittings after Trinity Term, 1861, when by consent a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:—

The North British Australasian Company, who are the defendants in this case, are

a Joint Stock Company incorporated, with limited liability, under the Joint Stock Companies Acts, 1856 and 1857.

By the rules and regulations of the said Company, made in pursuance of those Acts, the person or persons registered as the holder of any share in the said Company can only transfer the same by deed duly executed by both transferor and transferee; and the custom of the defendants has been, and at the time of the transactions hereafter mentioned was, not to register any such transfer unless the execution of such deed appeared on the face thereof to have been attested.

In the year 1854 the plaintiff purchased 700 shares in the said Company, and in the year 1857 the plaintiff purchased 300 shares in the said Company, and the plaintiff thereupon became and was the transferee, holder and proprietor of 1000 shares in the said Company, respectively numbered 156,735 to 157,434, both inclusive; 115,204 to 115,403, both inclusive, and 177,206 to 177,305, both inclusive; and the name and address of the plaintiff was duly entered on the register of shareholders of the said Company [606] as a shareholder thereof in respect of the said 1000 shares, according to the provisions of the said Joint Stock Companies Acts.

In the purchase of these shares, and also of other shares in other Companies, the plaintiff had employed a person named William Lemon Oliver who was a stock and share broker, but who was not a member of the Stock Exchange.

The plaintiff kept the certificates of his shares and other securities in a box, which, in November 1856, he had caused to be deposited by the said W. L. Oliver with the London and County Bank for safe custody, and the said W. L. Oliver received from the bank the following receipt on account thereof:—

“London and County Bank, 21 Lombard St.,
“15th Nov. 1856.

“Mr. W. L. Oliver has this day deposited a box on account of Mr. R. Swan of Alnwick.
“JAS. GRAY, Acct.”

There was at that time a padlock on the box, and before the plaintiff parted with the box he locked the padlock with a key which he kept in his own possession.

In the month of November, 1857, the said W. L. Oliver represented to the plaintiff that the lock of the box was so inferior that it was unsafe to have such valuable property under such a lock, and he would obtain a “Chubb’s” lock for greater security.

In consequence of such representation the plaintiff gave the said W. L. Oliver a written order for the delivery of the said box to him, and he thereupon obtained the said box from the London and County Bank and brought it to his, the said W. L. Oliver’s, office, at 4 Austin Friars, Old Broad Street, in the city of London. In the meantime the said W. L. Oliver had obtained a new lock having two duplicate keys, and gave the said new lock and one of the said keys to the plaintiff (who was not aware that he had obtained [607] two keys), but retained, and always until his arrest as hereinafter mentioned continued to retain, the other of such duplicate keys in his own possession. The plaintiff himself, at the said office of the said W. L. Oliver, took off the old padlock and fastened on the box the said new padlock which the said W. L. Oliver had so obtained.

On this occasion the plaintiff examined all the securities in the said box and found that the certificates of the said 1000 shares in the said North British Australasian Company, and all his other property which he had deposited therein, were then safe in the said box. The plaintiff then locked the said box and took away with him the key which had been given to him by the said W. L. Oliver, but he gave the said box to the said W. L. Oliver to be by him returned to the London and County Bank, and the said box was returned by the said W. L. Oliver and by him deposited with the said London and County Bank, in whose custody it remained until the month of October, 1858. It has always been and is the usage and custom of the said bank to receive deposits for safe custody, of deeds and securities, &c., from customers of the said bank and to deliver the same to such customers, but not to receive or deliver such deposits from or to other persons. The said W. L. Oliver was a customer of the said bank, but the said bank would not have received the said box from the plaintiff in person, he not being a customer of the same.

The plaintiff never delivered to the said W. L. Oliver the key of the said box

which had been so given by the said W. L. Oliver to the plaintiff, or any other key of the said box, or intrusted the said W. L. Oliver with it for any purpose whatever, or gave him any access to the said box, nor any further authority or permission to obtain possession of the said box at any time whilst the plaintiff's name remained on the register of the said Company in respect of the said 1000 shares; but on the 3rd day of August, 1858, at which [608] time, as hereafter appears, the plaintiff's name had been removed from the register, the plaintiff received from the said W. L. Oliver a letter, dated the 2nd of August 1858, which, so far as is material to this case, is as follows:—

"I enclose you a cheque for 10l. and also a blank transfer, and what I want you to do with this is just this. I can, if you like, lend your 1000 North British Australasian Shares for three months to a first class man, who is anxious to get on the direction of the Company; for the accommodation he will pay you 20l. down, and deposit with you 1100l. value, Manchester, Sheffield and Lincoln Stock, and 250 Submarine Telegraph Shares, value 350l. at the lowest, engaging too to pay you all dividends declared or declarable within the three months, and to return to you free of all expense the shares at the period named, that is three months. He has deposited with me the M. S. Stock and the Telegraphs, and waits your reply. Now as the election comes off at the board meeting, Wednesday noon, if you agree to this (I think it an easy way of getting a 20l. note) send up your key, and just say: 'Mr. M'Kewan. Please deliver to Mr. Oliver my deed box.—Yours, &c., R. S.' I will then get the shares, deposit in your box his agreement and the other things, that is, the M. S. and Telegraphs, and return you the key by return."

In answer thereto the plaintiff, on August 3rd, 1858, wrote to the said W. L. Oliver a letter, which, so far as it is material to this case, is as follows:—

"I beg to acknowledge cheque value 10l. and return documents signed so as you may carry into effect what is proposed in yours of the 2nd instant. I have not the key of the deed box, therefore just take it to 'Chubb's' where you were kind enough to buy the lock, and no doubt they will be able to open it for you, take out what is wanted and they could lock it, as I have the key in my portmanteau at Mr. Brooks."

[609] At the same time the plaintiff sent a written authority, directed to the manager of the bank, for the delivery of the box to the said W. L. Oliver, which said written authority was afterwards found by the messenger in bankruptcy among the papers of the said W. L. Oliver at his office in Austin Friars, in October, 1858, having at the foot thereof the following endorsement in the handwriting of the said W. L. Oliver: "Please give the above deed box to James Pickering, the bearer hereof.—W. L. Oliver." James Pickering was a clerk in Oliver's employ.

In October, 1858, the said W. L. Oliver was brought before the magistrates at the Guildhall, London, on a charge of embezzling a sum of 5000l. the money of one Caroline Adelaide Dance. Immediately the plaintiff became aware of this, he went to the said London and County Bank and inquired for his box, and then ascertained, for the first time, that it had been delivered by the bank to Oliver, and was then in the possession of the official assignee of the said W. L. Oliver, who had been declared a bankrupt.

With the exception of the order of August 3rd, the plaintiff had never given any authority to the bank or to Oliver for the removal of the box from the bank.

On opening the said box the plaintiff found that the certificates for the said 1000 shares in the said North British Australasian Company, besides other securities, had been taken therefrom. The plaintiff then went to the office of the said Company, and found that his name had been removed from the register as the holder of the said 1000 shares, and the names of other persons placed thereon as the holders thereof. It was afterwards ascertained that this had been effected by the said W. L. Oliver in the following manner:—

The said W. L. Oliver, in the year 1856, and from thence until his arrest as aforesaid, had his office at No. 4 Austin Friars, Old Broad Street. The plaintiff, in the year 1856, [610] wrote and sent to the secretary of the North British Australasian Company, Limited, who duly received the same, the following letter:—

"4 Austin Friars,
"London, Nov. 15th, 1856.

"Sir,—Having left my late residence, 'Alnwick, Northumberland,' I have to request

certificates of 500 of the said shares, which were respectively numbered 156,735 to 157,234, so as to cause the said blank form to appear to be a deed of transfer to one Horace Barry of the said 500 shares in the said North British Australasian Company. The said W. L. Oliver also forged the name of Caroline Bourne as an attesting witness of the execution of such transfer. (A true copy of this transfer is in the appendix to this case.(a))

[613] Upon each of the certificates of the said 1000 shares is the following memorandum:—"N.B.—No transfer of any of these shares will be registered unless accompanied by this certificate." And the defendants never did or would register a transfer unless accompanied by such certificate. And it has always been one of the rules, in conducting the business of the said Company, not to register the transfer of any shares in the books of the Company until after the expiration of three days from the time of sending to the transferrer, to the address of such transferrer as entered in the books of the said Company, a notice of the presentation to the said Company of such transfer for registration in the form hereinafter set forth.

On the 16th January, 1858, the said Horace Barry caused to be delivered to the secretary of the said North British Australasian Company, Limited, the said document, together with the said certificates of the said 500 shares, and thereupon the said secretary caused to be written and sent by post to the plaintiff a notice in the form of a letter, directed to the plaintiff to his address as registered as aforesaid in the books of the said Company, as follows: "To the care of Wm. Lemon Oliver, 4 Austin Friars, Old Broad Street," which said letter was duly delivered to the said W. L. Oliver at 4 Austin Friars aforesaid, and was afterwards found by the messenger in bankruptcy among the papers of the said W. L. Oliver, at his office at 4 Austin Friars aforesaid, and is as follows:—

"The North British Australasian Company, Limited, 27 New Broad St., London, E.C.

"Jan. 16th, 1858.

"Sir,—I beg to inform you that a deed of transfer of 500 shares of this Company from your name in favour of Horace Barry has been lodged at the office for registration. The certificate accompanying the same represents 700 shares, Nod. 156,735 to 157,234.

[614] "The transfer will be retained here for three clear days from the date hereof, in order to afford you an opportunity of communicating with me in the event of there being any irregularity in the transaction, and, failing your reply within the time mentioned, the transfer will be registered, and a new certificate issued to the purchaser.—I am, Sir, your most obedt. serv.,

"DAVID BUDGE, Secretary.

"Robert Swan, Esq.,

"Care of W. L. Oliver, Esq.,

4 Austin Friars."

(a) The copy in the appendix was as follows:—

I, Robert Swan, of 4 Austin Friars, Gentleman, in consideration of the sum of 375l. paid to me by Horace Barry, of the Stock Exchange, London, Gentleman, Do hereby bargain, sell, assign and transfer to the said Horace Barry 500 shares, numbered 156,735 to 157,234, of and in the undertaking called the North British Australasian Company, Limited, To hold to the said Horace Barry, his executors, administrators and assigns, subject to the same rules, orders, restrictions and conditions that I held the same immediately before the execution hereof.

And I, the said H. Barry, do hereby agree to take and accept of the said shares, subject to the same rules, orders, restrictions and conditions. Witness our hands and seals this 15th day of January, in the year of our Lord 1858.

Signed, sealed and delivered by the
above named Robert Swan, in the
presence of

Caroline Bourne, Paris.

ROBERT SWAN (L.S.).

Signed, sealed and delivered by the
above named Horace Barry, in the
presence of

C. V. Goode, Stock Exchange.

H. BARRY (L.S.).

The plaintiff never had any knowledge whatever of this letter. But the Company having received no reply to the said notice, the said secretary, at the expiration of three days from the date thereof, that is to say on the 19th day of January, 1858, caused the name of the plaintiff to be removed from the register of shareholders of the said Company, and the name of the said Horace Barry to be placed thereon. These 500 shares have been since sold and transferred to various other persons.

On or about the 22nd July, 1858, the said W. L. Oliver filled up the other of the said two blank forms, inserting therein the numbers mentioned in the certificates of the remaining 500 of the plaintiff's said shares, which were respectively numbered 157,235 to 157,434, 115,204 to 115,403, and 177,206 to 177,305, so as to cause the said last mentioned blank form to appear to be a deed of transfer to one W. McKewan and one James Gray of the last mentioned 500 shares in the said North British Australasian Company. The said W. L. Oliver also forged the name of Caroline Bourne as an attesting witness of the execution of such last mentioned transfer. (A true copy of this transfer is in the appendix to this case.(a))

[615] On the 26th July, 1858, the said W. McKewan and James Gray caused to be delivered to the secretary of the said North British Australasian Company the said last mentioned transfer, together with the certificates of the said last mentioned 500 shares, and thereupon the said secretary caused to be written and sent by post to the plaintiff a notice in the form of a letter, directed to the plaintiff to his address so registered as aforesaid in the books of the said Company, "To the care of Wm. Lemon Oliver, 4 Austin Friars, Old Broad Street," which said letter was duly delivered to the said W. L. Oliver, at 4 Austin Friars aforesaid, and was afterwards found by the messenger in bankruptcy among the papers of the said W. L. Oliver, at his office, at 4 Austin Friars, aforesaid, and is as follows:—

"The North British Australasian Company, Limited, 27 New Broad St., London, E.C.

"July 26th, 1858.

"Sir,—I beg to inform you that a deed of transfer of 500 [616] shares of this Company from your name in favour of W. McKewan and James Gray has been lodged at the office for registration. The certificates accompanying the same represent 500 shares, Nos. 157,235 to 157,434, 115,204 to 115,403, and 177,206 to 177,305.

"The transfer will be retained here for three clear days from the date hereof, in order to afford you an opportunity of communicating with me in the event of there being any irregularity in the transaction, and failing your reply within the time

(a) The copy in the appendix was as follows:—

I, Robert Swan, of 4 Austin Friars, London, Gentleman, in consideration of the sum of 300l. paid to me by William McKewan and James Gray, of 21 Lombard Street, Gentlemen, Do hereby bargain, sell, assign and transfer to the said William McKewan and James Gray 500 shares, numbered 157,235 to 157,434; 115,204 to 115,403; 177,206 to 177,305, of and in the undertaking called the North British Australasian Company, Limited, To hold to the said William McKewan and James Gray, their executors, administrators and assigns, subject to the same rules, orders, restrictions and conditions that I held the same immediately before the execution hereof.

And we, the said William McKewan and James Gray, do hereby agree to take and accept of the said shares, subject to the same rules, orders, restrictions and conditions. Witness our hands and seals this 23rd day of July, in the year of our Lord 1858.

Signed, sealed and delivered by the above named Robert Swan, in the presence of	} ROBERT SWAN (L.S.). Caroline Bourne, Paris.
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Signed, sealed and delivered by the above named William McKewan and James Gray, in the presence of	} W. MCKEWAN (L.S.). JAS. GRAY (L.S.).
Oliver Lyndall, 21 Lombard St.	

mentioned, the transfer will be registered, and a new certificate issued to the purchaser.

—I am, Sir, your most obdt. servt.,

“J. J. LEGGATT,

“Robert Swan, Esqre.,

“For DAVID BUDGE, Secretary.

“Care of W. L. Oliver, Esqre.,

“Austin Friars.”

The plaintiff never had any knowledge whatever of this letter. But the Company having received no reply to the said notice, the said secretary, after the expiration of more than three days from the date thereof, that is to say on the 2nd day of August, caused the name of the plaintiff to be removed from the register of shareholders of the said Company and the names of the said W. McKewan and James Gray to be placed thereon. The said W. McKewan and James Gray are respectively the manager and accountant of the said London and County Bank, and the said shares were transferred to them as trustees for the said Bank.

The plaintiff, except as aforesaid, never gave the said W. L. Oliver, or any other person, any authority whatever to fill up the said blank forms in the manner herein-before mentioned, or to use the same for any purpose whatever, except for the transfer of the plaintiff's shares in the said Scottish Australian Investment Company, Limited; neither, except as aforesaid, did the plaintiff ever deliver as his act and deed, or authorize the said W. L. Oliver or any other person to deliver as the plaintiff's act and deed, the said alleged [617] transfers, or any transfer whatever, for the said 1000 shares or any of them, or any share whatever in the said North British Australasian Company, nor did he ever know or suspect that the said blank transfers had been so used, or the said certificates obtained, until after the apprehension of the said W. L. Oliver as before mentioned.

The two letters sent to the plaintiff to the care of the said W. L. Oliver, as herein-before mentioned, were the only notices sent by the defendants to him that any deed or deeds of transfer of the said 1000 shares, or any of them, had been lodged at the office of the said Company for registration.

At a Session holden at the Central Criminal Court on the 22nd November, 1858, the plaintiff prosecuted the said W. L. Oliver for feloniously stealing, taking and carrying away the certificates of the said 1000 shares; and the said W. L. Oliver was then convicted of the said offence, and sentenced to twenty years' penal servitude.

On the 9th December, 1858, the plaintiff served the defendants with a notice in writing that the said 1000 shares had been transferred from his name in the books of the said North British Australasian Company by means of forgery and fraud, and the plaintiff by the said notice required that his name should be restored to the register of shareholders in respect of the said 1000 shares. On the 30th December, 1858, the plaintiff served the defendants with a notice in writing not to pay to any person the dividends on the said 1000 shares.

The London and County Bank, after the said conviction of the said W. L. Oliver, and with knowledge thereof, and that the certificates of the said shares had been stolen by the said W. L. Oliver as aforesaid, sold and transferred the said 500 shares, so as aforesaid registered in the names of the said W. McKewan and James Gray, to various other [618] persons, and the defendants registered the names of such persons after they received the aforesaid notice and request to restore the name of the plaintiff to the said register of shareholders.

It is agreed that the pleadings and appendix, and rules and regulations (a) of the

(a) The only clauses of the regulations material to the present case are the following:—

“V. Any person who shall have executed (as transferee) any deed of transfer of any share, or shall have signed any other written acceptance of any share, in a form approved by the directors, shall be deemed to have accepted such share for the purposes and within the meaning of the Joint Stock Companies Act, 1856; and no person hereafter becoming entitled to any share shall be entitled to be placed on the register of shareholders, as the holder thereof, until he shall have accepted the same in manner aforesaid, and shall also have bound himself by deed of covenant to observe and perform these regulations, or such other regulations of the Company as for the time being may be in force, either by executing such deed of transfer as aforesaid, or such other deed as shall be approved by the directors for the purpose; and if any

Company, shall form part of [619] the case, and that the Court shall draw such inferences from the above facts as they think fit.

In Trinity Term, 1860, the plaintiff obtained a rule of this Court calling on the said North British Australasian Company, and certain persons in the said rule mentioned, to shew cause why this Court should not order the register of shareholders in the said Company to be rectified by replacing thereon the name of the plaintiff as a shareholder therein from the time his name was removed from the said register in respect of the said 1000 shares. The said rule having been duly enlarged, cause was shewn against it in last Easter Term, when the Court directed this action to be brought, and the said rule has been further enlarged.

The questions for the opinion of the Court are—

1. Whether, under the above circumstances, the plaintiff is entitled to recover upon the first count of the declaration in respect of the said 1000 shares or any of them.

2nd. Whether, under the circumstances, the plaintiff is entitled to a mandamus as prayed in the second count.

If the Court shall be of opinion, upon the first question, in the affirmative, judgment is to be entered for the plaintiff for damages (the amount of such damages to be ascertained by an arbitrator, upon such principle as the Court shall direct), and 40s. costs.

And if the Court shall be of opinion in the affirmative [620] upon the second question, then a writ of mandamus is to be issued, commanding the said Company to replace on their register of shareholders the name of the plaintiff as a shareholder therein in respect of such shares, and from such time as the Court shall direct.

If the Court shall be of opinion in the negative, a verdict is to be entered for the defendants on the plea of not guilty, with 40s. costs.

Lush (with whom was Hurlstone) argued for the plaintiff (Jan. 27). The property in the shares remains in the plaintiff, and his name has been wrongfully removed by the defendants from the register of shareholders. First, there has been no transfer of the shares by deed, as required by the regulations (see clause 11, ante, p. 618) of the Company, made in pursuance of the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47, s. 9). *Hibblewhite v. M'Morine* (6 M. & W. 200) is an express authority that, where a deed is necessary for the transfer of shares, a blank paper, signed and sealed by the owner of them, cannot become a valid deed by being afterwards filled

such person as aforesaid shall have been placed on the register of shareholders as the holder of any share, but shall not have accepted the same in manner aforesaid, or shall not have bound himself by deed of covenant to observe and perform these regulations, or the regulations of the Company for the time being, in manner aforesaid, it shall be lawful for the directors, without any further consent or notice to such person, to remove his name from the register and to deprive him of all the profits and privileges of a shareholder, until compliance by him with the aforesaid conditions."

"XI. The person or several persons registered as the holder or joint holders of any share, may transfer the same by deed, in a form approved of by the directors, duly executed by both transferrer and transferee; but effectual receipts for any dividend payable in respect of any share registered in the names of more persons than one, may be given by any one of such persons."

"XII. Every deed of transfer shall, immediately after the execution thereof, be left at or sent to the registered office of the Company; and if the same shall be found correct, the directors shall cause a memorial of such transfer to be entered in the book to be called the register of transfers, and the entry thereof to be indorsed on the deed of transfer; and for every such entry and indorsement a fee not exceeding 2s. 6d. shall be paid by the transferee to the secretary for the use of the Company. And the Company may decline to register any transfer of shares made by any shareholder or shareholders who, or any one of whom, is indebted to them."

"XIII. The person or several persons registered as the holder or joint holders of any share or shares, shall, on payment of such sum not exceeding 1s. as the directors may prescribe, be entitled to a certificate under the common seal of the Company, specifying the share or shares held by him or them, and the amount paid up thereon."

"XIV. If any such certificate is worn out or lost, it may be renewed on payment of such sum not exceeding 1s. as the directors may prescribe."

up. [Martin, B. In Sheppard's Touchstone, p. 54, it is said:—"Every deed well made must be written, i.e., the agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do therewithal give commandment that an obligation or other matter shall be written in it, and they be done accordingly, yet this is no good deed."] Secondly, the transfers were forged: *Hart's case* (7 C. & P. 652), *Regina v. Wilson* (1 Den. C. C. 284), *Ex parte Swan* (7 C. B. N. S. 400, 432); and no property can pass by a forged instrument of transfer: *Davis v. The Bank of England* (2 Bing. 393). It will be contended, [621] however, that the plaintiff is estopped by his negligence from denying that the transfers are valid deeds. But, first, the doctrine of estoppel by negligence in signing instruments applies only to negotiable instruments, and has never been extended to deeds. The leading case on that subject is *Young v. Grote* (4 Bing. 253), where the plaintiff delivered to his wife printed checks, signed by himself, but with blanks for the sums, requesting his wife to fill the blanks up according to the exigency of his business. She filled one up with the words "fifty pounds two shillings," the "fifty" being commenced with a small letter, and placed in the middle of a line. The figures 50l. 2s. were also placed at a considerable distance from the printed £. In this state she delivered the check to her husband's clerk to receive the amount; whereupon he inserted, at the beginning of the line in which the word "fifty" was written, the words "Three hundred and," and the figure 3 between the £ and the 50. The banker having paid the check in the usual course of business, it was held that the loss must fall on the plaintiff. That decision is reviewed in *Ex parte Swan* (7 C. B. N. S. 400, 446) by Williams, J., who says: "It seems, therefore, doubtful whether the cases as to the liability of a man who signs a blank bill or note or check, are founded on the doctrine of estoppel, or on a rule of law-merchant that an actual authority is thereby conferred on the person in whose hands the instrument is. It is, however, plain that none of the decisions as to the effect of signing instruments in blank extend beyond the case of negotiable instruments. And it seems to me that it would be inconvenient and dangerous to apply the principle of any of them any further. If a man were induced to sign, seal and deliver to his attorney a deed of conveyance, with the parcels in blank, upon the understanding that it should be filled up by a description of [622] estate A., it would surely be difficult to contend that, if the attorney were fraudulently to fill up the blank by a description of estate B., the latter would pass to a bona fide purchaser, who paid for the estate on the supposition that he was buying the latter estate." [Wilde, B. In *Ex parte Swan* (7 C. B. 400, 432), Erle, C. J., says that the same principle applies to deeds as to negotiable instruments.] The only authority for that position is *Texira v. Evans* (1 Anstr. 225, 228), cited by Wilson, J., in *Master v. Miller* (6 M. & W. 200, 215), but that case is said by this Court in *Hibblewhite v. McMorine*, by Cresswell, J., in *Davidson v. Cooper* (13 M. & W. 343), and by Wood, V. C., in *Taylor v. The Great Indian Peninsular Railway Company* (4 De G. & J. 559), not to be law. Secondly, assuming that the doctrine of estoppel applies to deeds, there is not in this case that species of negligence which estops the plaintiff from insisting that the transfers are void. To have that effect the negligence must be such that the person who has sustained damage by reason of it may maintain an action against the person who has been guilty of it. *The Bank of Ireland v. The Trustees of Evans's Charities* (5 H. L. Cas. 389) is an express authority that the negligence which would deprive the plaintiff of his right to insist that the transfers are invalid, must be negligence in or immediately connected with the transfer itself. There the trustees of a charity in Dublin, incorporated by act of parliament, and having a common seal, possessed stock in the public funds, which stock was in Ireland, registered in the Bank of Ireland. The secretary of the incorporated trustees had the custody of their seal, and without any authority from them he affixed it to five powers of attorney, prepared in different years, and signed by them. The due affixing of the seal was attested by a witness who had never seen it affixed, but who acted without any fraudulent in-[623]-tention. The secretary presented the powers of attorney to the bank, and obtained the stock. In an action by the trustees against the bank, for refusing to transfer it under a valid power of attorney, the Lord Chief Justice told the jury that if they believed that the five powers of attorney were forgeries, then the verdict ought to be for the plaintiffs, unless they at the same time believed that the use made of the common seal of the trustees, whereby the defendants were imposed upon, was caused exclusively by the

negligence or default of the plaintiffs, in which case the verdict must be for the defendants. A bill of exceptions having been tendered, the House of Lords held that the direction was wrong. There Parke, B., after referring to the case of *Young v. Grote* (4 Bing. 253), said (5 H. L. Cas. 410): "The present case is entirely different. If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary, or ordinary, or likely result of that negligence. It never would have been, but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed. It is quite impossible that the bankers could have maintained an action for the negligence of the trustees, and recovered the damage they had sustained by reason of their having made the transfer. If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his check-book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying his forged check would be entitled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in [624] the sale, and so be disentitled to sue for their conversion on a demand and refusal." And Lord Cranworth, C., said (5 H. L. Cas. 413): "There must be either something which amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer." Here the negligence, if any, is more remotely connected with the transfer than the negligence in that case; and it is clear that no action could be maintained against the plaintiff, either by the Company or the transferees. The broker obtained the blank transfers by a false and fraudulent representation, but the mere possession of them was of no avail. The mischief did not ensue from the plaintiff's conduct in delivering them to the broker, for that was a perfectly harmless act. In order to effect a transfer of the shares it was necessary that the broker should commit three felonies, viz., a forgery of the deed and attestation, and a robbery of the certificates. The Company would not register a transfer of the shares unless accompanied by the certificates, and the broker stole them from the box which was deposited for safe custody with the bank, and by inserting their numbers in the blank transfers, and forging the attestation, he effected the transfer. But forgery and robbery were not the necessary or ordinary result of the alleged negligence of the plaintiff in executing the blank transfers. Moreover the defendants were not free from negligence, for they acted upon transfers which purported to be attested by a witness at Paris, who gave no address. Also, as to 500 of the shares which were registered in the names of the two trustees for the bank, they were guilty of negligence in allowing the broker to have access to the plaintiff's box. The fact that the Company sent a notice that they were about to register the transfers, does not affect the plaintiff's case, because the same result would follow whenever a notice is sent to the house of a person who is travelling abroad.

[625] Hawkins (with whom was Petersdorff, Serjt., and Holl), for the defendants. There was such negligence on the part of the plaintiff, independently of the robbery, as estops him from setting up his right against bona fide purchasers of the shares. He signed, sealed and delivered to the broker blank forms of transfer, with the intent that they should be used for the transfer of shares, and attested by a witness who had never seen them executed. The property in the shares is transferred by the deed, not by the delivery of the certificates; and, if the deed operates by way of estoppel, the purchasers might compel the production of the certificates. The principle which applies to the present case is that enunciated by Mr. Justice Ashurst, who, in *Lickbarrow v. Mason* (2 T. R. 63, 70), said:—"We may lay it down, as a broad general principle, that wherever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it." [Martin, B. Suppose an action on a bond, with a plea of non est factum, and the bond was in fact executed in blank and delivered to an agent, who filled it up without any authority from the obligor, would that be a good deed?] The obligor would be estopped from shewing the circumstances under which it was executed. If a person chooses to trust a fraudulent agent, he must suffer, not an innocent person. The doctrine of estoppel by negligence applies as well to deeds as to negotiable instruments. The ground of the decision in *Young v. Grote* (4 Bing. 253) was, that the banker had been misled by

want of proper caution on the part of his customer in the mode of drawing the check. [Martin, B. The point is not open upon these pleadings: the defendants should have pleaded the estoppel. Wilde, B. In *Sanderson v. Collman* (4 Man. & G. 209) the estoppel was pleaded.(d)¹] [626] In *Coles v. The Bank of England* (10 A. & E. 437) the negligent conduct of the plaintiff in receiving dividends on the sum to which her stock was reduced by a forged transfer, was treated by the Court as evidence of ratification of the transfer. So where the statute incorporating a railway Company required a transfer of shares to be by deed, and the seller executed a transfer with a blank for the purchaser's name, and stating the consideration untrue, but the purchaser afterwards signed and transmitted to the Company, in pursuance of their Act, a proxy paper, describing himself as the proprietor of the shares, in an action by the Company against him for calls it was held that he was precluded from disputing the validity of the transfer: *The Sheffield and Manchester Railway Company v. Woodcock* (7 M. & W. 574). There Parke, B., in the course of the argument, said:—"The defendant held out false colours, to induce the Company to register him as a proprietor, and therefore to bring this action against him. It is a universal rule of law, that where a party makes a representation to another, whereby the situation of the latter is altered, he is bound thereby." The principle of that decision was recognised and adopted in *The Cheltenham and Great Western Union Railway Company v. Daniel* (2 Q. B. 281). So where a purchaser of shares in a joint stock banking Company, who did not execute the deed of settlement, sent to the office of the Company a deed, by which he covenanted to observe the provisions contained in the deed of settlement, which first mentioned deed was apparently executed by himself, but, in fact, his name was signed by a third party, and he acted under the deed, and received dividends as a purchaser, it was held that his executors were estopped from denying that it was his deed: *In re the North of England Joint Stock Banking Company* (1 De Gex, M. & G. 576). Lord St. Leonards, C., there said:—"I am [627] asked to treat this deed as a nullity, because it turns out that a grandson of this gentleman signed it for him, believing himself to be authorized to do so, and acting for him generally in his affairs, Mr. Stratton, too, having himself made the purchase and afterwards acted upon the deed so sent forth as his deed. But such is not the law of this Court; and the doctrine of estoppel will apply to a case of this kind as well as to any other; and if I had to decide the matter for the first time, I should hold without the slightest difficulty that Mr. Stratton could never be heard to say, against any person in that Company, that the deed was not his deed." The case of *Taylor v. The Great Indian Peninsular Railway Company* (28 L. J. Chan. 285; 4 De Gex & J. 559) proceeded on the ground that the purchasers of the shares were guilty of negligence in taking blank transfers, and therefore, as against them, the plaintiff was not estopped from insisting that the transfers were void. It is no objection to a bill of exchange that the acceptance and indorsement are written before the bill is drawn, and the acceptor is estopped from denying the drawing or indorsing of the bill: *Schultz v. Astler* (2 Bing. N. C. 544), *Russel v. Langstaffe* (2 Doug. 514). *Texira v. Evans* (d)² is an express authority that the plaintiff, as against a bona fide purchaser, is estopped from denying the validity of the transfers. [Channell, B. That case was impeached by Lord Kenyon, and was overruled in *Hibblewhite v. M'Morine* (6 M. & W. 200).] The case of *The Bank of Ireland v. The Trustees of Evans's Charities* (5 H. L. Cas. 389) was argued and decided on the assumption that the doctrine of estoppel by negligence applied to instruments under seal. Lord Cranworth, C., there said that in *Young v. Grote* (4 Bing. 253) the plaintiff "was estopped from saying that he did not [628] sign the check for 350l., and if the circumstances are such, whether arising from negligence or any other cause, that as between the customer and his banker the customer is estopped from saying that he did not sign the check for a particular amount, that, as between them, is just the same as if he had signed it." That principle applies here. [Martin, B. Could the Company maintain an action for negligence against the plaintiff? In *Young v. Grote* (4 Bing. 253) the bank might have maintained an action against the plaintiff. You must establish that where a person acts in such a manner as to enable another to commit a fraud, he is liable to an action at the suit of the party thereby injured.] Negligence may operate as an estoppel,

(d)¹ The plaintiff's counsel then consented that the Court should decide the point irrespective of the pleadings.

(d)² Cited by Wilson, J., in *Master v. Miller*, 1 Anstr. 225, 228.

although it affords no ground of action. If these transfers are invalid, no property passed to the purchasers under the transfers of the shares in the other Company which the plaintiff authorized the broker to fill up. He also referred to *Master v. Miller* (4 T. R. 320) and *Ex parte Swan* (7 C. B. N. S. 400).

Lush, in reply. The case of *Taylor v. The Great Indian Peninsular Railway Company* (4 De Gex & J. 559) is an express authority that these transfers are void. Even if the blanks had been filled up with the authority of the plaintiff the transfers would have been inoperative, because an agent, to make a deed, must be authorized by an instrument of as high a nature. Precedent implied authority is not sufficient to render an imperfect instrument valid, but in all the cases the estoppel has arisen from the subsequent conduct of the party. In *Coles v. The Bank of England* (10 A. & E. 437) the conduct of the plaintiff in accepting the dividends on the reduced stock amounted to a ratification. In *The Sheffield and [629] Manchester Railway Company v. Woodcock* (7 M. & W. 574) the defendant had caused his name to be placed on the register as a proprietor of the shares. So, in *The Cheltenham and Great Western Union Railway Company v. Daniel* (2 Q. B. 281) there was an estoppel by subsequent conduct amounting to a ratification. In the case of *In re the North of England Joint Stock Banking Company* (1 De Gex, M. & G. 576) the party was held liable because he had sent to the Company a deed executed by another person, under which he acted and received a benefit, and therefore his subsequent conduct amounted to a delivery. If the doctrine of estoppel applies here, it would, a fortiori, have applied in the case of *Taylor v. The Great Indian Peninsular Railway Company* (4 De Gex & J. 559), for there the plaintiff delivered to the broker the certificates for the purpose of enabling him to fill up the blank transfers. That case shews that a precedent authority to fill up a deed cannot render it valid. All that the House of Lords decided in *The Bank of Ireland v. The Trustees of Evans's Charities* (5 H. L. Cas. 389) is, that mere negligence, not immediately connected with the loss, will not deprive the party of his right. Here the transfers are void, and there is no negligence amounting to ratification.

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were delivered in Trinity Vacation (June 28).

WILDE, B. The plaintiff in this case sues to have his name restored to the register for shares which he once held in the defendants' Company.

The defendants produce a transfer of the shares apparently [630] duly executed by the plaintiff, and actually having his real signature.

Under this transfer the shares have been bonâ fide and regularly passed through one or more hands to the possession of bonâ fide purchasers for value, who now hold them.

The plaintiff says he executed the deed of transfer in blank; that it has since been filled up without authority by the fraud of his agent, and that it is void.

The defendants answer that the fraudulent act was the plaintiff's own fault; that he by his own careless and negligent conduct brought it about, and that he is estopped from now denying the validity of the deed.

The defendants do not assert that such a deed so executed could be maintained as valid, but they invoke the doctrine of estoppel, and say that the plaintiff ought not to be allowed to set up the facts on which the invalidity rests.

The facts are plainly stated in the special case now before the Court, and I do not propose to recapitulate them.

That the plaintiff has acted with great carelessness, and with an overweening confidence in his agent, is I think very clearly established. The loss which has occurred through the dishonesty of this agent has been entirely his own fault, for the defendants were free from blame.

The defendants in their system for the transfer of shares appear to have taken all reasonable precaution to prevent imposition. These precautions have one after another been rendered valueless by the culpable negligence of the plaintiff.

In the first place the Company require the instrument of transfer to be in the most solemn form known to the law—the form of a deed. This the plaintiff has rendered nugatory by executing and handing to his agent a deed in blank in a form fit for the transfer of the shares in question, and wanting only words of identity to be applicable to those shares. This in itself was, in my opinion, gross negligence.

[631] If a man voluntarily parts with an instrument bearing his own signature,

which purports to convey property away from him—losing sight of and control over it, and that not for a limited time but for good, trusting to the honour or honesty of his agent,—he in fact substitutes that trust and confidence for the real control over his own property which the law gives him ; and if he turns out to have misplaced his trust, he has only his own careless confidence to blame.

This deed was the basis of the fraud which was committed. But the plaintiff's want of care did not stop here.

By the error of a similar confidence the same agent had the opportunity of tampering with the plaintiff's strong box, and getting possession of the share certificates.

And lastly, the plaintiff robbed himself of the benefit of the notice of transfer which the company sent him, by ordering his letters to be addressed to the same agent's office.

It is argued that the agent could not have committed the fraud without a felony in stealing the certificates, and that the plaintiff ought not to be charged with negligence in not foreseeing a criminal act. But the loss in all cases of this kind is caused by some criminal and fraudulent act. And the question is, whether the party has availed himself of the ordinary reasonable safeguards and personal control which the keeping of valuable property demands.

So far from exercising this reasonable control, the plaintiff has substituted another for himself throughout. He has absolutely intrusted his agent with the deed of transfer, without check, inquiry, or control ; and he has facilitated, with a culpable want of caution, the access of that agent to the other papers necessary to make the deed effectual for fraud.

It would be surely repugnant to all natural ideas of justice, or equity, that he should now be able to fall back upon his [632] rights of property, and make others pay for the confidence he so unwarily reposed. In my opinion he cannot do so. It was agreed on the argument of the case that all defences, whether legal or equitable, should be open to the defendants, whether open on the pleadings or not ; and the question therefore arises in the broadest form.

It is also of wide, general and increasing importance, as the learned author of Smith's Leading Cases, at the end of his note on *The Duchess of Kingston's case*, has remarked.

The common occurrences of business life might, and no doubt often do, raise such a question. A man gives his clerk a signed receipt, to collect a debt—he does not fill in the amount or the name. The servant fills in another name than that intended, and collects a larger debt than that authorized, putting the difference in his pocket. The payment is no doubt made without authority, and the debt is not discharged.

But can it be contended that the creditor so acting would or ought to be allowed to set up this want of authority, and make the debtor whom he had deluded into paying the wrong person, pay the debt over again ?

What then is the legal principle to which resort must be had to work out the ends of justice in cases such as this ? Doubtless the principle of estoppel. In various forms the law has always held men to their own acts or representations where the interests of others have been affected by them.

If a man pay money voluntarily, with knowledge of the facts, he cannot recover it back. Where an agent carelessly gave credit to a principal for money he had never received, on the faith of which the principal drew the money and spent it, the agent was not allowed to say that the credit was unfounded : *Skyring v. Greenwood* (4 B. & C. 281). *Shaw v. Picton* (id. 715), in the same book, was a very similar case.

[633] These cases were not decided explicitly on the ground of estoppel, but they rest upon a similar basis in principle.

In more modern times the principle has been clearly and plainly enunciated in reference to representations : *Pickard v. Sears* (6 A. & E. 469).

It was carefully reconsidered and with proper limits reasserted, in *Freeman v. Cooke* (2 Exch. 654), where Baron Parke laid it down with great distinctness.

The principle has been acted upon in a long line of cases cited at the bar. I do not go through them, for they are admirably enumerated by the Lord Chief Justice in *Ex parte Swan* (7 C. B. N. S. 400) in the Common Bench. Some of these arise on negotiable instruments, some on railway shares, and some on other contracts.

The last case was carried to the House of Lords, *The Bank of Ireland v. The Trustees of Evans's Charities* (5 H. L. Cas. 389). There the principle was taken for granted

and acted upon; and the sole question raised was whether the negligence in the particular case was established and the consequences sufficiently proximate.

Now the rule of decision which I deduce from an examination of these various authorities is this:—That if a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden as against them to deny that assertion. That if he has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to shew that state of facts did not exist.

In short and in popular language, a man is not permitted to charge the consequences of his own fault on others, and [634] complain of that which he has himself brought about. Now, why does not this principle apply to the case in hand?

It has been contended that the doctrine of estoppel is limited in its application to cases arising on negotiable instruments.

But why should it be so? It rests upon a ground totally different from that which renders negotiable instruments valid.

The law of negotiability is the law of property passing by delivery. It gives to actual transfer the effect of real title.

The law-merchant validates, in the interest of commerce, a transaction which the common law would declare void for want of title or authority; and transactions within its operation are as absolutely valid and effectual as if made with title or authority. But how different is the principle of estoppel.

It validates no transaction whatever. It all along implies a transaction itself invalid, and a person who is forbidden for equitable reasons to set up that invalidity.

It is therefore independent of negotiability; it operates in a different way; founded upon principles of equity and fairness between man and man, it rests on a wider basis than the principle which supports title in negotiable instruments; and as it has no relation to commercial intercourse or the exigencies of trade, so it is not confined to instruments which have become negotiable by the demands of commerce.

Nor have the cases in which it has been asserted and acted upon been confined in fact to instances of negotiable instruments.

It has been further contended by some that the doctrine of estoppel does not apply to the case of instruments under seal.

[635] I have great difficulty in appreciating this as applied to the case in hand. Greater effect and a more solemn sanction has always been yielded by the law to deeds than to parol instruments—notably so in ancient times. Whether in the present day there is any practical benefit in preserving this distinction, I do not stop to inquire; for there is no question here of invalidating or impeaching a deed by estoppel.

The case sets out with a deed of transfer by the plaintiff. It is the plaintiff who avers it to be void; and the doctrine of estoppel, so far as it intervenes at all, is called in aid by the defendant to support the deed, not to impeach it. Whatever the superior sanction, or extra force of a deed may be, the estoppel in this case, so far from coming into conflict with it, is in harmony with it; and it is difficult to see why, if a man is restrained or estopped from repudiating a parol transfer, he should be less restrained by the same estoppel from repudiating a solemn transfer by deed.

But the doctrine of estoppel, if unlimited in the direction I have been considering, has still a true limit in that of "remoteness."

Though a man may not disaffirm his own careless or culpable acts and complain of the consequences which those acts have brought about in the conduct or omission of others, it is still plain that such a rule must be limited to such consequences as are in some degree direct, and not collateral, probable though perhaps not necessary; and a question of some difficulty is, to define that degree.

Such was the matter chiefly discussed in the case of *The Bank of Ireland v. The Trustees of Evans's Charities* (5 H. L. Cas. 389). It was there (in the House of Lords) suggested that the necessary degree of proximity was the same as would support an action for negligence.

[636] It is, I think, always difficult, and sometimes illusory, to compare two principles which emanate from different sources and proceed in different directions. The action for negligence proceeds from the idea of an obligation towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury.

The doctrine of estoppel, as applied to these cases of negligence, is based on the

injustice of allowing a plaintiff to be the author of his own misfortune, and then charging the consequences on others.

In each case, no doubt, the consequences must be proximate, and not remote; and it may be that they require proximity in the same degree.

But there the parallel ceases. In all other features the two principles diverge, and it would be very fallacious to test any set of circumstances, as raising an estoppel or not, by asking whether, reversing the parties, an action for negligence would lie.

At the same time I do not believe that any more exact definition of the necessary degree of negligence can be offered than the general expression applied to actions for negligence and adopted in insurance law, viz., the damage must be the "proximate" and not the "remote" consequence of the act or acts of which complaint is made.

I think the forgery in the present case was the proximate consequence of the plaintiff's own careless conduct, and that he is forbidden in a Court of law, as he would be in a Court of equity, to fasten the result upon those who have acted without negligence on the appearances he himself created.

I have the authority of the Lord Chief Baron to state that he concurs with this judgment.

MARTIN, B. The circumstances of this case are these: [637]—In Easter Term, 1859, Mr. Swan, the plaintiff, made an application to the Court of Common Pleas against the North British Australasian Company (Limited), under the statutes 19 & 20 Vict. c. 47, s. 25 (the Joint Stock Companies Act, 1856,) and the 20 & 21 Vict. c. 14, to adjudge that he was entitled to have his name entered on the register of shareholders as owner of 1000 shares, and to order the register to be rectified accordingly. The matter was argued; and, in the result, two of the Judges, Mr. Justice Williams and Mr. Justice Willes, were of opinion that he was so entitled, the Chief Justice and Mr. Justice Keating being of a contrary opinion. The case will be found reported in the 7th volume of the Common Bench Reports, New Series, page 400. A similar application was afterwards made to this Court, and we directed an action to be brought in order that the question might be put on the record. An action was accordingly brought, alleging a wrongful refusal to place the plaintiff's name on the register, and a verdict was found for the plaintiff, subject to a special case, which came on to be argued; but a difficulty occurred upon the pleadings, and it was then agreed that we should decide the case upon the facts, without reference to pleadings, and give judgment according to the real rights of the parties.

The material facts are these:—The Company was constituted under the 19 & 20 Vict. c. 47 (the Joint Stock Companies Act, 1856). By the regulations of the Company, the owners of shares were authorized to transfer them by deed. This deed was to be sent to the office, and a memorial to be registered. At the time of the transaction in question it was the practice of the defendants not to register any transfer unless it was attested; and upon the certificates there was a memorandum:—"N.B.—No transfer of any of these shares will be registered unless accompanied [638] by this certificate;" and the defendants would not register a transfer unless it were so accompanied. It was also one of their rules not to register a transfer until three days after sending to the transferee, at his address entered in the books of the Company, a notice that a deed of transfer had been sent for registration. The plaintiff was the owner of 1000 shares, which he had bought through a broker named Oliver. He kept his certificates in a box, locked with a padlock, of which he kept the key; and in November, 1856, he caused Oliver to deposit this box for safe custody with the London and County Bank, where Oliver kept an account. In November, 1857, Oliver represented to the plaintiff that the lock was not safe, and suggested that a "Chubb's lock" should be put on for greater security, and in consequence the box was brought from the bank to Oliver's office, where the old lock was taken off and a new one put on and locked by the plaintiff himself. This lock had been bought by Oliver, who obtained two keys, one of which he delivered to the plaintiff, who believed it to be the only one; with it he locked the box, took that key away, and always retained it in his possession; but Oliver fraudulently retained the other. On the occasion of putting the new lock on the box the plaintiff examined the shares, found them correct, and again requested Oliver to deposit the box with the London and County Bank, which he did, and where it remained until October, 1858. In November, 1856, the plaintiff wrote to the secretary of the defendants a letter requesting him to alter his address in the address book of the Company to "Robert

Swan, to the care of Oliver," &c., which was done. The plaintiff had, on two occasions, employed Oliver to sell some shares in another Company, which were also transferable by deed; and Oliver then represented to the plaintiff that it was necessary for him to execute ten deeds of transfer, and accordingly the plaintiff signed and sealed, and sent to or [639] delivered to Oliver ten forms of transfer in blank, to be afterwards filled up by Oliver, who filled up and used eight of them for the purpose of the transfer of the shares of the other Company. On the 15th January, 1858, Oliver filled up one of the two remaining blank forms as a transfer of five hundred of the plaintiff's shares, and delivered it to the transferee with the certificates which he had feloniously stolen from the plaintiff's box by means of the duplicate key. On the 16th of January, 1858, the transferee delivered the transfer to the secretary of the defendants, together with the certificates, who, upon the same day, in accordance with the rule of the Company, wrote a letter addressed to the plaintiff at the address of Oliver to inform him of the proposed transfer; and, after the expiration of three days, the name of the plaintiff was removed from the register, and that of the transferee placed thereon. This letter never reached the plaintiff, and probably was intercepted by Oliver. On the 22nd of July, 1858, Oliver made use of the remaining blank form to transfer the remaining five hundred shares, and they were transferred to a transferee under precisely the same circumstances. In November, 1858, the fraud and forgery of Oliver was discovered; he was prosecuted by the plaintiff at the Old Bailey for stealing the certificates, found guilty, and sentenced to twenty years penal servitude.

The question is whether, upon the above facts, the plaintiff is entitled to have his name entered on the register as owner of the 1000 shares.

It is of importance in this case to distinguish between the rights of the parties at law and their equitable rights; for the principal argument on behalf of the defendants has been that, in a Court of law, the transfers operated as deeds by way of estoppel. It is required by the constitution of the Company that the transfer shall be by deed; the object, no [640] doubt, being, that it should be by an instrument of a well known solemn character, and that the Company should have the security of such an assurance to testify the agreement of the parties and authorize the change of name in the register. It is also clear that, until the interest of the shareholder in the share has been transferred, it remains in him. Now, a deed is an assurance of the common law, and to the making of it certain requisites are essential. One is that the agreement be all written before the writing be sealed and delivered; "for if a man seal and deliver an empty piece of paper or parchment, albeit he do therewithall give commandment that an obligation or other matter shall be within it, and this is done accordingly, yet this is no good deed:" Sheppard's Touchstone, p. 654. In the modern case of *Hibblewhite v. McMorine* (6 M. & W. 200) this rule, and another equally clear and well settled one, viz., that to render the execution of a deed by an attorney or agent by a prior authority valid, the authority must be under seal, were recognised and acted upon. The case of *Texira v. Evans* (1 Anstr. 225, 228), at nisi prius, is the only one in which, so far as I am aware, they have ever been departed from, and it has been repeatedly declared not to be law (see ante, p. 622). They are both arbitrary, positive and settled rules, binding upon all Courts, both of law and equity, and which no authority except that of the legislature can lawfully contravene. According to them, the instruments of alleged transfer were void; they were not filled up when they were signed and sealed by the plaintiff, and Oliver had no authority under seal to fill them up. They were forgeries, and by filling them up he committed forgery, and was guilty of felony. But the argument has been, inasmuch as the plaintiff placed the blank transfers, signed and sealed, in the possession of Oliver, [641] and thereby gave him the opportunity of filling them up, he is estopped from averring that they are not his deeds, although they are really not, and that he is bound by them as effectually as if they were genuine deeds, signed, sealed and delivered by him in due form of law. If five hundred people had seen the plaintiff deliver the blank transfers to Oliver, and heard him direct that they should be filled up with apt and proper words to transfer the shares and deliver them when complete to the transferee, the rules before mentioned would intervene and prevent such instruments from operating as the deeds of the plaintiff. But the argument is, that the circumstance of the blank transfers being in Oliver's possession through the negligence and want of care and caution of the plaintiff, has an operation

beyond a possession with an actual parol authority, and for all practical purposes operates upon him as if he had in person executed the deeds when filled up and complete.

The doctrine of estoppel, although now to a great extent obsolete, was well known in ancient times. Commentaries upon it will be found in Coke upon Littleton, and in all the old Digests; and it is an extraordinary circumstance that neither in the Court of Common Pleas or in this Court have these authorities been referred to. It may therefore be safely inferred that nothing has been there found to support the view for which the defendants contend. One question which occurs in the consideration of a contention whether a man has by his conduct estopped himself from averring the truth, must be whether his conduct be such as, assuming it to have caused damage to the person alleging the estoppel, would render him liable to an action at the suit of this person. This point was referred to by Baron Parke, in delivering the opinion of the Judges in *The Bank of Ireland v. The Trustees of Evans's Charities* (5 H. L. Cas. 389), and it is [642] an apt and pertinent one. If he would not be liable to an action, it is difficult to see how he can be estopped. In the present case one of three parties must suffer the loss consequent upon Oliver's fraud. If the plaintiff fails in the present action, he is the person who must bear it. If, on the other hand, he succeeds, the loss must fall either upon the defendants or the transferees, and if it could be made out that the defendants, in the event of the name of the plaintiff being replaced on the register, would be liable to make good to the transferees their loss, and the defendants could maintain an action against the plaintiff for an indemnity, it would go very far to shew that the defendants ought now to succeed, as a decision in favour of the plaintiff would only lead to circuity of action, which, as far as possible, ought to be avoided. An action of this kind at the suit of the defendants would be very complicated, but the principle of it may be tested by one at the suit of the transferee. Suppose the case to be that, before the name of the transferee had been entered upon the register, the plaintiff had discovered Oliver's fraud, and given notice to the defendants not to alter the name, and they had acted upon this notice. If the defendants could maintain the action against the plaintiff, the transferee could do so also, for the alleged tortious act of the plaintiff is identical as against both. It seems to me only necessary to state what the averments in the declaration would of necessity be, to shew that no such action could be maintained. It would first state that the defendant (in that action) had negligently, and without due care and caution placed in the hands of Oliver two blank transfers, signed and sealed by him, to enable him to fill them up and transfer to purchasers certain shares in another Company: that Oliver had opened a box in which the certificates of the shares in question were deposited, and taken them thereout (this being a [643] felonious act): that, having ascertained their numbers, he had inserted them in the blank transfers (this being a second felonious act), and then delivered them to the plaintiff in that action (being a third felonious act), who, believing them to be genuine transfers, paid the purchase money to Oliver: that the defendant gave notice to the Company not to act upon the transfers, and they refused to do so, by reason whereof the plaintiff had lost his purchase money, Oliver being insolvent and unable to pay it back. I do not think it would be contended by any one that such a declaration would shew a good cause of action. The act of the defendant, however negligent it may be assumed to have been, would be much too remote from the damage to render the defendant liable. There would be a good cause of action against Oliver (assuming indictments for the felonies against him to have been terminated), but not against the present plaintiff. The law prescribes what the conduct of men shall be towards each other; and if the act or negligence of a man afford no right of action to another who has sustained loss in some degree connected with or consequent upon it, how is it possible that the same act or negligence can estop him from averring the truth, which, if he is estopped from doing, the same precise evil consequence will ensue to him as if he had committed an unlawful act?

But, without reference to any abstruse legal reasoning, when a statute requires that the transfer of a share shall be by deed, the plain meaning is that it shall be by a writing under seal, being a deed according to the rules of the common law; and it seems to me that to hold that a writing not a deed shall convey the interest, by reason of the negligence or want of due care and caution of the owner of the share in regard to it, is nothing less than a judicial repeal of the statute.

[644] In the argument on behalf of the defendants, no attempt was made to discuss the question upon legal principles, but various authorities were cited, which it was said decided the question. The judgment of the Court of Common Pleas in the present case, where the Chief Justice and Mr. Justice Keating were of one opinion, and Mr. Justice Williams and Mr. Justice Willes of the other, cannot be deemed an authority. A real authority would be a case where a party was sued upon a deed, and pleaded non est factum, and a replication by way of estoppel, alleging that the defendant had negligently, and with a want of due care and caution, put into the hands of a third party a blank paper, signed and sealed, and thereby enabled him to deceive the plaintiff, was adjudged to be good. Such a case would be an authority, but none such has been cited. The authority first relied on was a passage from the judgment of Mr. Justice Ashurst in the celebrated case of *Lickbarrow v. Mason* (2 T. R. 70). This was the case in which ultimately it was held that an assignment by indorsement of a bill of lading for valuable consideration, defeated the right of the vendor to stop in transitu; and the passage is, that "wherever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Now, the excellence of this as a general principle no one will dispute, but Mr. Justice Ashurst was speaking of a bill of lading, a document which was not in use for centuries after the rules of law relating to deeds were established. Mr. Justice Ashurst had no more within his contemplation deeds, or their legal requisites, than he had as to what constitutes the crime of murder; and in my judgment these observations of his have no bearing upon the present question. The next authority was *Young v. Grote* (4 Bing. 253). Before I state what this case was, I refer again [645] to the case of *Hibblewhite v. M'Morine* (6 M. & W. 200), where it was held that a paper containing a transfer of a share, signed and sealed by the owner, but with the name of the transferee in blank, which name was afterwards filled in by a third person, with the prior parol authority of the owner, was not a deed, but was void, and did not transfer the share. The concluding sentence of the judgment is, "In truth this is an attempt to make a deed transferable and negotiable, like a bill of exchange or exchequer bill, which the law does not permit." The case of *Young v. Grote* was this: A person who had an account with a bank authorized his wife to draw checks, and she filled up one for 50l. in such a manner as enabled a fraudulent holder to insert the words "Three hundred and" in the body of the check, before the word "Fifty," and the figure "3" before the figures "50" in the left hand corner, in a manner to deceive the banker, and to induce him to suppose that it was a check for 350l., and it was held that the latter was entitled to charge the plaintiff 350l. in account. This case will be found referred to in *Hibblewhite v. M'Morine* and *The Bank of Ireland v. The Trustees of Evans's Charities*, and has been stated to be capable of being supported upon various grounds, one being that the check was a negotiable instrument. In *Hibblewhite v. M'Morine* it was held that it had no application to the case of a deed, and I entirely concur with this judgment. The next case cited was *Coles v. The Bank of England* (10 A. & E. 437). This was a case of an alleged subsequent ratification, and has no bearing upon the present, which must rest upon conduct and acts prior to the alleged delivery. This will also be found referred to in the case in the House of Lords before mentioned. But subsequent ratification stands upon an entirely different principle from a prior authority, for if a deed be delivered by a person professing to be an agent, and the principal afterwards personally agree to it, it is a good deed, and the maxim "omnis ratihabitio mandato æquiparatur" applies (Sheppard's Touchstone, p. 57). The next case was *The Sheffield, &c., Railway Company v. Woodcock* (7 M. & W. 574). This was an action for a call. By a section of the Act the production of the shareholders' register, containing the name of the proprietor, was to be primâ facie evidence of his being a shareholder. The transfer to the defendant had been executed in blank, as in *Hibblewhite v. M'Morine*, but he afterwards signed a proxy paper in the form directed by the Act and transmitted it to the secretary, and in consequence his name was entered on the register as the original proprietor of the shares in respect of which the call was made. Upon a motion to enter a nonsuit it was urged that the deed of transfer was in blank, and *Hibblewhite v. M'Morine* was cited. But Baron Parke said, "The defendant held out false colours to register him as a proprietor, and therefore to bring the action against him. It is an universal rule of law that where a party makes a representation to another, whereby the situation of the latter is altered, he is bound thereby." Now, is

it to be supposed from this observation that Baron Parke, who delivered the judgment in *Hibblewhite v. M'Morine*, had become of opinion that it was wrongly decided. I apprehend nothing of the sort. He merely expressed an opinion, which is correct, that the liability to pay calls being dependent upon the name of the party being on the register with his consent, a defect in the instrument whereby it got there, he having subsequently sanctioned and adopted its insertion, was immaterial. This case was afterwards approved of and acted upon in *The Cheltenham, &c., Company v. Daniel* (2 Q. B. 281). There were also cited *Russel v. Langstaffe* (2 Doug. 514), *Schultz v. Astley* (2 Bing. N. C. 544), both cases [647] of bills of exchange, and *Pickard v. Sears* (6 A. & E. 469), where a statement is made of a supposed general rule of law in like manner as that made by Mr. Justice Ashurst in *Lickbarrow v. Mason*. For a correct appreciation of this rule of law, I think the case of *Freeman v. Cook* (2 Exch. 654), and the before mentioned case of *The Bank of Ireland v. The Trustees of Evans's Charities* should be well considered.

These were all the authorities in the Courts of common law cited on the argument, and I need scarcely say that none of them approach what I have already said would be a real authority upon the point. There were some cases in equity cited; but, so far as regards the doctrine of estoppel in the sense of estopping a man, by reason of some negligence or want of due care and caution anterior to the execution of a deed, from averring that a writing is not his deed, they afford no colour for it. The case principally relied on was *Taylor v. The Great Indian Peninsular Railway Company*, originally before Vice Chancellor Wood, and afterwards before the Lords Justices by appeal, and reported 4 De Gex & Jones, 559. I apprehend a Court of equity, no more than a Court of law, can hold a writing to be a deed which is defective as not being in accordance with the rules of law. One of its functions is to compel men specifically to perform their contracts; and if a contract was not performed, by reason of a defect in the deed intended to carry it out, they would compel the contracting party to execute a new and valid one. But it is impossible, as it seems to me, that there can be a stronger repudiation of the doctrine of estoppel, contended for by the defendants, than the judgments of both the Lords Justices. In page 569, Lord Justice Knight Bruce says distinctly that the interest of the plaintiff was not affected by the deed executed in blank; [648] and Lord Justice Turner, at page 573, says, that the deed was not the deed of the plaintiff admitted of no question; and he adds, "The law on the point is perfectly settled, and it would be most dangerous in any way to unsettle it." So far from this case being an authority in favour of the doctrine contended for, it is directly the reverse. There was a case cited, *In re North of England Joint Stock Banking Company, Staffon's Executor's case* (1 De Gex, M. & G. 576), before Lord St. Leonards, but he was speaking of a ratification of a deed by assent or agreement subsequent, which, as has been said before, may well be. The only other case cited on behalf of the defendants was the before mentioned case of *The Bank of Ireland v. The Trustees of Evans's Charities* (5 H. L. Cas. 389). This was an action in the Court of Queen's Bench in Ireland. The secretary of the plaintiffs below, who were a corporation, had fraudulently affixed their common seal to five letters of attorney, authorizing the transfer of stock; and the question was, whether the plaintiffs were bound by his act. Chief Justice Blackburn had directed the jury that, if they believed the documents to have been forgeries, the plaintiff was entitled to the verdict, unless they believed that the use made of the common seal of the corporation by their secretary, whereby the defendants were imposed upon, was caused exclusively by the negligence or default of the plaintiffs; to which direction a bill of exceptions was tendered. The letters of attorney were in apt and proper words. There were no blanks in them when executed. The genuine seal of the corporation was impressed upon the wax; and the attestation of the attesting witness was, on his part, honest, he believing that the secretary was authorized to use the seal. Now, in every such case, it must of necessity be a question, to be decided by extrinsic [649] evidence, whether the seal has been affixed by the authority of the corporation; and the point decided by the House of Lords was that in that particular case there was no evidence which ought to have been submitted to the jury that the letters of attorney were the plaintiffs'. Baron Parke, in delivering the opinion of the Judges, stated that "they were all of opinion that the negligence which would deprive the corporation of their right to insist that the transfer was invalid must be negligence in, or immediately connected with, the transfer itself;" and, in a subsequent part of the judgment, he said that

"it was quite impossible that the bank could have maintained an action for the negligence of the corporation, and recover the damages they had sustained by reason of having made the transfers."

Those are the cases which have been cited, and I think it may be said with certainty that there is not one of them which is an authority for the proposition that, where a deed is not the deed of the party, he may be estopped by negligence or carelessness on his part from being permitted to aver that it is not. But beyond this I think the opinion of the Judges in *The Bank of Ireland v. The Trustees of Evans's Charities* is an authority in favour of the plaintiff. There was no technical difficulty there. The writing was complete when the seal was attached to it. There was no authority to the secretary to affix the seal, but the contention was that the negligence and want of due care and caution on their part estopped them from denying it to be their deed, or in other words rendered the deed practically binding upon them. The opinion of all the Judges was, that negligence, to have this effect, must be in or immediately connected with the execution of the deed itself. In the present case the alleged negligence of the plaintiff was separated from the execution of the alleged transfer by three felonious acts of Oliver, all of them in fraud of the plaintiff. As to what has been called the equitable rights of the parties, [650] I certainly think that, if the circumstances be such that a Court of equity would compel the plaintiff to execute a valid deed of transfer of the shares, we ought not to interfere; but I do not think a Court of equity would do so. The circumstances are these,—The plaintiff was the owner of shares; upon the shares there was indorsed by the authority of the defendants, "No transfer will be registered unless accompanied by this certificate." Unless therefore the plaintiff parted with the certificates, he had no reason to suppose that a transfer could be effected. Now the certificates were locked up in a box deposited at a banker's, of which, as he believed, no one except himself had a key, and he had as much reason to suppose the certificates were securely within his custody as if the box had been in his library. In fact the certificates were got possession of by Oliver by a felonious act, and I think the plaintiff is no more responsible for this than if the certificates had been obtained by a burglary. So also I think the circumstance that he had directed his letters to be addressed to him at Oliver's office is a blameless act; it is a common occurrence that a man directs letters to be addressed to him at the residence of another. The blameable matter imputed to him is that he delivered to Oliver signed and sealed transfers in blank, which enabled Oliver to commit the fraud. Now in the first place Oliver was not the general agent of the plaintiff, and there is no authority, so far as I am aware, that relieves a party who claims under the act of an agent from the necessity of proving the fact of agency, and that the agent had authority to do the act. In truth the plaintiff did not authorize this act: he authorized Oliver to fill up the blanks with the description of the shares in the other Company. It was said that if the alleged transfers in the present case were not binding, neither would the transfers in respect of the shares in the other Company; but this is a mistake. It is true that the transfers would be void as the plaintiff's deeds, [651] but a Court of equity would compel him to perform his contract, and execute effectual transfers. I by no means say that the placing the blank transfers in Oliver's hands was not an imprudent act, but I do say with confidence that no action at law would lie against the plaintiff for any damage which the defendants may sustain by reason of the fraudulent dealing of Oliver with them. For this position as I have already said, *The Bank of Ireland v. The Trustees of Evans's Charities* is, in my opinion, an authority. The legal answer to such an action would be that the act of the plaintiff was too remote from the damage to afford a cause of action; and it seems against reason to suppose that a man can be estopped from averring the truth, that a writing is not his deed, if his conduct be such that no action could be maintained against him at the suit of the party who has sustained the damage. Oliver is liable to the defendants. It is true he is now a convicted felon, and any remedy against him must be futile; but it is too much to require the law to afford to a party grieved not merely a remedy, but one against a party who is able to make good the loss. There is no doubt an observation by Lord Justice Turner, in the case before mentioned (page 574) favourable to the defendants' view, but I do not concur in it. All that the plaintiff did was to deliver to Oliver blank transfers, signed and sealed for an honest and legitimate purpose; he had no reason to suppose that Oliver possessed the information to enable him to use them for a fraudulent purpose. He could

only obtain it by committing the felony, for doing which he has been convicted, and sentenced to twenty years penal servitude. Again, he could not effect the colourable transfer except by committing two other felonies, which he also committed; and I do not think it reasonable to impute negligence and carelessness to the plaintiff to the extent of depriving him of his property, because he did not contem-[652]-plate beforehand that Oliver, who from aught that appears had up to this time borne an honest character, might, by committing three felonies, impose upon the defendants.

It may be said that the signatures to the transfers were the genuine signatures of the plaintiff, and the defendants were unaware that they were in any way defective, and why, it is asked, are they not to be protected in altering the register? The answer is that the transfers were required to be by deed, which is an instrument of a wholly different character from a bill of exchange, or other negotiable instrument. The defendants acted at their peril in not ascertaining that the transfers were the genuine deeds of the plaintiff.

I am unwilling to add to this very long judgment, but I cannot conclude without stating my entire concurrence with that of Mr. Justice Williams. He states most truly, that if the doctrine contended for be law, a man may find himself deprived of his estate without having ever had the slightest intention of parting with it: and although no one is more disposed than I am to enforce fair and honest dealing between man and man, I cannot think, and do not think, that I am called upon by the circumstances of this case to adjudge that by law the plaintiff has forfeited his property, which he never had the intention to part with, and for which he has received no consideration.

CHANNELL, B. The facts stated in this special case are substantially the same as those which were before the Court of Common Pleas in the case *Ex parte Robert Swan*, reported in the 7th volume of the Common Bench Reports, New Series, p. 400.

In that case the Court of Common Pleas, in Easter Term, 1859, granted a rule calling upon the North British Australasian Company (Limited) to shew cause why the [653] register of shareholders in that Company should not be rectified by replacing thereon the name of Mr. Robert Swan from the time his name was removed therefrom in respect of certain shares particularly mentioned.

The application was grounded on the 25th section of the 19 & 20 Vict. c. 47, and the 9th section of the 20 & 21 Vict. c. 14.

The rule was afterwards amended by calling upon certain persons to shew cause against it, being persons who were registered as the then holders of shares in the said Company which had formerly stood in the name of the said Robert Swan.

The case was twice argued. The Court of Common Pleas, after the second argument, was equally divided in opinion, and consequently the rule dropped.

A rule similar in effect was then moved for and obtained in this Court. On motion to make it absolute, we thought the question was of too much importance, and, considering the equal division of opinion amongst the Judges who heard the second argument in the Common Pleas, of too much doubt, to be decided on motion.

We therefore enlarged the rule to enable the parties so to raise the question as to admit of an appeal to a Court of error from our decision, whatever that decision might be.

This has been done by means of the action which has been brought and the special case which has been settled between the parties. The question, though raised in a different form, is in substance the same as that argued before the Court of Common Pleas; and is raised, as I have already stated, upon facts substantially the same as those which were before that Court; this Court being relieved by the counsel of the parties from a technicality that might have arisen on the pleadings.

[654] The facts are fully stated in the special case, and I do not think it necessary to refer to them at any length. The certificates for the shares in question, and other shares, were placed in a box which was locked of which the plaintiff kept, as he thought, the only key; and he never authorized the broker, Oliver, to touch any of the certificates of the shares in question. They bore upon them this notice:—"No transfer of any of these shares will be registered unless accompanied by this certificate." And by the regulations of the Company, "The person registered as the holder may transfer the same by deed in a form approved of by the directors, if the same is executed by both transferrer and transferee." In addition to which, it is carefully provided that it will not be registered until the transferee has executed; so

that until then it is clear that the transfer is not deemed to be complete. It is also clear that the certificates without the transfers would be useless. As the Lord Chief Justice said in the Court of Common Pleas, "they are neither the shares nor the title to them, but merely evidence of ownership, which the purchaser with ordinary care would inquire for." The possession of them by Oliver, the broker, might, no doubt lead anyone naturally enough to conclude that Oliver was authorized to deliver a deed of transfer, but without the deed they could have no effect whatever. And though their possession by the broker with the consent, or even by the laches or negligence of the plaintiff, might have had a material effect upon the case as against him, the case expressly states that Oliver feloniously stole them. The case likewise states, that when the lock was altered, the plaintiff took care to examine the box and see that the certificates were all safe, retaining himself, as he thought, the only key. He resided, however, at a distance, and on two occasions when he had to transfer shares [655] in other Companies, sent to Oliver such a number of transfers as Oliver told him were required, which were executed, that is, signed and sealed by the plaintiff in blank; and some were, it appears, retained by Oliver and applied to the subsequent transfer of the shares in question. These transfers bore attestations by a witness without date, but with the address "Paris," from which it would appear to anyone taking them that the owner, the plaintiff, was there. They must therefore have been sent by the plaintiff to Oliver in London, and by him delivered to the transferees at the time when executed by them; and thus, although the attestation clause, no doubt, in a printed form runs thus:—"Signed, sealed, and delivered" by &c., it is manifest that the delivery really was by Oliver in London. Nevertheless when the transfers and certificates were presented to them for approval, according to their rules, they merely wrote the customary letter to the plaintiff, directed to the address he had given them at Oliver's office, and without waiting for an answer, although the transfers shewed he was at Paris, and without seeing anything suspicious in the absence of any notice or answer they registered the transfers of the shares in question.

In the argument before us it was not seriously contended that there had been in this case any valid transfer of the shares in question. It could not well have been so contended consistently with the doctrine laid down by this Court in the case of *Hibblewhite v. M'Morine* (6 M. & W. 200), viz., that to authorize the execution of a deed by an agent an authority under seal is necessary. It is important, however, to bear in mind that apart from the question of the necessity of an authority by deed, there is no direct evidence whatever of any authority in fact by the plaintiff to Oliver to transfer the shares in question.

[656] It was argued by the counsel for the defendant, that the plaintiff was not entitled to the remedy sought by his rule and by this action, inasmuch as upon the facts stated in the special case he was estopped, as against persons claiming title to the shares as *bonâ fide* purchasers, from denying the existence of a valid transfer.

There are some cases of estoppel clearly recognised by law, which do not owe their efficacy to any connection with or reference to any deed. There is the well known rule that a tenant receiving possession of premises from a person assuming to be his landlord, is estopped from denying the title of the landlord at the time he received possession. Other cases, not perhaps quite analogous but not very dissimilar, may be put. For instance, where there has been an acknowledgment of title to personal property, goods or chattels of any description. Thus, an auctioneer who has been employed by a particular individual to sell for him is in general estopped from disputing his employer's title. So a wharfinger who has given an acknowledgment for goods: see *Holl v. Griffin* (10 Bing. 246). There the Court ground their decision on the legal effect of the acknowledgment as shewing that the wharfinger held the goods for the plaintiff, just as by a rule of law a tenant is said to be estopped from disputing his landlord's title.

In most of these cases, and in other similar cases which might be put, the party said to be estopped has been in communication, personally or by writing, with the party setting up the estoppel.

There is also that class of cases where agents have given credit in their accounts, and have sent such accounts to their principals as if certain sums had been received for them, and who have been estopped from disputing the fact thus untruly stated: *Shaw v. Pictou* (4 B. & C. 715), *Shaw v. Dartnell* (6 B. & C. 56), [657] *Skyring v.*

Greenwood (4 B. & C. 281); and generally it may be said that there is an estoppel where one has made a false statement on which another has acted, and so altered his position; as where one represents that certain property is the property of a certain person when it is not.

This doctrine was, I apprehend, well settled before the case of *Pickard v. Sears* (6 A. & E. 469), which perhaps only brought, for the first time, this fuller explanation of the doctrine that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring as against the latter a different state of things existing at the same time.

The estoppel in this case, if any, is the estoppel which arises by representing, or authorizing to be represented, something false, that is something as existing in fact which did not exist in fact, and thus being precluded from shewing what is true. Where a party accepts a bill, he is estopped from disputing that the signature of the drawer is genuine (*Beeman v. Duck* (11 M. & W. 251)), though it be a forgery: aliter of an indorsement of the drawer, unless he knew of the forgery. But cases as to bills of exchange and checks seem to rest entirely on the law-merchant: see *Marston v. Allen* (8 M. & W. 494, 503); *Ingham v. Primrose* (7 C. B. N. S. 85).

In all cases of the kind of estoppel we are called upon now to consider, the party has, I conceive, either himself made or authorized to be made a statement of fact untrue, or he has conducted himself so as to give rise to the belief of a fact not true.

It does not appear to me that the leaving the two trans-[658]-fers, signed and sealed by the plaintiff in blank, with Oliver, the broker, shews that the plaintiff, by his conduct, authorized a statement of any fact untrue, or the belief of a fact not true. But the case is put by the defendants on the ground that, by the plaintiff's negligence, he enabled Oliver to commit the fraud complained of; and that this negligence on the part of the plaintiff is to estop him from disputing that there was a valid transfer.

This view of the case is urged, I apprehend, principally with reference to the ruling of Mr. Justice Ashurst in *Lickbarrow v. Mason* (2 T. R. 63, 70), where he says, "We may lay it down as a broad general principle that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

No doubt this ruling has admitted of very general application, and has been followed in cases of commercial and negotiable instruments, and in documents and transactions which take effect were valid, by reference to the law-merchant.

It would seem that an estoppel may arise out of circumstances having reference to a bill of lading or negotiable instrument taking effect by virtue of the law and custom of merchants, where no estoppel could arise from nearly similar circumstances with respect to a document not operating by virtue of the law and custom of merchants: see *M'Ewan v. Smith* (2 H. L. Cas. 309, 325). There the question was as to the effect of a delivery order and a right to a lien on the goods mentioned therein. In giving his opinion to the House, the Lord Chancellor (Cottenham) notices an argument that had been urged at the bar, which was "that though the delivery note does not pass the property as a bill of lading would have passed it, by being indorsed over from one party to another, still it [659] operates as an estoppel upon the party giving it, so far at all events as a third party is concerned, and it is argued that it is a kind of fraud for a person to give a delivery note which the person receiving it may use so as to impose upon a third person, and then to deprive that third person of its benefit." Adverting to this the Lord Chancellor said:—"But that argument is merely putting the argument as to the effect of a delivery note in another form, and it assumes that such a document has all the effect of a bill of lading. But as the nature and effect of these two documents are quite different from each other, it seems to me that such an argument has no foundation at all, and cannot be adopted without converting a delivery note into a bill of lading."

The possession by the broker Oliver of the transfers executed by the plaintiff in blank no doubt facilitated the commission of the fraud by Oliver; but the case expressly finds, setting out the circumstances, that Oliver feloniously stole the certificates. To give to the blank transfers the semblance of validity, Oliver not only filled them up for the purpose for which they were used without authority, but did so fraudulently and so was guilty of forgery. He committed a second forgery in putting to the transfers the signature of the supposed attesting witness.

To defeat the plaintiff's right, on the ground of negligence, it must be shewn, I think, that that negligence is connected with the damnification to the other party, and is the direct cause of the loss; and this it appears to me cannot be as regards instruments such as these transfers, where a wrongful, or at all events where a felonious act of another party has intervened. This view, that the negligence must be proximate, is in accordance with the decision of the House of Lords in *The Bank of Ireland v. The Trustees of Evans's Charities* (5 H. L. Cas. 389).

[660] I do not think it necessary to go through all the authorities cited in the course of the argument.

I have had the advantage of reading and considering the judgment of my brother Martin. Agreeing with him in his view of the cases and of their application to the present case, I content myself with one or two observations upon them. *Tevira v. Evans* (1 Austr. 228) is the only case that has been brought before us in which the argument contended for in the present case, or anything like it, was sought to be made applicable to a deed executed in blank. I agree with my brother Martin in thinking that that case must be considered as overruled.

Young v. Grote (4 Bing. 253) was strongly pressed upon us. That case must be considered as explained by Parke, B., in the case of *Roberts v. Tucker* (16 Q. B. 560), and by the Judges in the House of Lords in *The Bank of Ireland v. The Trustees of Evans's Charities* (5 H. L. Cas. 389). I agree in the view expressed by my brother Williams, in the Court of Common Pleas, that it seems doubtful whether the cases as to the liability of a man who signs a blank bill, or note, or check, are founded on the doctrine of estoppel, or on a rule of law-merchant that an actual authority is thereby conferred on the person in whose hands the instrument is.

If the present had been the case of a negotiable instrument governed by the law-merchant, or even a case in which a transfer could have been made by simple contract without deed, there might have been ground for contending for the defence relied upon by the defendants. But the cases relied on, with the exception of *Tevira v. Evans*, are cases of negotiable instruments.

I agree with my brother Willes in the view expressed by him in the Court of Common Pleas, that such instruments [661] form part of the currency of the country and stand upon a peculiar footing; and that the doctrine applicable to such instruments has never yet been extended to conveyances by deed of land or other property. I participate fully in his unwillingness so to extend that doctrine.

I am of opinion that our judgment should be for the plaintiff.

MARTIN, B. The Court being equally divided in opinion, according to the usual practice the junior Judge will withdraw, in order that the case may be taken to a Court of error; and our judgment will be for the plaintiff.

Judgment for the plaintiff.

SHEPPARD v. THE UNION BANK OF LONDON. Jan. 20, 1862.—To a count for detainee of goods, the defendants pleaded that they were bankers, and whilst S. had dealings with them as such bankers L. was intrusted by the plaintiff with the said goods as his agent: that the defendants were possessed of other goods upon which they as such bankers had a valid lien in respect of previous advances to S. at the request of L.: that it was agreed between L. and the defendants, as such bankers, that in consideration of the delivery by the defendants to L. of the said other goods he would deliver to the defendants as such bankers, and by way of pledge, the goods in the count mentioned, and that the defendants should hold the same as a lien, instead of the said other goods, in respect of the previous advance and also such further advances as the defendants might make to L., and which L. then requested the defendants to make: that the defendants, in pursuance of the agreement delivered up to L. the said other goods, and L. then delivered to the defendants the goods in the count mentioned as such pledge, and the defendants afterwards advanced to S. further sums of money which are still owing. Replications: First, that the plaintiff was induced to trust L. with possession of the goods in the count mentioned by the fraud, misrepresentation and covin of L. Second: that the agreement by L. to deliver to the defendants by way of pledge the goods in the count mentioned was not made, nor were the goods delivered to the defendants by L. by way of pledge, in the usual and

ordinary course of business. Third: that the said other goods in the plea mentioned were not the goods of L. or pledged with the defendants by L., nor had the defendants any lien upon the same from L.—Held: First, that the transaction disclosed by the plea afforded a good defence under the 2nd section of the Factors' Act, 5 & 6 Vict. c. 39. Secondly, that neither of the replications was an answer to the plea.

[S. C. 31 L. J. Ex. 154; 8 Jur. (N. S.) 264; 10 W. R. 299; 5 L. T. 757. Referred to, *Cole v. North Western Bank*, 1875, L. R. 10 C. P. 373. Adopted, *Cahn v. Pockett's Bristol Channel Steam Packet Company*, [1899] 1 Q. B. 643.]

The last count of the declaration stated that the defendants detained from the plaintiff his goods, that is to say, a locket and necklace, &c.

Plea, to that count. That, at the time of making of the pledge or deposit hereinafter mentioned, the defendants [662] were and still are bankers carrying on the trade and business of bankers in copartnership, and one Sydney Linnett had dealings with them as such bankers, including the dealings hereinafter mentioned; and whilst the said Sydney Linnett had such dealings with the defendants as such bankers, one John Linnett was intrusted by the plaintiff with the possession of the goods as the agent of the plaintiff; and the defendants were at the same time possessed of other goods upon which the defendants as such bankers then had a valid lien and security in respect of previous advances and loans of money made by the defendants as such bankers, and in the ordinary course of their business as such bankers, to the said Sydney Linnett, at the request of the said John Linnett, by virtue of an agreement theretofore made by the defendants as such bankers with the said John Linnett. And the defendants, as such bankers, and the said John Linnett being so respectively possessed of the said respective goods, it was agreed by and between the said John Linnett and the defendants, as such bankers, that in consideration of the delivery by the defendants to the said John Linnett of the said other goods, he the said John Linnett would deliver to the defendants as such bankers, and by way of a pledge, the said goods in the last count mentioned; and that the defendants should hold the same goods as a valid lien and security in the place and stead of the said other goods in respect of the said previous advance, to the amount of the value of the said other goods, and also in respect of such future advances as the defendants might make in the way of their trade and business of bankers to the said Sydney Linnett, and which the said John Linnett then requested the defendants to make. And the defendants say that they accordingly, in pursuance of the said agreement, then delivered up to the said John Linnett the said other goods; and the said John Linnett then delivered to the defendants [663] as such bankers the said goods in the last count mentioned as such pledge, lien and security. And the said agreement was made *bonâ fide* on the part of the defendants. And the said other goods so delivered by the defendants to the said John Linnett were of a value equal to that of the goods in the last count mentioned; and there is still due and owing to the defendants as such bankers a large sum of money, exceeding the value of the said goods in the last count mentioned, in respect of the said previous advance. And the defendants as such bankers afterwards, in pursuance of the said request, advanced and lent to the said Sydney Linnett further large sums of money, which are still due and owing from him to the defendants; wherefore the defendants as such bankers detained and still detain the said goods in the last count mentioned for a lien and security for the said monies so due and owing to the defendants as such bankers as aforesaid, which is the alleged detention.

Demurrer and joinder therein.

Replications. First: that the plaintiff was induced to intrust the said John Linnett with the possession of the said goods in the last count mentioned by the fraud, misrepresentation and covin of the said John Linnett.

Second. That the agreement by the said John Linnett to deliver to the defendants by way of pledge the said goods in the last count mentioned was not made, nor were the said goods, nor were nor was any or either of them, delivered to the defendants by the said John Linnett by way of pledge, as in that plea mentioned, in the usual and ordinary course of business.

Third. That the said other goods in the said plea mentioned did not, nor did any of them belong to, nor were they, nor was any of them, the goods of the said John Linnett, or delivered to or pledged with the defendants by [664] the said John

Linnett, nor had the defendants any lien or security upon the same from the same John Linnett.

Demurrers to the replications, and joinders therein.

Prentice, for the plaintiff. Assuming the plea to be good, the first replication is an answer to it. It cannot be said that John Linnett was intrusted with the goods within the meaning of the Factors' Act, 5 & 6 Vict. c. 39, when he obtained possession of them by fraud, misrepresentation and covin. In order to render a factor a party intrusted with the possession of a document of title to goods, within the meaning of the previous Factors' Act, 6 Geo. 4, c. 94, it was necessary that the owner of the goods should have intended that the factor should be possessed of them at the time of the pledge: *Phillips v. Huth* (6 M. & W. 573). There Parke, B., in delivering the judgment of the Court, said:—"If the legislature had intended to make the simple possession of such instruments sufficient to enable the party having them to make a good title, they no doubt would have so provided; if they had, the innocent party dealing with him would have been protected, but the innocent owner would, in that case, have suffered, if the document had been taken from him by felony or fraud. But by providing that a person should be intrusted as well as in possession, the inconvenience is obviated." That decision is an authority under the 5 & 6 Vict. c. 39. The word "intrusted" implies a confidence reposed in the agent, and he cannot be intrusted within the meaning of that Act unless there was an intention to trust him. [Martin, B. An agent may tell his principal a specious story, by which the latter is deceived, and upon the faith of it delivers to the agent goods, why is he not intrusted with them within the meaning of the 5 & 6 [665] Vict. c. 39. It is true that he did not intend to intrust, but was led astray by a fraudulent representation; he does not however the less intrust.] The legislature intended that those persons only should suffer by the frauds of their agents, who intrusted them with goods or evidences of title without taking precautions to prevent them from deceiving others. Intrusting with a document is essentially different from enabling a person to become possessed of it. A party intrusted with a bill of lading for the purpose of selling the goods mentioned in it, is not, in consequence of being so intrusted, to be considered as intrusted with the dock warrant, notwithstanding that his possession of the bill of lading and of the goods under it enables him to obtain the dock warrant: *Hatfield v. Phillips* (9 M. & W. 647; in error, 14 M. & W. 665). [Channell, B. That case does not support your proposition; for there was no intention to intrust the party with the dock-warrant.] *Kingsford v. Merry* (1 H. & N. 503) and *Higsons v. Burton* (26 L. J. Exch. 342) are authorities that if a person obtains possession of goods by false pretences or fraud, he is not intrusted with them so as to give a pledgee a good title as against the owner. The 5 & 6 Vict. c. 39 applies to the fraud of the agent, provided he obtained lawful possession of the goods; but this replication states that he obtained possession of them by fraud. [Pollock, C. B. If the agent was in fact intrusted with the goods, it is immaterial in what way that was effected. Martin, B. I can conceive a case of a person obtaining goods by fraud, which would not be an intrusting, as, for instance if a person pretended that he had authority to buy goods on credit when he had not and so got possession of the goods.]

The second replication is good. The 5 & 6 Vict. c. 39 does not apply to every case of a pledge by an agent intrusted with the possession of goods or documents of title [666] to goods, but only to a pledge in the usual and ordinary course of business; and the advancing money upon jewelry is not in the usual and ordinary course of business of bankers. The preamble of the Act recites the provision of the 6 Geo. 4, c. 94, which rendered valid as against the owner contracts with agents intrusted with goods, "provided the contract was made in the usual and ordinary course of business;" and the preamble also recites that "advances on the security of goods and merchandize have become an usual and ordinary course of business. In *Wood v. Rowcliffe* (6 Hare, 191), Sir J. Wigram, V. C., held that the 5 & 6 Vict. c. 39 applied only to mercantile transactions, and not to the case of advances made, upon the security of furniture used in a furnished house, to the apparent owner of such furniture, such apparent owner afterwards appearing to be an agent intrusted with the custody of the furniture by the true owner. [Martin, B. A person who takes a furnished house is not an agent intrusted with the furniture, but a bailee.] This was not a pledge in the usual and ordinary course of business with an agent. Every servant of the owner of goods employed in the care or carriage of such goods is in one sense an agent intrusted with

the goods, but he is not an agent within the meaning of the statute: *Monk v. Whittenbury* (2 B. & Adol. 484), 1 Smith's Lead. Cas. 654. [Wilde, B. The replication assumes that the goods were intrusted to John Linnett as agent, but says that he did not pledge them in the usual and ordinary course of business. Martin, B. That may mean that the pledge was made after the usual hours of business.] The preamble uses the words "advances on the security of goods and merchandize."

The third replication is good. The plea is founded on the second section of the 5 & 6 Vict. c. 39, but that section only gives validity to pledges made in consideration of the [667] delivery to the agent of other goods, upon which the person delivering them up had at the time an available lien in respect of a previous advance by virtue of a contract with such agent. Here the substituted goods were not pledged by the person to whom the advance was made on the security of the goods delivered up, or his agent, but by a third person. He referred to *Bonzi v. Stewart* (4 Man. & G. 295), 1 Smith's Lead. Cas., p. 655, 4th ed.

Rochfort Clarke, for the defendants. The plea is in conformity with the provisions of the second section of the 5 & 6 Vict. c. 39. It states that the defendants were possessed of goods on which they had a lien in respect of advances made to Sydney Linnett at the request of John Linnett, by virtue of an agreement made by the defendants with John Linnett, and that they delivered those goods to him in consideration of the pledge of other goods and of further advances to Sydney Linnett. [Martin, B. It may be that John Linnett was surety for Sydney in respect of his banking transactions.] The third section was intended to remove the difficulty which existed under the 6 Geo. 4, c. 94, in cases of excess of authority or fraud by the agent against the principal. It gives validity to contracts, and protects advances made *bonâ fide* and without notice that the agent has no authority to make the same, or is acting *malâ fide* in respect thereof against the owner of the goods. Under 6 Geo. 4, c. 94, s. 2, the pledge was invalid if the pledgee had notice, by the documents or otherwise, that the person intrusted with the goods was not the *bonâ fide* owner of them. [Wilde, B. The argument on the part of the plaintiff is, that the third section applies to the fraud of the agent, provided he has lawfully obtained possession of the goods, but this replication alleges that he got possession [668] of them by fraud.] The replication admits that he was in fact intrusted with the possession of the goods. If the possession was obtained by fraud, the plaintiff should have traversed that the agent was intrusted with the possession of the goods.

The second replication is bad, for it is immaterial whether the pledge was made or the goods delivered in the usual and ordinary course of business. The 5 & 6 Vict. c. 39, makes no mention of the "usual and ordinary course of business," except in the preamble, which recites the 9 Geo. 4, c. 94. [Wilde, B. The preamble only means this: whereas it has become usual to make advances upon the security of goods.]

The third replication is also bad. It admits that the previous advances and the pledge of the other goods were made at the request of John Linnett, and it shews that the substituted goods were pledged by him, not only in respect of the previous advances, but as a security for further advances which were made. Therefore, even if the plaintiff's view be correct, this replication is no answer to the plea.

Prentice replied.

POLLOCK, C. B. We are all of opinion that the defendants are entitled to judgment. At first I was disposed to think, with my brother Martin, that there was considerable doubt whether the plea was good; but, when examined and compared with the Act, it turns out to be good.

Then, what are the answers to it? The first replication is, that "the plaintiff was induced to intrust the said John Linnett with the possession of the goods by the fraud, misrepresentation and covin of the said John Linnett." So that if a principal employs an agent, who makes some [669] misrepresentation as to his authority to dispose of goods, although they are actually intrusted to him for the purpose of sale, and he has possession and absolute dominion over them as agent, if he has obtained that by fraud or misrepresentation, according to this replication he will have no power to pledge them. There is no foundation for such a replication. All that the statute requires is that the goods should be intrusted to him as agent, and this replication admits that they were.

The second replication is, in substance, that the pledge was not in the usual and ordinary course of business. But that is not required by the Act.

With regard to the third replication, there is a misapprehension as to what is required by the Factors' Act, with respect to substituted goods. That replication says that those goods "did not, nor did any of them, belong to, nor were they nor was any of them the goods of the said John Linnett,"—for which there is not the least necessity,—“or delivered to or pledged with the defendants by the said John Linnett, nor had the defendants any lien or security upon the same from the said John Linnett;”—not denying that there was some pledge or security, but traversing matters which may turn out in certain events to be wholly immaterial.

For these reasons, I am of opinion that the replications afford no answer to the plea, and that our judgment must be for the defendants.

MARTIN, B. I am clearly of opinion that the first replication is bad; for an agent may be intrusted with goods within the meaning of the Act, so as to be enabled to make a valid contract by way of pledge, although he obtained possession of them from his principal by fraud.

[670] The second replication is also bad. There is nothing in the Act about a pledge in "the usual and ordinary course of business," and I do not understand the meaning of it. It may mean that the pledge was made out of the usual hours of banking business. Another meaning has been suggested by my brother Wilde, that it is not in the usual and ordinary course of business for bankers to make advances on jewels. But, however that may be, I am of opinion that this replication is bad.

With respect to the third replication, the impression on my mind when I read the plea was that the advance protected by the Factors' Act was an advance made to the factor or his agent; and I was disposed to think the plea bad because it states that the advance was made, not to the factor or his agent, but to a third person. But before I could decide against the defendants I must be satisfied that where a person has pledged goods with a banker, upon the guarantee of another person for the payment of the debt, and the guarantor afterwards becomes intrusted with goods within the meaning of the Factors' Act, he cannot substitute those goods in lieu of the goods originally pledged by the person for whom he was guarantor. But I think that such a transaction is within the words of the Act. I have read them attentively, and it seems to me that, applying them to such a transaction, they would protect it. The words of the first section are, "that any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien or security, *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance or payment made upon the security of such goods [671] or documents, as also for any further or continuing advance in respect thereof," &c. There is nothing in that enactment which prohibits an advance in such a case as I have mentioned. The second section provides: "That where any such contract or agreement for pledge, lien or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandize, or documents of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien and security for or in respect of a previous advance by virtue of some contract or agreement made with such agent, such contract and agreement, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance within the true intent and meaning of this Act, and shall be as valid and effectual to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bonâ fide* present advance of money." It seems to me that a contract or agreement for pledge made with a guarantor is a contract or agreement within the meaning of that section. The third replication merely shews that John Linnett was not the owner of the goods originally pledged, and was not the person who gave the defendants a lien upon them; but that does not take the case out of this act of parliament; and, inasmuch as I cannot decide against the defendants without holding that such a transaction as I have mentioned would not be within the protection of the Act, I think that our judgment ought to be for the defendants.

CHANNELL, B. I am of the same opinion. The real question is, whether the plea is good, either under the first or second section of the Factors' Act. It appears to me that the plea is good. It alleges that the defendants [672] had a valid lien and security in respect of advances and loans of money made by them in the ordinary

course of their business as bankers, to Sydney Linnett, at the request of John Linnett, by virtue of an agreement theretofore made by the defendants, as such bankers, with John Linnett. It seems to me that agreement gave them a right to hold the goods originally pledged, although the money was advanced, not to John Linnett, but to Sydney at John's request. Then, the question is, whether the plea is displaced by any of the replications. I am clearly of opinion that the first and second replications are bad upon the grounds already stated. I certainly entertained some doubt as to the third replication; but in the sense in which I read the plea as constituting a good *primâ facie* answer to the declaration, the plea is not answered by the third replication; because, it is immaterial that John Linnett was not the owner of the goods originally pledged, and that the defendants did not obtain any lien upon them from him.

WILDE, B. The transaction disclosed by the plea is this: A person named John Linnett was the agent of the plaintiff who now sues for jewels, which John Linnett pledged with the defendants upon a twofold consideration. One part of the consideration was that certain goods which the defendants then had in their possession should be delivered up. Those goods had been deposited with the defendants by somebody, and they had made advances upon them to a person named Sydney Linnett, at the request of John Linnett, and by virtue of an agreement made by the defendants with him. The first part of the consideration was that those goods should be delivered up, and that the goods, the subject of this action, should stand as a security for the advances. The second part of the consideration was [673] that the defendants should make further advances to Sydney Linnett at the request of John Linnett. The plea goes on to say that they made those further advances.

The plaintiff replies, first, that he was induced to intrust the goods to John Linnett by fraud. Now although, as the plaintiff's counsel argued, there may be cases where goods come to the hands of an agent without constituting any trust in him,—for there may be a fraudulent holding of the goods, and then they are not “intrusted,” though he is the agent of the person to whom they belong, (and on the trial of this case it may turn out that the transaction was such that the goods were not intrusted within the meaning of the Factors' Act),—yet the plea says they were intrusted, and the first replication also says that they were, and merely adds that it was by reason of the fraud of the agent. In my opinion that makes no difference. The object of the statute is to protect a person who makes advances and who may know nothing of the dealing between the principal and agent. Mr. Clarke pointed out, in furtherance of that view, that the object has been not only to protect the pledgee from the fraud of the agent, but also to protect him if the agent acts without authority and *malâ fide* as against his principal.

The second replication alleges that the goods were not delivered to the defendants by John Linnett, by way of pledge, in the usual and ordinary course of business. There again, when the facts come to be proved, it may turn out that the circumstances under which the goods were pledged, were so unusual and out of the course of business of bankers as not to be within the Factors' Act. But what we have to determine on this replication is, whether it is enough to say that the pledge was not in the usual and ordinary course of business. It is impossible to say what that means, and we [674] cannot hold that this replication is good without holding the statute to be nugatory in any case in which the usual and ordinary course of business may be departed from.

As to the third replication, it is bad on two grounds. First, it does not notice the second portion of the consideration for the deposit, namely, the future advances, but only deals with the first portion, namely, the delivering up the goods originally pledged. And even as to those goods this replication does not go far enough, for it does not say that they were not deposited with the defendants: it does not say that they were not held as a lien or security by the defendants: and further, it does not say that the defendants did not make advances on them by agreement with John Linnett. In all these respects the replication is deficient. All that it does say is, whatever lien or security the defendants had in respect of these goods was not derived from John Linnett. That is no way necessary for the third section. For these reasons I think the plea good and the replications bad, and that our judgment should be for the defendants.

CHANNELL, B. I wish to add that I concur with the observations of my brother

Wilde, that the third replication cannot be supported in reference to the further advances.

Judgment for the defendants.

[675] *CROSS v. WILLIAMS*. Jan. 21, 1862.—The plaintiff, a tailor, sued the defendant, the commandant, and a member of the committee, of a volunteer rifle corps for uniforms supplied to the corps. The evidence was conflicting. According to the plaintiff's statement he attended a meeting of the committee when the defendant used expressions which implied that he undertook to pay for the uniforms. This was denied by the defendant, who gave in evidence the plaintiff's day-book and ledger in which the uniforms were debited to the corps. The defendant admitted his liability to pay for his own uniform and those of the band which he had ordered. The Judge told the jury: First, that if the contract was with the defendant alone for the whole corps he was liable. Secondly, if with the defendant jointly with the committee (there being no plea in abatement) he was liable. Thirdly: so, if with the defendant jointly with the whole corps. Fourthly: but if by the defendant for his own uniform and those which he specially agreed to pay for, he was not liable. Held, that the case was properly left to the jury, and that there was no foundation for a new trial on the ground of misdirection.

[S. C. 31 L. J. Ex. 145; 10 W. R. 302; 6 L. T. 675. Referred to, *Samuel Brothers v. Whetherly*, [1907] 1 K. B. 712: affirmed [1908] 1 K. B. 184.]

Action for goods sold and delivered, work and materials, &c.

Pleas. Except as to 37l., parcel, &c., never indebted; as to 37l., payment of that amount into Court.

At the trial before Byles, J., at the Devonshire Summer Assizes, 1861, the following facts appeared: The plaintiff was a military tailor at Plymouth, and the defendant had been commandant of the "Calstock Volunteer Rifle Corps." The defendant had taken an active part in the formation of the corps and was a member of its committee of management. The corps was composed of labourers and miners, and many of the men were under age. The plaintiff had sent a tender for the supply of clothing and accoutrements to the corps, and he attended some meetings of the committee when the orders were given. On two of those occasions the defendant was present, on the others he was not. On one occasion, when the plaintiff attended a meeting of the committee at which the defendant was present, he submitted a pattern for the uniform and according to the plaintiff's evidence (which was in conflict with that of the defendant) the plaintiff was directed by the defendant to measure several of the men. The defendant asked the plaintiff within what time he would require payment, and he [676] replied, three months. One man refused to be measured, saying that he could not pay for his clothes in three months, when the plaintiff said to the defendant, "if you require six months' instead of three months' credit in this particular case you can take it, but I will have nothing to do with individual members." The defendant then told the plaintiff to measure the man. The next week the plaintiff brought some of the clothes to the committee, when the defendant directed him to make the caps and belts according to a pattern, which the defendant produced; and upon the plaintiff expressing a doubt whether that pattern would be allowed by the Lord Lieutenant, the defendant said that as he was to pay for them he would have them as he liked. This was denied by the defendant, and another witness said that it was stated that "every man present must understand that he was to pay for his own clothes, if he could not it was no use to be measured." The defendant's counsel called for and put in the plaintiff's day-book and ledger in each of which there was an entry, headed "Calstock Rifle Corps. Dr. 28 suits supplied for the following persons, at 3l. 12s." Then followed the names of the persons for whom the uniforms had been made. The words "Captain Williams" had been afterwards inserted by the plaintiff's son. The plaintiff made and delivered twenty-eight suits at 3l. 12s. each. The defendant admitted his liability for nine suits, seven of which were for the band, which he had provided at his own cost. In the following September the corps was disbanded.

The learned Judge told the jury:—First, if the contract was with Williams, the defendant, alone for the whole corps, he was liable. Secondly, if with Williams, the defendant jointly with the committee (there being no plea in abatement), he was liable. Thirdly: so, if with Williams, the defendant, jointly with the whole corps. Fourthly: but if [677] by Williams, the defendant, for his own uniform and those which he specially agreed to pay for only, he was not liable. His lordship called the attention of the jury to the entry in the day-book and ledger. The jury found a verdict for the plaintiff, with 63l. 10s. damages; and the learned Judge reported that he was not dissatisfied with the verdict.

Coleridge, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury as to the contract having been made with the corps of Calstock Volunteers.

Karslake now shewed cause, in the present term (Jan. 18). The direction of the learned Judge was correct. There was evidence upon which the jury might find a verdict for the plaintiff, in either of the three alternatives submitted to them. First: there was ample evidence of the defendant's personal liability. Secondly: there was evidence that the contract was with the defendant jointly with the committee; and there being no plea in abatement he cannot set up their non-joinder as a defence. Thirdly: there was evidence from which the jury might properly infer that the defendant contracted jointly with the whole corps. The attention of the jury was called to the entry in the day-book and ledger, which was some evidence that the clothes were supplied on the credit of the corps.

Coleridge (Pinder with him), in support of the rule. The first of the alternatives submitted to the jury is free from objection; as to the second, it is doubtful whether the committee could pledge the credit of the defendant, but the point is not open on this rule; the third, upon which the jury appeared to have acted, amounts to a misdirection. A general verdict having been found, if any one of these three alternatives was wrongly presented to the jury the [678] defendant is entitled to a new trial. There could be no evidence of such a contract as that stated in the third alternative, because no such contract can be entered into in point of law. A rifle corps is a fluctuating body, and the members cannot in law have the power to pledge each other's credit. The members at the time the action was brought were not the same as those at the time the orders were given. The entry in the plaintiff's day-book and ledger, headed "Calstock Rifle Corps," does not mean that the contract was made with the corps, but merely indicates the regiment in which the men were to whom the clothes were supplied. In *Keate v. Temple* (1 Bos. & P. 158), which was an action against the first lieutenant of a man-of-war for clothes supplied to the men, upon an understanding that the defendant would "see the plaintiff paid," the jury having found a verdict for the plaintiff, the Court granted a new trial, taking into consideration not only the expressions used, but the situation of the defendant and the amount for which he would be liable. A colonel of a regiment is not liable for knapsacks furnished to the regiment by his order: *Prosser v. Allen* (Gow, 117). [Pollock, C. B. That is because there is a regimental fund for the payment of such articles; and the person who supplies them must be supposed to look to the credit of the fund. The colonel gives the order as the servant of the Crown. Upon the same principle a person who subscribes and becomes the governor of a hospital is not personally liable for the medicine supplied to it.] The committee of a club have no authority to pledge the personal credit of the members: *Fleming v. Hector* (2 M. & W. 172); *Todd v. Emly* (7 M. & W. 427; 8 id. 505). [Channell, B. Though the third alternative is an improbable view, and the first and second are probable, still if there was sufficient evidence upon the third for the Judge to submit it to the jury, there was no misdirection.] It is not enough that [679] there is a scintilla of evidence. In *Avery v. Bowden* (6 E. & B. 953, 973), Pollock, C. B., said: "When the question whether there is evidence to go to the jury is reserved by consent (and it cannot be reserved without consent), 'no evidence' means 'no reasonable evidence.'" And Cresswell, J., said: "Certainly there has been a little fluctuation in the view taken by the Courts at Westminster of the point to which the Lord Chief Baron has adverted. Lord Tenterden said that if the evidence was such that the jury could conjecture only but not judge, it ought not to go to the jury: that the onus was on the party offering the evidence; and that he, if he offered only evidence consistent with either supposition

of fact, was not entitled to have it put to the jury. Afterwards the practice got in of adhering more closely to the language in which motions for new trials are made, where the question is stated to be whether there was 'any evidence,' and it was said that this must be answered in the affirmative, if there had been a scintilla of evidence. . . . But if the evidence leads only to conjecture, it is not fit for the consideration of the jury." In *Toomey v. The London, Brighton and South Coast Railway Company* (3 C. B. N. S. 146, 150), Williams, J., said :—"It is not enough to say that there was some evidence; for every person who has had any experience in Courts of justice knows very well that a case of this sort against a railway Company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the Judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." Here there was no sufficient evidence that the defendant made the contract jointly with the whole corps.

Cur. adv. vult.

[680] POLLOCK, C. B. This was an action by a military tailor, to recover from the defendant, the captain of a rifle corps, the price of regimentals furnished to certain members of the corps. The jury found a verdict for the plaintiff, and a new trial was applied for on the ground of misdirection; not on the ground that the verdict was against evidence.

The corps had been established by the generous and patriotic conduct of the defendant. He had subscribed largely, and had taken various measures to promote its interests. He had provided a military band, and he admitted that he had ordered regimentals for some members of the corps. His defence to this action was, that he had paid for the regimentals which had been supplied upon his order, and that he was not responsible for those with which he was now charged by the plaintiff. There was a committee who assisted in managing the affairs of the corps, and the defendant was a member of that committee. On one occasion when some of the orders were given the defendant was not present, but on another occasion when several orders were given he was present. According to the evidence of the plaintiff the defendant ordered all the regimentals but one suit, and in the course of conversation used expressions which amounted to an order, for he gave directions with respect to the cuffs; and when the plaintiff expressed some doubt whether what he wished would be permitted by the Lord Lieutenant, the defendant said that as he was to pay for them he would have them as he liked. The defendant, however, denied that he used that expression, and the real question is not so much whether the plaintiff or the defendant spoke the truth,—for that would be an unnecessarily offensive mode of considering the question,—but whether in point of law the defendant is liable; for it is possible that, without having in the slightest degree deviated from the truth, the defendant may have used [681] expressions which led the plaintiff to believe that he was ordering the regimentals on his own credit, and that the plaintiff was justified in trusting him. Though the defendant might not have intended to make himself personally liable, yet if he used expressions which imported that he meant to pay, in my opinion he is liable.

In the course of the cross-examination of the plaintiff, his books were produced, and they contained an entry, the tendency of which was to negative the notion that the defendant was personally liable for the charge for the regimentals,—it was headed, not "Captain Williams," nor "The Committee of the Corps," but "The Corps." It is very improbable, however, that there would be any contract which could be properly described in that way; but such was the entry.

The learned Judge, in summing up, mentioned three ways in which the defendant might be liable: first, by having given the orders individually; secondly, by having given the orders jointly with the committee of which he was a member; and, thirdly, by having given the orders jointly with the whole corps. The learned Judge told the jury that, if they believed that, in either of these cases, the entry in the book was founded on an order to which the defendant was a party, he would be liable.

There is difficulty in saying, after the entry in the book, that the defendant ordered the regimentals on his personal responsibility. The probability is that they were ordered by the committee. There is no ground for the suggestion that they were

ordered on behalf of the corps; for it is most improbable that a tradesman would furnish goods unless some one was able to pay for them; and, moreover, the plaintiff swore that he distinctly said that he would not supply the articles on the credit of the men individually. My brother Byles having summed up in the way I have [682] stated, the jury found a verdict for the plaintiff, and, in my opinion, there was no misdirection. The learned Judge could not avoid noticing the entry in the book, to which the attention of the jury had been called, and I think that, in point of law, he was justified in the mode in which he left the case to the jury.

With regard to the verdict being against the weight of evidence, I say nothing. The sole ground on which it was questioned was misdirection, and I think there is none. The rule must therefore be discharged.

MARTIN, B. I am also of opinion that there was no misdirection; but I am unable to form any judgment whether or not the verdict is against the weight of evidence. The testimony of the plaintiff was directly at variance with that of the defendant and some other witnesses. It seems to me that the real question is, which of these parties was accurate. The defendant's counsel called for and put in evidence the plaintiff's day-book and ledger, and in these books the debit was to "The Calstock Rifle Corps." That being evidence for the Judge to deal with, he was bound to do so. A Judge cannot select portions of the evidence for the purpose of comment, but must sum up all the facts; and if, in this case, the learned Judge had paid no attention to the plaintiff's books, I have no doubt a new trial would have been moved for on the ground that he omitted to leave to the jury something which he ought to have done. I agree with my brother Channell that the entry is very weak evidence, and, if the jury had disregarded it, I should not have been dissatisfied. But the question is, how was the Judge to deal with it? And I do not see how my brother Byles could have dealt with it otherwise than he did.

With respect to the verdict being against evidence, it seems to me impossible for any one to judge of that who [683] has not seen the witnesses. It was distinctly stated by the plaintiff, "I said to Captain Williams, if you require six months' instead of three months' credit in this particular case you can take it, but I will have nothing to do with the individual members." On the other hand, that was distinctly denied by the defendant, and I find from the evidence of another witness that it was said, "Every man present must understand that he is to pay for his own clothes; if he cannot, it is no use to be measured." Therefore, it is plain to my mind that the real point in the case is, which party was accurate as to what had occurred when the clothes were ordered. The learned Judge told the jury: First, that "if the contract was with the defendant alone for the whole corps, he was liable." No one can complain of that. Secondly, that "if the contract was with the defendant jointly with the committee (there being no plea in abatement) he was liable." There is no doubt that is the law; though it may be there was no satisfactory evidence that such was the contract. Thirdly, "if the contract was with the defendant jointly with the whole corps, he was liable." I agree that no tradesman who thinks at all would ever think of trusting a whole corps of riflemen; it would be absurd to suppose that the labourers and miners of which this corps was composed would each become responsible to the extent of 100l. for clothes supplied to the others. Nevertheless there was the entry in the plaintiff's book, and it was given in evidence for the purpose of setting up this theory to relieve the defendant. The learned Judge said: Fourthly, "if the contract was by the defendant for his own uniform and those which he specially agreed to pay for only, he was not liable." The case could not have been more correctly laid before the jury. As I before stated, I have no means of judging whether the verdict is correct according to the evidence, but the learned Judge says that he thought it right.

[684] CHANNELL, B. In the course of the argument I entertained some doubt whether it would be right to discharge the rule, or whether it ought not to be absolute on terms. But I have since had an opportunity of considering the case, and have given the best attention to it, knowing that my view does not altogether concur with that expressed by the Lord Chief Baron and my brother Martin; and I cannot say that the case is so clear as it has presented itself to their minds.

I will state shortly the grounds on which I do not propose to dissent from the rest of the Court. The learned Judge propounded to the jury three views, in either of

which the defendant would be liable; and if they had returned an answer favourable to him on the two first questions, I should not have been dissatisfied with their finding. The first question submitted to the jury was whether there was evidence that the defendant was personally liable. The second was whether there was evidence that he was liable in the character of committee-man; and in that view the plaintiff would be entitled to recover, the defendant not having pleaded in abatement the nonjoinder of the other members of the committee. The third question was whether the contract was made with the defendant jointly with the whole corps; and it is possible that the verdict of the jury may have proceeded on the answer to that question.

It is objected that there was misdirection on the part of the learned Judge in leaving that question to the jury; and the rule is moved for solely on that ground. I am not quite satisfied with the way in which the case was left to the jury, but I cannot say that there was a misdirection. I think that such a contract might in point of law be made; but at the same time I think it highly improbable that it was in fact made. What was the contract set up? Not that each member of the corps was liable for the supply to himself, but that [685] each member of the corps was responsible for the whole supply. It is said that there was some evidence for the jury in support of that view. I cannot, on consideration, say there was no evidence, because the defendant called for the plaintiff's ledger and day-book, and on their being produced there appeared a debit of the corps, with the goods supplied, though followed by the name of each individual volunteer to whom the supply had in fact been made. The books were read as part of the defendant's evidence, and with the view, no doubt, of repudiating the two other modes in which the plaintiff sought to render the defendant liable. I therefore cannot say that there was not a scintilla of evidence which would warrant the learned Judge in leaving the case to the jury. But if the jury had found on that question alone, I should have held that the evidence was insufficient.

Then am I called upon in this state of circumstances to decide that there ought to be a new trial? The ground on which to grant it is misdirection; and if there was any evidence for the jury there was no misdirection. Am I then at liberty to depart from the ground on which a new trial is asked for, and to suggest another ground, viz., that the verdict is against the evidence? As I have pointed out, a verdict for the defendant on the first two questions would have been quite satisfactory to my mind, but I am not prepared to say that the verdict is against the justice of the case. It may be that the jury did not find in favour of the plaintiff with reference to the third question; but on the ground that the defendant had made himself liable as a member of the committee, and not having pleaded in abatement the non-joinder of the other members, the plaintiff was entitled to recover. Therefore I am not called upon to strain any point on the ground that the verdict is against the justice of the case. It seems to me that it is in [686] accordance with the justice of the case if the jury proceeded on either the first or second propositions. I think they did on the second and not on the third; and if so, the verdict is to my mind satisfactory. It might be open to the Court to say: "Although the rule was asked for on the ground of misdirection, yet if we can see that it is against the justice of the case, or that the evidence was insufficient to warrant it, we will interfere;" but I do not entertain that view. I am only anxious to guard myself against being understood as thinking there was any satisfactory evidence on which the jury ought to have found that the corps, as a corps, was liable; and that each member of such a fluctuating body was liable for the whole supply.

WILDE, B. I was not present when the case was argued, and therefore give no opinion.

Rule discharged.

ANCONA v. MARKS. Jan. 13, 1862.—A person may ratify an action brought in his name, but without his knowledge or authority, by another professing to act as his agent and on his behalf.—Therefore, where the holder of a bill of exchange, without the knowledge or authority of the plaintiff, indorsed and delivered it to an attorney for the plaintiff, and in order that an action might be brought upon it in his name, and the plaintiff after action brought ratified the act: Held, that the

subsequent ratification was equivalent to a prior authority, and that the plaintiff had a valid title to sue on the bill.

[S. C. 31 L. J. Ex. 163; 8 Jur. (N. S.) 516; 10 W. R. 251; 5 L. T. 753. Considered, *Bolton v. Lambert*, 1889, 41 Ch. D. 307; *Durant & Company v. Roberts*, [1900] 1 Q. B. 629: reversed nomine *Keighley, Maxted & Company v. Durant*, [1901] A. C. 240.]

The first count of the declaration stated that the defendant, on &c., by his check or order for the payment of money, directed to Messrs. Attwood and Co., bankers, required them to pay to bearer 100l.: and the plaintiff became the bearer of the check. And the said Messrs. Attwood and Co. have not paid the said check, whereof the defendant had due notice but did not pay the same. Second count: that the defendant, on &c., by his promissory note, now overdue, promised to pay to his own order 75l. two months after date, and the defendant indorsed the said note to Herbert [687] Wright, who indorsed the same to the plaintiff, but the defendant did not pay the same. The third count was on a promissory note for 100l., made and indorsed by and to the same parties. The fourth count was on a bill of exchange drawn by H. Wright upon and accepted by the defendant for payment to the order of H. Wright of 100l. three months after date, and indorsed by H. Wright to the plaintiff.

Pleas (inter alia). To first count: that the plaintiff never was the bearer or possessed of the said check before suit. To second count: that the said note was not indorsed to the plaintiff as alleged. To the same count: that the plaintiff was not at the commencement of this suit the lawful holder of the said note. To third count: pleas similar to those pleaded to the second count. To fourth count: that the bill was not indorsed to the plaintiff as alleged. To same count: that the plaintiff was not at the commencement of this suit the lawful holder of the said bill. Issues thereon.

At the trial, before Martin, B., at the London Sittings after last Trinity Term, it appeared that the defendant, who was a tradesman at Birmingham, had indorsed and delivered to one Herbert Wright, an attorney and money lender at Birmingham, the promissory notes, bill of exchange and check mentioned in the declaration, upon his discounting them for the defendant. Wright, in his evidence, stated that he came to London and saw Mr. Tucker, a member of the firm of Greville and Tucker, attorneys in London, who had occasionally acted as his agents. He had with him the check, promissory notes and bill of exchange, and he asked Tucker to find a client who would lend his name in an action upon them. Tucker said there was no difficulty as he had the authority of Ancona (the plaintiff). Wright then said, "I wish you to receive these bills for Ancona and to [688] bring an action upon them in his name;" and Wright then indorsed and delivered them to Tucker. On a previous occasion Wright had a bill of the defendant's and asked Tucker if he could find a client who would allow his name to be used in an action upon it, when Tucker mentioned Ancona, the plaintiff, and the action was brought in his name and the money recovered. Tucker corroborated Wright's statement, and said that at the time he had a general authority from Ancona to use his name for such purposes. The check, notes and bill were in his possession at the time the writ was issued. He afterwards communicated to the plaintiff the fact of the action having been brought in his name, and he adopted it. The plaintiff stated that Greville and Tucker had used his name before. He had no knowledge that his name was used in this action until after it was brought, but when he was told of it he was willing the action should go on. He did not know Wright, and had not instructed Greville and Tucker to bring the action.

It was objected, on behalf of the defendant, that the plaintiff was not at the time the action was brought the holder of, nor had he any interest in, or possession of the documents sued upon, and therefore he could not have brought the action, and consequently his ratification after action brought could give no validity to the proceedings.

The learned Judge refused to nonsuit, and told the jury that if they believed that, on a day anterior to the action being brought, Wright, the owner of the securities, gave them to Tucker, who received them as and for the plaintiff and to sue upon them in his name, and that the plaintiff subsequently assented to his name being used, and ratified the proceedings, then such ratification had relation back to the time when the securities were handed over by Wright to Tucker, and had the same effect as if the plaintiff had [689] then stood by and given authority to sue in his name, in which

case he would be entitled to recover. A verdict having been found for the plaintiff for 375l., and interest,

Hawkins, in last Michaelmas Term, obtained a rule nisi for a new trial, on the grounds that there was no evidence to support (for the plaintiff) the issues on the above pleas; and that the learned Judge misdirected the jury in holding that there was such evidence, and also in ruling that ratification after action brought was sufficient, and telling the jury that, if they believed the evidence for the plaintiff, he was entitled to recover.

Collier (with whom was Macnamara) shewed cause (Jan. 11). The effect of the evidence is, that Wright, being bearer of the check, and indorsee of the notes and bill, requested Tucker to sue upon them in the name of another person, and handed them over to him for that purpose. Tucker, who had a general authority to use the name of the plaintiff, received them as his agent and attorney, and for the purpose of bringing an action upon them in his name. If Tucker had then communicated with the plaintiff, and he had assented to his name being used, his subsequent ratification would have been equivalent to a prior authority. But it is objected that as the ratification did not take place until after action brought, it cannot relate back so as to give the plaintiff a title to sue as indorsee and holder of the securities at the time the action was brought; and *Emmett v. Tottenham* (8 Exch. 884) is relied on as an authority for that position. But in that case the plaintiff had not the possession of or any interest whatever in the bill. Here the possession of the securities by Tucker as agent and on behalf of the plaintiff was a sufficient constructive possession to entitle him to sue on them: *Jenkins v. Tongue* (29 L. J. Exch. 147). Where a bill of [690] exchange is indorsed in blank, it is competent to the holder to hand it over to a third person to sue upon it on his behalf. *Law v. Parnell* (7 C. B. N. S. 282). Ratification after action brought is equivalent to a prior command; *Richardson v. The Countess of Oxford* (2 F. & F. 449); *Hull v. Pickersgill* (1 B. & B. 282).

The Court then called on

Hawkins and Tindal Atkinson to support the rule. At the time the action was brought the plaintiff had no right to sue on these securities, and therefore he could not ratify the act of Tucker in suing in his name. The owner of the securities was Wright, and the plaintiff had no knowledge whatever that his name was used until after the action was brought. A person can only ratify where he could have given the previous command. Greville and Tucker were not the agents of the plaintiff, but of Wright. The plaintiff never had any constructive possession of the securities, and Wright never intended to part with the possession of them. [Martin, B. Tucker received the securities for and as the plaintiff.] There was no indorsement or delivery of them to the plaintiff, so that the question of ratification does not arise, for there can be no ratification of an act which is in itself void. In *Lloyd v. Howard* (15 Q. B. 995, 999), Lord Campbell, C. J., said:—"An indorsement requires that there shall be a delivery of the bill with an intent to make the person to whom it is indorsed owner of the bill; a party to the bill; and transferee of the property in it." The plaintiff was not an indorsee within that definition. Greville and Tucker could not make him an indorsee by merely taking proceedings in his name: *Emmett v. Tottenham* (8 Exch. 884). [Channell, B. The [691] foundation of that decision was that the plaintiff had neither any interest in the bill nor any possession of it.] Here the securities were not handed over to Greville and Tucker to hold for the plaintiff, but for Wright. In *Sainsbury v. Parkinson* (18 L. T. 198: see post, p. 692) the promissory note was indorsed by the payee for the purpose of bringing an action upon it in the plaintiff's name, but was never in the plaintiff's possession, the payee having handed it over, after he indorsed it, to the attorney who brought the action. It was contended that the delivery to the attorney was a sufficient delivery to the plaintiff to make a valid indorsement to him: but Pollock, C. B., ruled that there never was any delivery sufficient to constitute a legal indorsement to the plaintiff. Supposing, however, there could be any ratification of such an indorsement, the ratification must be made before action brought, or at least before plea; for otherwise a plea might be true up to the time of the trial, and then a plaintiff, by adopting proceedings taken in his name without his knowledge, might falsify the plea. The doctrine of ratification is only available to effectuate a real and not a fictitious transaction, such as this. In *Story on Agency*, sect. 240, p. 304, 4th ed., it is said:—"At the common law, however, there is a distinction between the ratification of acts which are void, and the

ratification of acts which are voidable. In the former case, the ratification is inoperative for any purpose whatsoever; in the latter full validity is given to the acts." To enable the plaintiff to ratify, it is essential that he should be the holder of the securities at the time the action was brought. Here the commencement of the action was a void act, as regards the plaintiff. In *Doe d. Mann v. Walters* (10 B. & C. 626), it was held that, assuming a landlord could recognize a notice to quit given by his agent who had at the time no authority to give it, the bringing an ejectment was not a sufficient [692] recognition of such authority to entitle the lessor of the plaintiff to recover, because the recognition ought at all events to be before the day of the demise laid in the declaration. Moreover, the doctrine of ratification only applies where the act is done by an agent professing to act on behalf of the principal and for his benefit: *Wilson v. Tumman* (6 Man. & G. 236).

POLLOCK, C. B. We are all of opinion that the rule ought to be discharged. There is no doubt that the plaintiff, at the time the action was brought, did not know that his name was used, but the question is whether, the securities having been delivered to Greville and Tucker (who on a previous occasion had the plaintiff's permission to use his name) for the purpose of the action being brought on them in the plaintiff's name, and the action having been so brought, and the plaintiff having subsequently ratified the proceedings, he is entitled to retain the verdict. I think he is. In my opinion it makes no difference whether the ratification is before action, or after.

A case of *Sainsbury v. Parkinson* was cited from the Law Times (vol. 18, p. 198), in which I am reported to have ruled at Nisi Prius, that, "to constitute a legal and valid indorsement of a bill of exchange, the holder must not only write his name on the back thereof, but he must also manually deliver the bill to the indorsee." I do not recollect so expressing myself, but if I did I was wrong, for it is clear that the indorsement of a bill of exchange and the delivery of it to a clerk or servant, or any agent of the indorsee, for the indorsee, would constitute a valid indorsement. The facts of that case are also incorrectly stated in the report.(c) There was no [693] indorsement whatever of the note to the plaintiff, and I ruled that without it he had no legal title. I think that the maxim, "Omnis rati habitio retrotrahitur et mandato priori æquiparatur," applies to this case, and therefore the rule ought to be discharged.

CHANNELL, B. I am also of opinion that the rule ought to be discharged, though I should not have been sorry if, consistently with the rule of law, we could have made

(c) The Lord Chief Baron having sent for his note subsequently said:—"With respect to the case of *Sainsbury v. Parkinson*, I must disavow having ruled as reported in the Law Times. The action was brought by a person of the name of Sainsbury, the real plaintiff being a person of the name of Smith. Smith applied to Sainsbury to allow his name to be used, to which Sainsbury assented. The report in the Law Times is this:—"Sainsbury stated: Mr. Smith one day called on me and asked me to lend him my name for the purpose of enabling him to sue the defendant upon the note. I consented to do so, and I went to the office of Mr. Chapple, the attorney, whom I instructed to sue the defendant in my name. The note was never in my possession, but was handed over to Mr. Chapple by Smith after he had indorsed it.' My note of Sainsbury's evidence is this: 'I am a clerk in the State Paper Office. The bill was not indorsed to me before it was due, or at any time, but I allowed my name to be used and I saw the attorney. I had nothing to do with the costs, but I allowed my name to be used. Mr. Smith called on me the day I called on the attorney.' From that it appears that the attorney was not instructed by Sainsbury, but was the attorney of Smith, who had given him instructions to sue on the note as soon as he could get a plaintiff. Then the ruling as stated in the report is not correct. I am alleged to have ruled that there must be a verdict for the defendant on the plea denying the indorsement; but the jury found that there was no indorsement, and then the verdict being entered for the defendant on the plea denying the indorsement, I gave the plaintiff liberty to move to enter the verdict for him; but no motion was made. All that case decides is this: that if a person merely lends his name to be used as a plaintiff in an action, does not employ the attorney, is under no liability for costs, in fact is 'vox et præterea nihil,' the bill cannot be said to be indorsed to him. That is the decision in that case, not that there must be a manual delivery of the bill to the indorsee."

it absolute. I wish to be understood as giving no opinion on some of the points argued. The simple question is, whether upon these pleadings it has been shewn by [694] the evidence at the trial that the plaintiff was the holder of the securities at the time of action brought. It is not necessary that he should be the actual holder ; it is sufficient if he has an interest in them coupled with possession either actual or constructive. There is no pretence for saying that at the time the action was brought he had any knowledge that his name was used ; therefore the question is, whether there was any evidence that he was the holder of the securities at that time. Now Wright, being the owner of the securities, consented that Greville and Tucker should hold them for the plaintiff. He asked Greville and Tucker to receive them for the plaintiff, and he indorsed them for Greville and Tucker to sue upon them in the plaintiff's name. Then, did Greville and Tucker receive the securities for the plaintiff? Unquestionably they did. The two facts concur, viz., that Wright, the actual owner, intended that Greville and Tucker should receive the securities when indorsed for the plaintiff, and they did receive them for him ; and all that was wanting was that which existed in a former transaction between the same parties, viz. the authority of the plaintiff to Greville and Tucker to sue in his name. If, before action brought, the plaintiff had known of the arrangement and had assented to the action being brought in his name, it would have been well brought ; and though that previous authority was wanting in this case, it was supplied by the subsequent ratification.

WILDE, B. I am of the same opinion. The difficulty I have had was not as to the law, but the facts. It now appears that the securities were handed by Wright to Greville and Tucker for the plaintiff, Wright knowing that they acted for him ; and there is no doubt, if Greville and Tucker had had previous authority from the plaintiff to sue in his name as his agents, they would have been entitled to do so. Then [695] the question is whether, although they had not that authority, it might not be supplied by subsequent ratification ; that is, whether that Greville and Tucker did, namely, suing on the securities in the plaintiff's name, was such an act as the plaintiff could have done, and therefore such as being done by them, he could subsequently ratify. The mere consent by a person that a bill of exchange may be sued upon in his name will not make him the holder of it. There must be something more—he must have some sort of possession. That, no doubt, was the ground of the ruling in *Gill v. Lord Chesterfield*.^(a) What I understand the Lord Chief Baron to have ruled in *Sainsbury v. Parkinson* is, that the mere consent by a person to allow his name to be used in an action on a bill of exchange will not make him the holder, so as to give him the legal right to sue on the bill. The evidence here is, that Wright, the real owner of the securities, handed them to the plaintiff's agent, who took them for and as the plaintiff and sued upon them in his name. Under those circumstances it seems to me that the plaintiff would have been in a position to sue on them. If so, the remaining question is, whether there was any ratification by him of their act. I think there was. It was contended that this subsequent ratification would not make the plaintiff the holder of the securities at the time the action was brought. But in *Wilson v. Tuman* (6 Man. & G. 236, 242), it is distinctly laid down :—"That an act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, [696] to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority." For that position the Year Book, Hil. 7, H. 4, fo. 34, pl. 1, is cited. Applying that law to the present case, the subsequent ratification by the plaintiff of the act done by Greville and Tucker for him, places them in the same position as if he had given his previous assent, and makes the act done by them as his agents the same as if he had done it himself.

MARTIN, B. I am of the same opinion. I should be satisfied if the law upon this subject were altered, and the right to sue on bills of exchange confined to persons who have the real interest in them. The first count of this declaration is on a check payable to bearer, and there is no doubt that the bearer of a check is the person

(a) Not reported, but referred to in 8 Exch. 884.

entitled to receive the money, and that he may transfer it to any other person; and whoever has possession of it as bearer may maintain an action upon it. The same rule of law applies to promissory notes indorsed generally; although the term more frequently used with reference to them is the "holder," not "bearer." A general indorsement enables the person who is holder of a promissory note to bring an action upon it, and it is sufficient for him to shew that he has possession of the note. It is the same with respect to bills of exchange. Such is the law, and if wrong it must be altered by the legislature; but as it is at present, possession is the test of the right to maintain the action.

Now, what are the facts? Wright, the owner of these instruments, did not like to bring an action on them in his own name, and he handed them to Greville and Tucker for the plaintiff and in order that they might sue on them in his name, and Greville and Tucker received the instruments for the plaintiff. That being so, what is [697] the law with respect to it? My brother Wilde has referred to *Wilson v. Tumman* (6 Man. & G. 236), and in the note to *Armory v. Delamirie*, in Smith's Leading Cases (vol. 1, p. 301, 5th ed.), there occurs the following passage:—"And on similar reasoning seems to rest the well-known doctrine, that a subsequent ratification is tantamount to a prior command of an act done in the name of the party who ratifies. . . . So that where a person, if present at the time, could lawfully command any act to be done, any other person, though either wholly without authority, or exceeding the limits of his authority, would be justified in doing that act, provided he did it in the name, or as one acting by the authority of the person entitled (whether to his advantage or not, and obtained his subsequent ratification." *Doe v. Walters* (10 B. & C. 626), which seems adverse to this doctrine, was the case of a subsequent recognition by a landlord of a notice to quit, given by his agent without his authority. That case may possibly be explained on the ground that the interests of third persons might be affected by holding the notice good. However that may be, the doctrine is too well established to be questioned. A case similar to the present was tried before my brother Cresswell, who ruled that the plaintiff was entitled to maintain the action, and his ruling was upheld by the Court of Common Pleas.(d)

Rule discharged.

[698] *EVEREST v. RITCHIE*. Jan. 27, 1862.—After issue joined, a cause was referred by a Judge's order to an arbitrator, who had no power to direct a verdict to be entered. The arbitrator awarded "that there should be a verdict for the plaintiff for the sum of 7l. 9s. 11d." Held, that the award might be construed as a finding by the arbitrator that the plaintiff was entitled to recover 7l. 9s. 11d., and consequently the award was good.

[S. C. 31 L. J. Ex. 350.]

Declaration. For money payable by the defendant to the plaintiff upon and by virtue of an award made by one John Chantler, upon and by virtue of a submission by the plaintiff and the defendant to the arbitration and award of the said J. Chantler, of and concerning a certain action brought by the plaintiff against the defendant, and then pending, &c.; and whereupon the said J. Chantler awarded a certain sum, to wit, the sum of 7l. 9s. 11d., to be paid by the defendant to the plaintiff. Also for money payable by the defendant to the plaintiff for costs duly taxed and allowed to the plaintiff as the costs of the said action and of the said reference and award, and due and owing to the plaintiff under and by virtue and in pursuance of the terms of the said submission and award, &c.

Plea. That before the said submission to arbitration, the plaintiff had delivered to the defendant a declaration in the said action, and the defendant had pleaded several pleas thereto, whereupon issue had been joined, and the said cause was at issue; and that afterwards, and before any trial of the said action, the said submission to arbitration was made by order of Bramwell, B., and which said submission and order was and is in the words and figures following (that is to say): In the Exchequer of Pleas. *Everest v. Ritchie*. Upon hearing the attornies on both sides and by their consent, I do order that this cause be referred to the award, order, arbitrament, final

(d) *Semble, Law v. Parnell*, 7 C. B. N. S. 282.

end and determination of John Chantler, of, &c., surveyor, &c. (Then followed the usual provisions of an order of reference. The costs of the cause and of the reference and award were to abide the [699] event.) That there never was any other submission made by the plaintiff and the defendant to the award, order and determination of the said John Chantler, of and concerning the said action, than the said submission in this plea set out as aforesaid. That the said award in the declaration mentioned was and is in the words and figures following:—The plea then set out the award, which, after reciting the order of reference, concluded as follows:—"Now I, the said John Chantler, having taken upon myself the burthen of the said arbitration, &c.: Do make and publish this my award in writing, of and concerning the said premises, following (that is to say): I do award, order, and adjudge that there should be a verdict for the plaintiff for the sum of 7l. 9s. 11d. in addition to the sum of 26l. 12s. 7d. paid into Court by the defendant. In witness," &c.

Demurrer and joinder therein.

Field, in support of the demurrer. The objection to the award is founded on the case of *Jackson v. Clarke* (M'Clell. & Y. 200; 13 Price, 208), where an arbitrator, to whom a cause, before being at issue, was referred by rule of Court, awarded thus:—"I award and direct that a verdict in this cause be finally entered for the plaintiffs, with 284l. 12s. damages;" and it was held that he had exceeded his authority in directing the entry of a verdict, and that as the award consisted of only one sentence, that direction could not be rejected and the residue considered as an award that so much money was due, and to be paid. That case, however, was reviewed by the Court of Common Pleas in *Law v. Blackburn* (14 C. B. 77). There an action of ejectment upon two several demises, was, after issue joined, referred by a Judge's order to the award of an unprofessional arbitrator, the costs of the cause and of the reference [700] and award to abide the event of the award. The arbitrator, professing to make his award "of and concerning the matter to him referred," ordered that the verdict in the said cause should be entered for the lessors of the plaintiff. Maule, J., and Talfourd, J., held, that although the submission gave the arbitrator no power to enter a verdict, yet that, inasmuch as the words used by him were not precise and technical words, the Court was at liberty to deal with them as a mere intimation of his intention substantially to decide in favour of the lessors of the plaintiff, and consequently that the award might be enforced by action. So here, the award that there should be a verdict for the plaintiff for the sum of 7l. 9s. 11d. may be read as an order that the defendant shall pay to the plaintiff that amount.

The Court then called on

W. G. Harrison to support the plea. The arbitrator had no power to direct a verdict to be entered for the plaintiff, and therefore the award is void. In *Donlan v. Brett* (2 A. & E. 344), a cause, after being set down for trial, was referred by a Judge's order, with all matters in difference between the plaintiff and defendant, to an arbitrator; the costs of the suit to abide the event of the award. The order of reference contained no power to order a verdict to be entered. The arbitrator awarded that a verdict should be entered for the plaintiff for a sum named, and did not award that any sum was due or to be paid to the plaintiff by the defendant; and he further awarded that, as to the matters in difference, nothing was due to either party. The order having been made a rule of Court, the Court of Queen's Bench, after taking time to consider, refused to enforce the award by attachment. There the decision of Littledale, J., in *Cartwright v. [701] Blackworth* (1 Dow. P. C. 489), was cited as an authority that an award, that a verdict for a sum named should be entered for the plaintiff, was tantamount to an order that the defendant should pay so much to the plaintiff. But Lord Denman, C. J., in delivering the judgment of the Court, said that they had conferred with Littledale, J., and he informed them that he should not have decided as he did in *Cartwright v. Blackworth* (1 Dow. P. C. 489), if he had been aware of the case of *Jackson v. Clarke* (M'Clell. & Y. 200; 13 Price, 208). In *Hayward v. Phillips* (6 A. & E. 119) the award was held void on the ground that the arbitrator had no power to increase the verdict, and therefore had not determined the matter in dispute. The language of this award, "that there should be a verdict for the plaintiff for the sum of 7l. 9s. 11d.," is not equivalent to saying that the defendant shall pay that amount. [Pollock, C. B. If an arbitrator directs that a verdict shall be entered for the plaintiff, when he has no power to do so, the award is bad; but if he says "I think a verdict ought to be entered for the plaintiff," the award is good,

for it is merely saying that in his opinion the plaintiff is entitled to recover. *Martin, B. In Law v. Blackburn* (14 C. B. 77), *Williams, J.*, said, that if he were now called upon to decide *Jackson v. Clarke*, he should decide it differently; but he considered it binding.] In *Law v. Blackburn*, the arbitrator directed the verdict to be entered "for the lessors of the plaintiff," which was an absurdity, for a lessor of a plaintiff is as much a stranger as if he were not named on the record, and therefore it was necessary to read the phrase as if the arbitrator had awarded that the lessors of the plaintiff were entitled to recover. No money can be payable under such an award as this. [Pollock, C. B. In *Jackson v. Clarke* the cause was referred before plea; here the cause was at issue when it was referred.] [702] In *Hawkyard v. Stocks* (2 Dow. & L. 936) the cause was referred after issue joined, but no power was given to the arbitrator to order a verdict to be entered. He awarded that a verdict be entered for the defendants, and directed the plaintiffs and defendants respectively to execute mutual releases: it was held that the award was bad for excess of authority, and that that portion of it which ordered a verdict to be entered could not be rejected as redundant, since, if struck out, the meaning of the award would be altered. *Cook v. Gent* (13 M. & W. 364; 14 M. & W. 680) is an authority to the same effect.

Field, in reply. It is conceded that the arbitrator had no power to order a verdict to be entered for the plaintiff, but effect can be given to the award by construing it as directing that the sum of 7l. 9s. 11d. shall be paid by the defendant to the plaintiff. It was the obvious intention of the arbitrator to decide in favour of the plaintiff, and he has used the word "verdict" in a popular sense as indicating that the plaintiff is entitled to recover.

POLLOCK, C. B. I am of opinion that the plaintiff is entitled to judgment. The action is brought on an informal award. The plea sets out the award in hæc verba, and the substantial question is whether an award is good in which the arbitrator orders "that there should be a verdict for the plaintiff;" he having no power to direct a verdict to be entered. It seems to me that it is sufficient for the arbitrator to find a cause of action existing and the amount due, and therefore I think the finding of the arbitrator has determined the question between the parties, and that the expression "that there should be a verdict for the plaintiff for the sum of 7l. 9s. 11d.," means nothing more than this: "I [703] the arbitrator, am of opinion that the plaintiff is entitled to recover the sum of 7l. 9s. 11d." So reading it, we give effect to his decision, by enabling the plaintiff to maintain an action on the award.

I regret that there should be any difference of opinion on such a subject. In *Law v. Blackburn* we find two of the Judges upholding the award, whilst the third considered himself bound by the decision of this Court in *Jackson v. Clarke*. It seems to me that when the cases are examined, it will be found that there is a distinction where the reference is before or after issue joined. Where the reference is before issued joined, it is difficult to understand how an arbitrator could entertain the notion that a verdict ought to be entered. In *Law v. Blackburn*, *Williams, J.*, is reported to have said that if he were called upon to decide the case of *Jackson v. Clarke* he should decide it differently. I agree that previous decisions should not be departed from hastily, but I do not think the same rule applies to decisions upon what may almost be called a point of practice, and which being on the record may be reviewed by a Court of error. I agree with *Maule, J.*, in *Law v. Blackburn*, that if an arbitrator uses language from which the Court can understand that he has decided in favour of the one party or the other, they ought to give effect to it; but if he uses a strictly technical and appropriate expression, the Court must deal with it according to the terms used. My judgment proceeds on this ground,—here is an award made after issue joined, and the arbitrator says that there should be a verdict for the plaintiff for the sum of 7l. 9s. 11d.; and I consider that he has used the word "verdict," not in the sense of a decision of a jury, which must be entered on the record, but merely that he finds that the plaintiff is entitled to recover 7l. 9s. 11d.

[704] MARTIN, B. I am of the same opinion. The plea states that after issue was joined in the action, by a consent of the parties it was referred to an arbitrator, the costs of the cause, reference and award to abide the event. Now I find it thus laid down in *Watson on Arbitration* (page 129, 3rd ed.): "There is no technical dress required in framing an award, even an award in the form of an opinion has been held sufficient." Here the arbitrator has awarded "that there should be a verdict for the plaintiff for the sum of 7l. 9s. 11d.;" and, according to the rule laid down in *Watson*

on Arbitration, all that is necessary is that the arbitrator should intimate his opinion at a sum of money is due from the one party to the other. Independently of authority, I think that in this case the arbitrator has made a statement, which cannot be misunderstood, that the defendant is indebted to the plaintiff in the sum of 7l. 9s. 11d. *Jackson v. Clarke* may or may not be an authority for the position contended for by Mr. Harrison, but it was expressly overruled in *Law v. Blackburn*, which decided that where on a reference of an action of ejectment the arbitrator awarded that "the verdict in the cause should be entered for the lessors of the plaintiff," it meant that they were entitled to recover. That is an authority for our decision in this case, and moreover I find that Williams, J., said, in his judgment in *Law v. Blackburn*, that the decision of this Court in *Jackson v. Clarke* was wrong.

CHANNELL, B. I am also of opinion that the plaintiff is entitled to judgment. I am not aware of any case which militates against our giving judgment for the plaintiff. This cause was referred after issue joined, and that is an important circumstance which distinguishes it from the cases relied on by the defendant. I agree that the submission gives no power to the arbitrator to direct a [705] verdict to be entered as a step in the cause, but if the plaintiff would have been entitled to a verdict, he will have the benefit of it by the decision of the arbitrator. The arbitrator makes his award in language, not directing a verdict to be entered for the plaintiff in a technical sense; but when he uses the words "I award, order and adjudge that there should be a verdict for the plaintiff for the sum of 7l. 9s. 11d." he must be understood as meaning "I award that there ought to be a decision or determination in favour of the plaintiff for the sum of 7l. 9s. 11d." That does not conflict with *Jackson v. Clarke*, of which I do not approve, and which met with the express dissent of Williams, J. Besides, the case of *Cock v. Gent* (13 M. & W. 364; 14 M. & W. 680), although not decisive, is some authority in support of the view we take. That case was before this Court on two occasions, on an application to set aside the award, and on an application to enforce it by attachment, but the Court refused to interfere, leaving undisposed of the question whether an action could be maintained on the award. Then how does the case stand with reference to *Law v. Blackburn*? The judgments of Maule, J., and Talfourd, J., go a long way in support of our decision in this case; and though there is no express authority on the point, justice requires us to put that construction on the award which the Lord Chief Baron and my brother Martin have given it.

WILDE, B. I am also of opinion that our judgment ought to be for the plaintiff. The first question is, whether it appears upon the face of the award that the plaintiff is entitled to the sum of money mentioned in it. I think it does. The arbitrator has, in an unmistakable form, shewn that he intended that the plaintiff should recover that sum of money; but the difficulty pressed upon us by Mr. Harrison [706] is of another nature, and of which I entertained some doubt in the course of the argument, viz., that he has done that which he had no authority to do,—ordered a verdict to be entered for the plaintiff. If we could see that the arbitrator has exceeded his authority by ordering a verdict to be entered for the plaintiff, we should be bound by the authorities to hold the award void. The question is, whether, reading the language of the award according to its plain and ordinary meaning, the Court can come to the conclusion that the arbitrator intended to order that a verdict for the plaintiff should be entered on the record. Now the arbitrator has awarded "that there should be a verdict for the plaintiff for the sum of 7l. 9s. 11d.;" and, from the language he has used, I do not come to the conclusion that he contemplated the entry of a verdict. I see nothing from which I can conclude any such intention. If he had said, "I direct a verdict to be entered for the plaintiff," the case would have been different. This precise distinction is pointed out by Maule, J., in *Law v. Blackburn*, who says: "If the arbitrator had said, 'I decide in favour of the lessors of the plaintiff,' or, 'I award and determine that the lessors of the plaintiff are entitled to recover,' that would, I apprehend, have been well enough." It seems to me that the previous cases do not apply to this award, and that it is a mere finding that the plaintiff is entitled to recover the sum mentioned in it.

Judgment for the plaintiff.

[707] COOPER, *Appellant v. HANNAH SIMMONS, Respondent*. Jan. 20, 1862.—By indenture, an infant, with the consent of his father, bound himself apprentice to a tradesman, “his executors and administrators, such executors or administrators carrying on the same trade or business and in the town of W.,” and with him and them to serve for the term of seven years. And the master, in consideration of the service of the apprentice, covenanted to teach and instruct him, or cause him to be taught and instructed, during the term. Held: First, that upon the death of the master, the apprentice was bound to serve his widow, who was his executrix, whilst she carried on the same business in the town of W.; and that she was bound to teach the apprentice.—Secondly, that it was no answer to an information against the apprentice for absenting himself from the service of the executrix, that he had consulted an attorney, who advised him that the apprenticeship was determined by the death of the master, and that he had acted on the bonâ fide belief that the advice was correct.

[S. C. 31 L. J. M. C. 138; 8 Jur. (N. S.) 81; 10 W. R. 270; 5 L. T. 712.]

Referred to, *Walter v. Everard*, [1891] 2 Q. B. 373.]

The following case was stated for the opinion of this Court, pursuant to the 20 & 21 Vict. c. 43.

At a Petty Sessions holden for the borough of Wolverhampton, on the 19th day of September, 1861, before two justices of the said borough, John Cooper, (the above named appellant), was charged upon the complaint of Hannah Simmons (the above named respondent), as the sole executrix and widow of Thomas Simmons deceased: “For that he the said John Cooper was bound apprentice to him the said Thomas Simmons, his executors and administrators, by an indenture bearing date the 5th day of April, 1859, for a certain term which was then existing and unexpired, (and upon whose binding no premium was paid or contracted to be paid), and had in the service of his apprenticeship been guilty of misdemeanours, miscarriages, and ill behaviour towards his said mistress, and particularly on the 15th day of April, 1861, did without lawful excuse absent himself from the service of his said mistress and against her consent.” And the said parties being present the said charge was duly heard before us, and upon such hearing we adjudged the said John Cooper to be guilty of the said offence, and that he should for such offence be imprisoned to the House of Correction at Stafford, there to remain, and to be held to hard labour, for the space of fourteen days.

At the hearing of the said complaint the following [708] indenture was proved:—“This indenture witnesseth that John Cooper the younger, son of John Cooper the elder, of Wolverhampton, in the county of Stafford, tailor, as well of his own free will and accord as with the consent of his said father, testified by his being a party to and executing these presents: Doth put himself apprentice to Thomas Simmons, of Wolverhampton aforesaid, Rim and Mortice Lock Maker, his executors and administrators, such executors or administrators carrying on the same trade or business and in the town of Wolverhampton aforesaid, to learn his art, and with him and them after the manner of an apprentice to serve from the 23rd day of April instant until the full end and term of seven years thence next following, to be fully complete and ended. During which term the said apprentice his master faithfully shall serve” &c. (Then followed provisions not material to the present question.) “And the said Thomas Simmons, for and in consideration of the due and faithful service of his said apprentice so as aforesaid to be done and performed, his said apprentice in the art of a rim and mortice lock maker, which he uses, by the best means that he can, shall teach and instruct or cause to be taught and instructed during the said term. And also shall and will pay or cause to be paid unto the said apprentice, or his said father, the sum of 4s. a week from the 23rd of April instant until the 23rd of April, 1860; the sum of 5s. a week for the first year thereafter; the sum of 6s. a week for the second year thereafter; the sum of 7s. a week for the third year thereafter; the sum of 8s. a week for the fourth year thereafter; the sum of 9s. a week for the fifth year thereafter; the sum of 10s. a week for the sixth year thereafter.” (Then followed a covenant by John Cooper the elder, for himself, his executors and administrators, with Thomas Simmons, his executors and administrators, that John Cooper the elder

would at his own [709] expense find his son, during the term, sufficient meat, drink, &c., and all necessaries.)

At the hearing of the complaint it was proved, on the part of the complainant, that the appellant had served under the indenture of apprenticeship the said Thomas Simmons her husband, during which time she had taken an active part in the management of the business: that the husband died on the 24th day of June, 1860, having by his will bequeathed his business and personal estate to the respondent and appointed her executrix of his will: that she had continued to carry on the business and take an active part therein, and employed competent workmen who taught and instructed the apprentices; and the appellant had continued to serve her as such executrix under the said indenture of apprenticeship for a period of nearly ten months, namely, until the 15th day of April, 1861, when he ran away and absented himself from her service; immediately upon which she obtained a warrant for his apprehension. The constable, in whose hands the warrant was placed, was not able to find him, but he voluntarily surrendered himself on the 19th of September, 1861, having in the interim been working for another master of the like trade at increased wages. The respondent was and is still carrying on the same trade as her late husband, and employs competent workmen, who as well as the respondent are able and willing to teach and instruct the appellant in his trade. It was admitted that at the date of the apprenticeship indenture the appellant was an infant, and also was an infant on 19th September, 1861.

Upon the above state of facts, the attorney for the respondent contended that the binding to the executors and administrators was usual in such cases, and inasmuch as the executrix was carrying on the same trade as her late husband in Wolverhampton and was liable on the husband's [710] covenant to pay appellant's wages, and to teach and instruct or cause him to be taught and instructed, and the appellant had for his own good served the executrix of his own free will and accord for a period of ten months, the appellant was bound to serve the executrix, and that the appellant's father was equally liable on this covenant that he should serve not only the husband but the executrix.

On the part of the appellant it was contended, by his attorney, that the appellant was not bound to serve the executrix, the contract for service being a personal one only with the husband, and the executrix being under no personal liability to adopt or continue to comply with the testator's covenant; and that the appellant being an infant was not competent to bind himself except by an ordinary indenture of apprenticeship, and that the binding to the executrix was unusual: and as she incurred no liability (except in her representative capacity), it was manifestly not for his benefit, and was therefore, so far as the binding to the executors was concerned, void and of no effect; and he cited *Regina v. Lord* (12 Q. B. 757). He also stated that he, as the attorney for the appellant, had advised that the apprenticeship was at an end on the death of the husband; and that the appellant, acting on the bonâ fide belief that the opinion of his attorney was correct, had absented himself from his service; but no evidence was adduced before us or required by the respondent, as to when the advice was given. In support of his case he quoted *Regina v. Youle* (6 H. & N. 753).

After a careful consideration of the whole case, we were of opinion that the respondent and her workmen were quite as capable of instructing the apprentice as the husband was during his lifetime; and that the appellant had not left his service for want of proper instruction, but with a view only to get better wages elsewhere. We are also of opinion that the appellant is bound to serve the executrix (the respondent [711] in this case) under the above indenture of apprenticeship until the expiration of his term, so long as she manages and carries on the business in the manner proved before us; and with respect to the plea that the apprenticeship was at an end, and supposing such advice to have been given before absenting himself from his service, he must abide the consequences thereof, as we think it would be no excuse for his doing an illegal act.

The judgment of the Court of Exchequer is respectfully required whether we were correct in point of law in our determination as aforesaid, or as to what should be done in the premises.

Gray, for the appellant. The indenture only bound the apprentice during the life of his master, for two reasons; first, because apprenticeship is a personal trust in the master, and on his death the apprentice does not continue bound to his executors or

administrators, notwithstanding the indenture may say so: secondly, because there is no covenant by the executrix to instruct the apprentice. With respect to the first point, it is laid down in Burn's Justice, tit. "Apprentices in General," § 7, p. 195, that "the apprenticeship is a personal trust and confidence imposed on the master, so that the master cannot of his own will, either at law or equity, assign it over to another." Again, in Bac. Abridg., tit. "Master and Servant" (E.), it is said: "The placing out an apprentice to a particular person arises from an esteem and a good opinion of the party to whom he is so committed, that he will not only instruct him in his trade or calling, but will also be careful of his health and safety; and, therefore, the law has made it such a personal trust or confidence, that the master cannot assign or transfer it over to another." By the custom of London an executor may assign an apprentice to another master of the same [712] trade. As the master appoints his executor, the apprentice has no opportunity of choosing the person whom he shall serve. In *Baxter v. Burfield* (2 Stra. 1266), it was expressly decided that an apprentice was not bound to serve the executrix of his master. That was an action, by the executrix of the master, on a bond conditioned for the performance of covenants in the indenture of apprenticeship. The defendant pleaded that he served faithfully to the death of the testator; the plaintiff replied that since the death of the testator the defendant had absented himself from her service; and on demurrer, it was held that the executrix could maintain no such action. Lee, C. J., in delivering the judgment of the Court, said: "The binding was to the man, to learn his art, and serve him, without any mention of executors. And as the words are confined, so is the nature of the contract; for it is fiduciary, and the lad is bound from a personal knowledge of the integrity and ability of the master." The 32 Geo. 3, c. 57, s. 1, which empowers two justices to order apprentices, with whom no more than 5l. has been paid, to serve out the remainder of their time with the widow, son, daughter, brother, sister, executor or administrator of the master, is a legislative declaration that in other cases the apprenticeship is determined by the death of the master. [Martin, B. Here the apprentice expressly covenants that he will serve for seven years, and that if his master dies he will serve his personal representatives, provided they carry on the same trade at Wolverhampton.] Secondly, there is no covenant by the executrix to teach; and a contract by an infant to serve for a certain term, if not beneficial to him, is wholly void: *Regina v. Lord* (12 Q. B. 757). In *Rex v. Guildford* (2 Chitt. 284), it was held that the binding an apprentice to a feme covert was void. Abbott, C. J., there said: "Who is [713] bound to instruct the apprentice?" It is the essence of the contract that the master should instruct the apprentice. [Martin, B. Here the master does covenant to instruct the apprentice during the term.] The apprentice has no remedy for the breach of that covenant after the master's death except against his assets, which may not be available. [Wilde, B. The compensation must come from the assets of the master, whether in his lifetime or after his death.] The justices could not compel the executrix to perform the contract, for she might say "I am not the master." [Martin, B. If there was a covenant by the apprentice to serve, but no covenant by the master to teach, would the indenture be void?] It would be voidable at the option of the apprentice, the contract not being for his benefit. If this indenture is in force, the apprentice must serve a person whom he has never contracted to serve. [Wilde, B. The question is, whether it is more beneficial for the apprentice to serve the executrix carrying on the same trade, or that the apprenticeship should be at an end. I should have thought the former.] Thirdly, this is a criminal proceeding, and therefore the apprentice cannot be convicted, unless he acted with an evil mind or an intention to commit a criminal offence: *Regina v. Youle* (6 H. & N. 753). It appears by the case that in absenting himself he acted bona fide, under the advice of his attorney, and believing that he was not bound to serve.

Hayes, Serjt., for the respondent. The question is, whether the covenant by the apprentice to serve the executrix of his master invalidates the indenture, for it is either void altogether or not at all. An infant may bind himself apprentice by indenture, because it is for his benefit: *Rex v. The Inhabitants of Arundel* (5 M. & Sel. 257); and though no action lies against him on his covenant to serve, yet it is so far bind-[714]-ing on him as to give justices a jurisdiction to enforce it: *Gylbert v. Fletcher* (Cro. Car. 179). As Abbott, C. J., said in *Rex v. The Inhabitants of Great Wigston* (3 B. & C. 484): "If then it is for the benefit of the infant to bind himself an

apprentice, it is impossible to say, generally, that it is for his benefit to dissolve such a connexion; such a position involves a contradiction." [Wilde, B. A master would naturally require a higher premium if the contract is to terminate at his death, for the latter years of the service are of course more valuable.] If the contract is only voidable in the event of the executrix not instructing, here it is found that the apprentice might be as well instructed by the executrix as the master, and that he absented himself because he obtained higher wages. The Court cannot say that the covenant to serve the executrix is unreasonable. So far from the case of *Barter v. Burfield* (2 Stra. 1266) being an authority that a covenant to serve executors is void, it is evident that such a covenant would have been held good if it had been introduced, for the judgment of the Court proceeds upon the ground that the contract was with the master alone. In *Regina v. Lord* (12 Q. B. 757) the contract was held void on the ground that it was inequitable. Where an apprentice upon the death of his master was, with his own consent, turned over by the widow (who had taken no administration) to another master whom he served, it was held that he gained a settlement in the last parish: *Rex v. Inhabitants of East Bridgford* (2 Stra. 1115). [Wilde, B. The question is, not whether in a particular event the contract may be beneficial, but whether generally it is beneficial. "Apparent benefit" must mean on the face of the contract, not with regard to what subsequently happens. In *Drury v. Drury*, cited by Buller, J., in *Maddon v. [715] White* (1 Salk. 66), Lord Mansfield laid it down, as a general principle, "that if an agreement be for the benefit of an infant at the time, it shall bind him." Lord Hardwicke afterwards adopted this rule.] The custom of London referred to shews that such a contract is not illegal. In *Rex v. Peck*, Holt, C. J., said: "That by the custom of London in these cases, the executor shall put the apprentice to another master of the same trade. And that in other places it would be very hard to construe the death of the master to be a discharge of the covenants; he said, it had been held that the covenant for instruction failed, but that he still continues an apprentice with the executor, quoad maintenance." The covenant to instruct is binding on the executor. [Martin, B. The 32 Geo. 3, c. 57, recites that "in such indentures of apprenticeship, it hath been usual to insert several agreements and covenants to be done and performed by the several parties thereto (that is to say), an agreement, on the part of the apprentice, that he will faithfully serve his master during the term of such apprenticeship; and also several covenants on the part of the master, for himself, his executors and administrators, that he the said master will teach or cause to be taught, such apprentice in the business, &c., which such master then useth; and that such master shall also, during the term of such apprenticeship, find and allow unto such apprentice sufficient meat, drink, apparel, lodging, &c.: and whereas in the event of the death of the master during the term of such apprenticeship the agreement for service on the part of the apprentice is at an end, but the covenant for maintenance on the part of the master still continues in force, as far as the master's assets will extend, or doubts have arisen with respect thereto," &c.] That refers to the ordinary case where the indenture contains no provision for service after death of the master. Here a covenant is in-[716]serted in order that there may be no doubt as to the obligation of each. Then it is said that the apprentice acted under the advice of his attorney, but it would be extension of the doctrine recently introduced that there must be a guilty mind, if an apprentice was exempt from punishment because he acted on the bad advice of an attorney. [Wilde, B. *Rider v. Wood* (29 L. J. M. C. 1) is the foundation of that doctrine.]

Gray, in reply. In order to ascertain whether a contract is binding on an infant, it must be looked at with reference to the time when it was entered into. Now suppose the master had died the day after the indenture was executed, and the executrix refused to instruct the apprentice; no doubt there would be a breach of the testator's covenant for which the apprentice might recover damages, but as there is no covenant binding the executrix to teach, the Court of Chancery would not decree a specific performance. Such a contract cannot be for the benefit of the infant. On the last point he cited *Barkhouse, App., Bishopwearmouth, Resp.* (9 C. B. N. S. 315).

POLLOCK, C. B. This case comes before us upon an appeal, under the statute 20 & 21 Vict. c. 43, against a conviction by two magistrates of an apprentice for absenting himself from the service of his alleged mistress. The magistrates awarded him imprisonment for fourteen days, with hard labour.

The facts are very short. The apprentice was bound to the husband of the

respondent to serve him and his executors upon his death, provided they carried on the same business in the same town. Upon the death of the master the apprentice continued to serve the wife, who was the executrix of the master, for ten months, and was sufficiently instructed the whole time. The business was *bonâ fide* [717] carried on, and during the life of the husband the wife had taken an active part in the management of it; so that substantially there is no ground of complaint. Whatever objection is or can be raised is purely of a technical character. At the end of the ten months the apprentice went away, and obtained higher wages. I think no importance ought to be attached to that, because in all probability the wages he would have under the indenture would be below the value of his service at that period of his apprenticeship. I must assume that the ground of absenting himself was that he was advised by his attorney that the indenture was not binding upon him, and that he was at liberty to leave. The magistrates have dealt with that question in a way which calls on us to decide it; and they have pointed out that there was no evidence when the advice was given—whether before or after the absenting.

Now the first question is, is the indenture binding? It appears to me that it is. The case of *Baxter v. Burfield* (2 Stra. 1266), where the executors were not named in the indenture, justifies the inference that if they had been inserted the Court would have held the indenture binding.

Then the next question is, is the advice of the attorney any answer to the complaint. A mistake in point of fact might be an answer to the complaint; but everyone is bound to know the law, and the case cannot be put higher than if the apprentice had *bonâ fide* believed, from what he read in a book, that he had a right to leave. But is it any answer to a complaint for misconduct, that the offender thought he was not guilty of misconduct? It would be dangerous if we were to substitute the opinion of a person charged with a breach of the law for the law itself. The question is, was the apprentice justified in doing what he did? I think he was not. I will assume for a moment that he [718] thought he had a right to leave; but the question is, had he in point of law a right? Taking all the circumstances into consideration, it appears to me that the decision of the magistrates was correct; and that the points of law which have been raised furnish no answer to the case on the part of the executrix who makes the complaint.

MARTIN, B. I am of the same opinion. Mr. Gray originally took two objections to the conviction. The first was, that apprenticeship is a personal trust in the master; the second was, that there is no covenant binding the executrix to teach the apprentice. That is not so, for the covenant by the master is binding on his personal representatives. The master covenants that he will teach and instruct, or cause to be taught or instructed, the apprentice during the term; there is therefore an obligation on the part of the master that instruction should be given during the whole term.

With respect to the first objection, viz. that an apprentice binds himself to the master alone, no doubt, generally speaking, persons are bound apprentice to the master alone, and in some cases the business may be of such a nature that it would be impossible for an executor to teach it. For instance, it would be absurd to suppose that a person who is article to an attorney binds himself to serve the widow in the event of his death. But a person may well bind himself apprentice to a trader and after his death to his executors, provided they carry on the same trade in the same place. Now this indenture witnesseth, that J. Cooper, the younger, "as well of his own free will and accord as with the consent of his father," &c., "doth put himself apprentice to Thomas Simmons, of Wolverhampton, rim and mortice lock maker, his executors and administrators, such executors or administrators carrying on the same trade or business and [719] in the town of Wolverhampton aforesaid, to learn his art, and with him and them after the manner of an apprentice to serve from the 23rd day of April last until the full end and term of seven years." The question then is, whether a contract by an infant in those terms is absolutely void. In order to ascertain that, we must see what authority an infant has to bind himself. Now, in Co. Lit. 172 a., it is said:—"An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physick, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." It does not say that there is any particular mode of binding an infant apprentice, but it says generally that an infant may bind himself "for his good teaching or instruction, whereby he may profit himself." The question is, whether this contract is for the

benefit of the infant, for I find it laid down by Eyre, C. J., in *Keane v. Boycott* (2 H. Black. 512), that for those things which are necessary for an infant, he may bind himself even by deed, and that the Court only makes void such contracts as they can pronounce to be to his prejudice. And in a note to the 8th edition of Sheppard's Touchstone, p. 56, it is said:—"Deeds or contracts made by an infant from which no apparent benefit can arise to him, are considered as absolutely void. But such as he may derive a benefit from are only voidable." How can we say that it must necessarily be a disadvantage to an infant to bind himself apprentice for a certain term, if his master lived so long, and in the event of his death to continue apprentice with his executor, provided he carries on the same business in the same town. It is possible that the executor may be a person with whom it may not be beneficial for the apprentice to continue; on the other hand it may be of the greatest benefit to the apprentice to remain in the service of the [720] executor; and we must clearly see that it is not before we can avoid the contract.

There was a third point, viz., that this apprentice, conceiving that he was not bound by this deed to serve the executrix, went to an attorney at Wolverhampton who advised him that he was not; and thereupon he bonâ fide believing that advice to be sound withdrew himself from the service. Mr. Gray treated the information before the justices as a criminal proceeding. I doubt whether that is its true character. It seems to me nothing more than a provision by the legislature for the purpose of enforcing mutual rights. The legislature may have taken into consideration that there are persons against whom it would be idle to bring an action; and they may reasonably have said, "this is not a contract which can be enforced in the ordinary way by a civil action, therefore we will give a more summary remedy by punishing the offender,"—not as a criminal, but by way of compelling him to perform his contract. The question then is, is it any answer to wilfully and deliberately acting contrary to that which the law, by his own contract, imposed on him, that he was advised by his attorney to do it? It seems to me that it would be contrary to good sense so to hold. If an apprentice wilfully and designedly absents himself from his service he must take the consequences, and one is that, by an act of parliament, justices have jurisdiction to punish him.

WILDE, B. I am of the same opinion. I read the indenture as a contract that the apprentice will serve the executors of his master, and on the other hand that the master binds both himself and his executors to "instruct, or cause to be instructed," the apprentice during the term. That being the contract, the question is whether it is binding on the apprentice.

[721] It was said, and I think correctly, that the contract must be looked at with reference to the time when it was made; and regarding it in that view, the question is whether such a contract as this will bind an infant. Mr. Gray says, that to bind an infant the contract must be manifestly for his benefit. I agree with my brother Martin, that a contract is binding on an infant unless it is manifestly to his prejudice, or at least so plainly so that the Court can say that it is to his prejudice; it is then not voidable only, but absolutely void. On examining the cases that will be found to be the law.

Then is this contract so manifestly prejudicial to the infant as to be void? It is laid down in the books that the binding of an infant as an apprentice is beneficial to him. Then is it less beneficial by reason of this clause, perhaps unusual, certainly not universal, by which he binds himself to serve the executors? That seems to me to make the contract more beneficial; at all events, I cannot say that the contract is manifestly to his prejudice. Then Mr. Gray says, "assuming it may be looked at in this way, there is no contract to bind the executors to instruct." I have endeavoured to follow the reasoning, and I cannot say, when the master has bound himself and his executors to instruct or cause to be instructed, that the contract can be performed unless they do so. I presume that branch of Mr. Gray's argument was founded on the supposition that the executors are not bound by the covenant; if they are, the argument fails.

With respect to the objection as to the advice of the attorney, I entirely concur in what has fallen from the other members of the Court, and in the terms in which the Lord Chief Baron has expressed himself. I will therefore say no more on that subject.

Order of justices affirmed.

[722] WHITE v. BASS. Jan. 22, 1862.—In 1885, the owners in fee of a house and adjoining land, granted to trustees a lease of the land for ninety-nine years, and they covenanted to build upon it according to a certain plan. In 1856, the owners conveyed the reversion in fee of the land to the trustees. In 1857, the owners conveyed the house in fee to a person under whom the plaintiff obtained possession. The defendant subsequently, with the authority of the trustees, built upon the land so as to obstruct the light and air, which for upwards of twenty years had come to the windows of the plaintiff's house. If he had built according to the plan in the lease the obstruction would not have been to the same extent. Until the lease was granted there had never been any severance either in the title to or possession or occupancy of the land and house, and the same had been occupied and used together by the proprietors thereof for upwards of fifty years.—Held, that the plaintiff could maintain no action against the defendant for building on the land so as to obstruct the light and air which formerly came to the windows of the plaintiff's house.

[S. C. 31 L. J. Ex. 283; 8 Jur. (N. S.) 312; 5 L. T. 843. Referred to, *Ellis v. Manchester Carriage Company*, 1876, 2 C. P. D. 16; *Wheeldon v. Burrows*, 1879, 12 Ch. D. 40.]

The first count of the declaration stated that the plaintiff, before and at the time of the committing of the grievances &c., was and from thence hitherto hath been and still is lawfully possessed of a certain messuage, dwelling house and beer shop, in which said messuage &c., during all the time aforesaid, there were and still of right ought to be, divers ancient windows, through which the light and air, during all the time aforesaid, ought to have entered, and until the committing of the said grievances did enter and still of right ought to enter into the said messuage &c., for the convenient and wholesome use, occupation and enjoyment thereof. Yet the defendant, contriving to injure the plaintiff, and to deprive him of the use, benefit and enjoyment of the said windows, and to annoy and incommode him in the use, possession, and enjoyment of the said messuage &c., wrongfully and injuriously erected and raised, and caused and procured to be erected and raised, a certain wall and building near to the said windows, and wrongfully and injuriously kept and continued the said wall and building so then erected and made for a long time, to wit, from thence hitherto, by means of which premises the said messuage &c., during all the time aforesaid, was and still is greatly darkened, and the light and air were and are hindered and prevented from coming and entering into and through the said windows into the said messuage &c., [723] and the same hath thereby been rendered and is close, uncomfortable, unwholesome and unfit for habitation, or for the purposes of the plaintiff's business of a beer seller, &c.

Second plea. That in the said messuage &c. there were not at the said time when &c., divers ancient windows, or any ancient windows through which the light or air ought to have entered as alleged. Issue thereon.

By consent of the parties and order of a Judge the following case was stated for the opinion of this Court:—

The action is brought to recover damages for the obstruction of the light and air coming to the windows of a beer shop of the plaintiff, by the defendant building on the adjoining land. The pleadings, and also the lease and conveyances hereinafter referred to, are to be taken as part of this case.

The plaintiff's house has stood for upwards of twenty years before the nuisance complained of, during all which time there has been free and uninterrupted access of light and air to the windows in question.

Prior to the 2nd day of October, 1855, the plaintiff's house, and the land on which the defendant has built, belonged to W. Erwood and E. Carter, who were seized thereof in fee.

On that day the said W. Erwood and E. Carter leased the land on which the defendant has built to G. Payne, G. Arney, and E. Hampson, described in the lease (as in fact they were, trustees of Price's Workmen's Stores Industrial Society, for ninety-nine years from the 29th September, 1855, in which lease was contained the following covenants. And also that the said G. Payne, G. Arney and E. Hampson, their executors &c., shall, within the space of nine calendar months from the date

hereof, build upon the said piece or parcel of ground one good and substantial store-house, messuage or tenement and buildings, &c., according to the [724] plan, elevation and specification this day signed by the said parties hereto. And also shall not erect or build any other building on the said ground hereby demised other than the said messuage or tenement &c., mentioned and described in the said last mentioned plan, without the license and consent in writing of the said W. Erwood and E. Carter, their heirs &c. But it shall be lawful for the said G. Payne, G. Arney and E. Hampson, their executors &c., from time to time during the said term to make alterations in the said messuage or tenement, &c., so that the same shall not in any way be diminished in value.

Up to the time at which the said lease was made, there had not been, so far as can be traced, any severance either in the title to or possession or occupancy of the said land and house, and the same had been occupied and used together by the proprietor or proprietors thereof for the time being for upwards of fifty years.

On the 31st day of December, 1856, the said W. Erwood and E. Carter, being then the owners in fee simple both of the said house and land, but subject as to the land to the said lease, conveyed the land to the said G. Payne, G. Arney and E. Hampson, trustees as aforesaid, in fee simple,^(a) and the fee has from that time hitherto been vested in them.

[725] On the 6th day of May 1857, the said W. Erwood and E. Carter, conveyed the plaintiff's house to J. Griffin in fee simple, under whom the plaintiff had before the grievances complained of become, and has since continued to be and is, entitled to the possession of the said house.

Subsequent to the conveyance in fee to the said G. Payne and other trustees as aforesaid, and subsequent to the plaintiff becoming entitled to the said house, the defendant, by the direction or with the authority of the said trustees, who were then and still are possessed of the said land, began to build on the said land so conveyed to the said trustees, and built so as materially to obstruct the light and air coming to the plaintiff's said windows of his said house.

He did not build according to the plan mentioned and referred to in the said lease to the said trustees, but built on another and different plan, which was sanctioned by the trustees. Had he built according to the said plan, the light and air coming to the plaintiff's said windows would not have been obstructed to the same extent as they are by the present building, though such light and air would have been obstructed to some extent.

The question for the opinion of this Court is, whether or no the defendant is liable to the plaintiff for obstructing the light and air coming to his said windows; and if the defendant is so liable, whether he is liable for the whole of the said obstruction, that is to say, both for the obstruction of so much of the light and air as would have been obstructed if he had built according to the plan mentioned and referred in the said lease, and for the excess, or only liable for the excess.

[726] If the Court shall be of opinion in the affirmative, judgment is to be entered for the plaintiff on the issues joined on the first count of the declaration for such damages as an arbitrator shall find and costs, and the arbitrator is to assess the damages either for the whole obstruction or for the excess only, according to the judgment of the Court.

(a) The indenture of the 31st of December, 1856, after reciting (inter alia) that W. Erwood and E. Carter had "contracted and agreed with the said G. Payne, G. Arney, and E. Hampson for the absolute sale to them of the piece or parcel of ground" thereafter described, witnessed "that in pursuance of the said agreement and in consideration of the sum of 240l. sterling, on or before the execution of these presents, paid," &c., "they the said W. Erwood and E. Carter Do and each of them doth grant, bargain, sell, release and convey unto the said G. Payne, G. Arney, and E. Hampson, and their heirs, All that piece or parcel of ground situate, lying, and being on the South side of the York Road, in the parish of St. Mary, Battersea, measuring," &c. (describing the ground by measurement and abutments), "and which said piece or parcel of ground is, for the better identification thereof, more particularly described in the ground plan thereof drawn in the margin of these presents: Together with all houses, outhouses, buildings, rights, members, easements, and appurtenances to the said piece or parcel of ground and premises belonging or appertaining."

If the Court shall be of opinion in the negative, judgment is to be entered for the defendant on the issue joined on the second plea, with costs applicable to such issue.

Petersdorff, Serjt. (with whom was Hance), for the plaintiff. The covenant in the lease of the land cannot affect the plaintiff's right to the free and uninterrupted access of light and air to the windows of his house. Where the owner of a house and land conveys the house to one person and the land to another, there is an implied reservation of all easements enjoyed by him: *Pyer v. Carter* (1 H. & N. 916). The obligation is equally binding on the grantor and grantee and persons claiming under them. The rule is thus laid down in *Gale on Easements* (page 81, 82, 3rd ed.): "Upon the severance of an heritage a grant will be implied: first, of all those continuous and apparent easements which have in fact been used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have had no legal existence as easements: and secondly, of all those easements without which the enjoyment of the several portions could be had at all. . . . Cases of this nature, which have come under the consideration of our Courts, have generally been treated as arising from the application of the rule that 'no man can derogate from his own grant.' This maxim, however, although consistent with the doctrine stated, is insufficient to account for the principle that the obligation is imposed equally on the grantee and the gran-^[727]-tor." In *Palmer v. Fletcher* (1 Lev. 122), which was an action on the case for stopping lights, it appeared that a man erected a house on his own land, and afterwards sold the house to one and the land adjoining to another, who obstructed the light of the house; and it was resolved that, "though it was a new message, yet no person who claimed the land by purchase, under the builder, could obstruct the lights any more than the builder himself could; who could not derogate from his own grant, for the windows were a necessary and essential part of the house." It is true that in *Tenant v. Goodwin*, as reported by Lord Raymond (2 Ld. Raym. 1093), Lord Holt said: "As to the case of *Palmer v. Fletcher*; if, indeed, the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground, and kept the house, without reserving the benefit of the lights, the vendee might build against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." It is, however, observed in *Gale on Easements* (page 84, 3rd ed.), that "the report of the same case by Salkeld (1 Salk. 360), who was himself counsel in the cause, is silent as to any such dictum, and from the report in 6 Mod. 314, it would seem that the Court only expressed a doubt on the point." The learned author adds: "This opinion of Lord Holt, if indeed it can be treated as such, was probably founded on the civil law, whereas the doctrine of the English law was apparently of French origin. The Code Civil in this respect merely recognised an ancient provision of the French law."^(e) The principle is this, that the grantor, who must know the state of the premises, ^[728] impliedly reserves all easements enjoyed by him, and the grantee must be presumed to be cognizant of their existence and that the grantor intended to preserve them. Suppose the owners in fee had occupied the house at the time they sold the land, the inference would be that they intended that the access of light and air should not be obstructed. [Martin, B. No doubt, the intention of the grantors was to reserve all rights in respect of the house, subject only to the derogation (if any) by building on the land.] The condition of the property must be regarded at the time of the grant; and if it is then burthened with an apparent and continuous easement, upon its severance the grantor impliedly conveys, and the grantee takes, subject to that easement. In *Cox v. Matthews* (1 Vent. 237, 239), Hale, C. J., said: "If a man should build a house upon his own ground, and then grant the house to A. and grant certain lands adjoining to B., B. could not build to the stopping of A.'s lights in that case." The law is laid down in similar terms by Holt, C. J., in *Rosewell v. Pryor* (6 Mod. 116). *Compton v. Richards* (1 Price, 27) decided that the occupier of one of two houses built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case against the tenant of the other, for obstructing his window lights by adding to his own building, however short the previous period of enjoyment by the plaintiff. [Channell, B. There the property, which consisted of several dwelling-houses, was

(e) Pothier, Coutume d'Orléans. Introduction au Titre XIII.

sold under a condition which bound each purchaser not to injure the house of another by building on some garden land. There Thomson, C. B., said that the effect of *Palmer v. Fletcher* is, "that where a man sells a house, he shall not afterwards be permitted to disturb the rights which appertain to it." In *Swansborough v. Coventry* (9 Bing. 305) the plaintiff purchased [729] a house of A., and the defendant at the same time purchased of A. the adjoining land, upon which an erection of one story high had formerly stood. In the conveyance to the plaintiff, his house was described as bounded by building ground belonging to the defendant; it was held that the defendant was not entitled to build to a greater height than one story, if by so doing he obstructed the plaintiff's light. There Tindal, C. J., in delivering the judgment of the Court, said: "It is well established by the decided cases, that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can anyone who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights." The restricted power to build contained in the lease of the 2nd October, 1855, shews that it was in the contemplation of both grantor and grantee that no building should be erected on the land, which would obstruct the free access of light and air to the house. It must be assumed that the grantee was aware the grantor intended to preserve existing rights. [Martin, B. The law requires that agreements in respect of any interest in land should be in writing. *Pinnington v. Gulland* (9 Exch. 1) was a case where the owner of several closes had executed deeds of conveyance to three purchasers on the same day, and we held, upon the authorities, that although there was no special grant or reservation of any particular way, the purchasers were entitled to rights of way. But what authority is that for saying that if a man has a house and a piece of land adjoining it, and he sells the land, there is an implied grant that the purchaser shall not build upon it so as to obstruct the light of the house?] In *Glave v. [730] Harding*,^(a) this Court seems to have considered that grants of light and air might be implied on the severance of a property.

Lush (with whom was Fooks) appeared for the defendant, but was not called upon to argue.

POLLOCK, C. B. I am of opinion that our judgment should be for the defendant. My brother Petersdorff has cited no authority for the precise matter which he has urged before us, and I think that, in construing a conveyance of land, we must collect what the parties intended from the language they have used. It seems to me that we cannot look into the lease of the 2nd of October, 1855, for it is merged in the fee, a conveyance of the reversion having been made to the lessees; and we must look to that conveyance alone in order to ascertain the rights of the parties. In that conveyance (ante, p. 724) there is no covenant by the purchasers not to build on the land so as to obstruct the light and air coming to the windows of the plaintiff's house, nor indeed any limitation of the right to use the land. I therefore think that the present action is not maintainable, and the defendant is entitled to our judgment.

MARTIN, B. I am of the same opinion. The conveyance (ante, p. 724) of the reversion in fee of the land to the lessees (who are substantially the defendants) is in the most general terms. My brother Petersdorff contends, that notwithstanding the [731] grant of the land in those terms, the purchasers are restricted in their use of it, so that they cannot make any erection upon it which obstructs the light and air of the plaintiff's house. I know of no authority for that position. There is an absolute conveyance of the land, which, as against the grantor, gives every right which a grantee would have, that is to use it in a lawful way.

CHANNELL, B. I entirely agree. The argument for the plaintiff has dwelt a great deal upon the case of *Palmer v. Fletcher* (1 Lev. 122), but that case is explained in *Tenant v. Goodwin* (2 Ld. Raym. 1093), by Lord Ilolt, who said: "If indeed the builder of a house sells the house with the land and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of

(a) 27 L. J. Exch. 286. In this case, the Court having taken time to consider their judgment discovered, on examination of the lease under which the defendant claimed, that it expressly provided that there should be no right of way and consequently the point which had been argued did not arise, and a written judgment which was prepared was not delivered.

ground, and kept the house without reserving the benefit of the lights, the vendee might build against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." I think that is the true view of the case; and it does not conflict with any of the authorities cited. Then the only point for our consideration is, whether, there having been prior to the conveyance in fee a lease containing a covenant to build in a particular way, that lease under the circumstances makes any difference. I think that, having reference to the fact that no building was erected under that lease, and looking at the time when the building was erected, viz. after the conveyance in fee, the lease does not affect the case.

WILDE, B. The action is for obstructing the light and air of the plaintiff's house; and it is contended that the [732] defendant had no right to build in the way he has built. Now the title to the land on which the defendant built was obtained from the owners of the house, the light of which is obstructed, under a conveyance executed in 1856. There had been a previous lease, but at that time the reversion in fee was conveyed to the lessees. The question then is, whether, the lessees having obtained the fee in 1856, there was anything to prevent them from building on the land. As my brother Martin observed, the conveyance to them is in the most general terms, and does not in any way purport to restrict them in their use of the land.

Then, if the conveyance does not restrict them, what does? It is said that the owners, who conveyed to them the reversion in fee of the land, having at that time themselves the use of the neighbouring house, is a circumstance from which it ought to be implied that in granting, fully and freely as they did, the land, they meant to restrict the grantees in building upon it. No authority has been cited for that position. The only authority that at all approaches that view is the case of *Pinnington v. Galland* (9 Exch. 1), but all that case decided is that the Court might, as a matter of law, imply a reservation of a way where it was a way of necessity. To this extent the law has gone; that where the owner of a close surrounded by his land grants the close to another without any express reservation of a way, if there is no other means of getting to the close, the law will imply a way over the grantor's land, as incident to the grant. That is no authority for implying in this case a restriction upon the grantees of the land, that they shall not build upon it so as to obstruct the light and air of the plaintiff's house. If the grantees of the land might have built upon it in 1856, I do not understand how the conveyance of the house in 1857 to the person from whom the plaintiff obtained possession, can alter the case. [733] It may be that the grantors could not derogate from their grant in 1856; but it is impossible to say that the grant in 1857 in any way derogated from the rights granted in 1856. When the facts are understood, this is to my mind a plain case. For these reasons I think that the defendant is entitled to judgment.

Judgment for the defendant.

ROGERS v. MUTTON. Jan. 22, 1862.—Declaration on a deed, whereby the plaintiff, in consideration of money lent to him by the defendant, assigned to the defendant certain goods, subject to a proviso for redemption on repayment of the 5th of March, 1870, "or at such earlier day or time as the defendant should appoint for payment by notice in writing;" with liberty on default in payment to seize and sell the goods. Breach: that the defendant without giving the plaintiff notice of an appointment of any reasonable earlier day than the 5th of March, 1870, for payment of the money, and before any default in payment, seized and sold the plaintiff's goods. Pleas: that before seizing and selling the goods, to wit, on the 30th April, 1861, the defendant, in pursuance of and under the provisions in the deed, duly gave the plaintiff a notice in writing, appointing an earlier day than the 5th March, 1870, for payment of the money, to wit, at two o'clock of the afternoon of the 30th April, 1861, but the plaintiff did not pay the same. Held, that the plea was bad, inasmuch as a notice for payment on the same day the notice was given was insufficient; and also that it was consistent with the plea that the seizure and sale were before default in payment at the time mentioned in the notice.

[S. C. 31 L. J. Ex. 275.]

Declaration. For that, on the 5th May, 1860, by a deed then made between the plaintiff of the one part, and the defendant of the other part, in consideration of the

sum of 55l. lent and advanced to the plaintiff by the defendant, and in consideration of such further sum or sums of money as might be thereafter lent by the defendant to the plaintiff, the plaintiff assigned and transferred unto the defendant certain household furniture, plate, linen, china, farming stock, &c., of the plaintiff, to hold the same unto the defendant as his own proper goods, chattels and effects, subject to a proviso for redemption, that if the plaintiff should pay or cause to be paid unto the defendant the sum of 55l., together with such further sum or sums as might be due and owing to the defendant, on the 5th day of March, 1870, or at such earlier day or time as the defendant, or his attorney or agent, should appoint for payment thereof by notice in writing sent by post or delivered to or left at [734] the house or last place of abode in England of the plaintiff, then and in that case the deed should cease and be void: Provided that if default should be made in payment of the said sum, or any part thereof, contrary to the aforesaid proviso &c., thereupon it should be lawful for the defendant or his agents forthwith, or at any time or times thereafter, to enter into and upon any lands, dwelling-houses and premises of the plaintiff and to take possession of the said goods, chattels and effects (with force, if necessary, as by breaking open the house door &c.) and to sell the same or any part or parts thereof &c. And the said deed also provided that until default should be made in payment of the said sum of money thereby secured, it should be lawful for the plaintiff to hold, possess and use the said goods, chattels and effects, without hindrance or disturbance of the defendant. Averments: that the defendant afterwards lent and advanced to the plaintiff a further sum of 50l., but that the plaintiff afterwards duly paid to and satisfied the defendant a large part of the whole of the said monies lent by the defendant to the plaintiff, leaving the sum of 57l. 10s. only due. Breach: that the defendant afterwards, without sending by post, or delivering to or leaving at the house or last known place of abode in England of the plaintiff, any notice in writing of the appointment by the defendant of any reasonable earlier day or time in that behalf than the said 5th day of March, 1870, for the payment of the said sum of 57l. 10s., and before any default had been made by the plaintiff in payment of the said sum of 57l. 10s., contrary to the said proviso &c., wrongfully and unjustly, and contrary to his covenant in that behalf, seized and took possession of the said household furniture &c. of the plaintiff, then being in and upon the plaintiff's dwelling-house &c., and afterwards wrongfully and unjustly sold and disposed thereof, &c.

Plea. That before the said seizing and taking possession [735] of the said household furniture &c. of the plaintiff by him the defendant, and before the selling and disposing thereof by him the defendant as in the declaration mentioned, to wit, on the 30th day of April, A.D. 1861, he, the defendant, did, in pursuance and under the provisions of the said deed, duly give to the plaintiff, by delivering the same at his dwelling-house, a notice in writing appointing an earlier day and time than the said 5th day of March, 1870, for the payment of the said sum of 57l. 10s. by the defendant, to wit, at two o'clock of the afternoon of the said 30th day of April A.D. 1861, but the plaintiff did not pay the said sum of 57l. 10s., or any part thereof, in pursuance of the said notice.

Demurrer and joinder therein.

J. Martin, in support of the demurrer. The plea is bad, for it states that a notice to pay was given on the day appointed for payment, which is unreasonable. The notice should have been for payment in a reasonable time, so as to afford the plaintiff an opportunity of complying with it. It is evident from the language of the deed that the parties contemplated a notice for payment on a day different from that on which the money was to be paid. Two things are requisite, a notice to pay and an appointment of a day for payment. [Wilde, B. You say, if this notice is good a notice to pay in five minutes would be good.] This is in effect a notice requiring instant payment. In Com. Dig. tit. Pleader (C.) 74, it is said, "Where notice is necessary, it ought to appear that it was given in due time, as if a man promises to pay as much as he disburses at such a fair, before the end of the fair, he ought to allege notice of his disbursements given before the end of the fair, otherwise it is too late." [Martin, B. The plea is badly pleaded. It alleges that before the seizure the plaintiff gave notice, but [736] it does not appear that the seizure was after two o'clock on the day appointed for payment.]

The Court then called on

H. T. Cole, to support the plea. The plea states that before the seizure the

defendant did, in pursuance and under the provisions of the deed, duly give to the plaintiff a notice appointing a day for payment. That must mean a due notice in law. [Wilde, B. The plea does not allege that the plaintiff made default in payment before the defendant seized his goods, but merely that notice was given before the seizure. It is not only necessary that the notice should be given, but also that there should have been a default in payment at the time named in the notice.]

Per Curiam.(a) The defendant may have liberty to amend within a week, otherwise judgment for the plaintiff.

Amendment accordingly.

BOLCH v. SMITH. Jan. 30, 1862.—The workmen in a Government dock-yard were permitted to use certain water-closets erected for their accommodation, and for that purpose to use certain paths across the dock-yard. The defendant, a Government contractor, was permitted to erect in the dock-yard certain machinery for the purpose of his work. He erected across a path which led to one of the water-closets a revolving shaft, partly covered with planks. The plaintiff, a workman in the dock-yard, having gone along this path to the water-closet, on his return stumbled, and on putting out his hand to save himself, his arm was caught by the shaft and lacerated. There was another path along which he might have gone, but the one he used was the more convenient. Held, that the defendant was not liable for the injury, since he was under no obligation to fence the shaft, and the defect in the fencing was apparent.

[S. C. 31 L. J. Ex. 201; 8 Jur. (N. S.) 197; 10 W. R. 387; 6 L. T. 158. Referred to, *Watkins v. Great Western Railway*, 1877, 46 L. J. C. P. 819; *Clinton v. Lyons*, [1912] 3 K. B. 209. Followed, *White v. France*, 1877, 2 C. P. D. 310. Adopted, *Burchell v. Hickisson*, 1880, 50 L. J. Q. B. 103; *Latham v. Johnson*, [1913] 1 K. B. 404. Explained, *Lowery v. Walker*, [1910] 1 K. B. 189.]

The first count of the declaration stated that the defendant, before and at the time of the happening of the injury hereinafter mentioned, was possessed of a certain mortar-mill adjoining or near to a certain public road on one side [737] thereof, and also of a certain steam-engine adjoining or near to the said road on the other and opposite side thereof; and the defendant wrongfully put, placed and fixed, and caused to be put, placed and fixed, in, upon, and across the said road, and which was raised above the surface thereof, a certain shaft between the said steam-engine and the said mill, for the purpose of working, and which at the time of the happening of the said injury, was being used by the defendant in and for working the said mill and other works of the defendant; and the defendant wrongfully kept and continued, until and at the time of the happening of the injury hereinafter mentioned, the said shaft there, then so raised above the surface of the said road and obstructing the said road, and not being cased over or otherwise fenced, nor any means being used so as to prevent injury being caused thereby to persons passing along the said road whilst the same was being used by the defendant for the purposes aforesaid. And the plaintiff says that he, lawfully being and walking in and upon the said road, did accidentally, and without any want of ordinary caution on his part, slip and fall down to the ground in and upon the said road near to the said shaft, and in and whilst so falling his left arm accidentally, and without any want of ordinary caution on his part, came in contact with the said shaft, which was then revolving and being so used as aforesaid, and by reason of the premises his said left arm was by the said shaft greatly crushed and lacerated, &c. Second count: that at the time of the happening of the injury hereinafter mentioned, the plaintiff was lawfully in and passing and walking upon and along a certain close of land then being used by the plaintiff, and having been, and being, from time to time used by the plaintiff and divers other persons as a road or footway for certain purposes, with the consent and permission of the lawful possessors thereof; and the defendant was possessed [738] of a certain mortar-mill adjoining or near to the said close of land on one side thereof, and also of a certain steam-engine adjoining to the said close of land on the other and opposite side thereof, and of a certain shaft between the said steam-engine and the said mill, placed upon and raised above the

(a) Pollock, C. B., Martin, B., Channell, B., and Wilde, B.

surface of the said close, for the purpose of working, and which at the time of the injury hereinafter mentioned was used by the defendant in and for working the said mill and other works of the defendant; and the defendant, well knowing the premises, then carelessly, negligently and improperly kept the said shaft there without being [properly] (a) cased over or [properly] fenced, and without any [proper or sufficient] means being used so as to prevent injury being caused to persons lawfully passing upon and along the said road or close of land whilst the said shaft was being used by the defendant for the purposes aforesaid. (It then proceeded to state, as in the first count, that the plaintiff, whilst he was lawfully in and passing and walking upon and along the said close, and using the same as aforesaid, accidentally fell, and whilst so falling his left arm came in contact with the shaft and was crushed.)

Pleas. First: not guilty.

Second: to first count. That at the time of the happening of the said injury there was no public road adjoining or near to the said mortar-mill of the defendant on one side thereof, and adjoining or near to the said steam-engine of the defendant on the other and opposite side thereof, as alleged.

Third: to first count. That at the time of the happening of the said injury, the shaft between the said steam-engine and the said mill was not raised above the surface of the said road and did not obstruct the said road, as alleged.

Fourth: to the second count. That at the time of the happening of the said injury, the plaintiff was not lawfully [739] in and passing and walking upon and along the said close of land, nor was he then using the same as a road or footway with the consent and permission of the lawful possessors thereof, as alleged.

Issues thereon.

At the trial, before Channell, B., at the last Hampshire Summer Assizes, the following facts appeared. The plaintiff was a millwright employed in the Government dock-yard at Portsmouth. The defendant was a contractor, and had been engaged for some time in enlarging one of the docks. The men employed in the dock-yard were not allowed to leave it during the day, and water-closets had been built for their use. For the purpose of going to these water-closets, they had permission to use certain paths which crossed the dock-yard. The defendant had been permitted to erect a mortar-mill for the purpose of his work, and he built an engine-house on one side of one of these paths and the mortar-mill on the other side of the path. A revolving shaft which connected the engine with the mill was placed across the path about six inches above the level of the ground. This shaft was partly covered with a few planks not joined together, and forming an incline upwards from the ground, so that a barrow could be wheeled over it. The shaft had been on that spot covered or uncovered for five years. The plaintiff had gone along this path to one of the water-closets, and whilst returning he accidentally stumbled when near the shaft, which was in rapid motion, and on reaching out his hand to save himself, his left arm was caught by the shaft, and so much lacerated that it was necessary to amputate it. There were two other paths by which the plaintiff might have reached the water-closet; but the one he used was the shortest and most convenient. There was conflicting evidence as to whether the plaintiff [740] had a right to use the path on the day of the accident, the defendant's witnesses stating that a launch took place on that day, and that a barrier had been erected to prevent people using the path.

At the close of the plaintiff's case, the learned Judge ruled that the first count could not be supported, as there was no evidence that the path along which the plaintiff went was a public road. It was then submitted, on the part of the defendant, that the second count could not be supported, and that the plaintiff ought to be nonsuited, inasmuch as there was no legal obligation on the defendant to fence the shaft, and there was no evidence from which such a duty could be inferred; and *Hounsell v. Smyth* (7 C. B. N. S. 731) was relied on. The learned Judge referred to *Corby v. Hill* (4 C. B. N. S. 556), and reserved the question of nonsuit until after evidence on behalf of the defendant had been given. In the course of the defendant's case it appeared that the shaft had been fenced to some extent but not sufficiently, and the learned Judge allowed the plaintiff to amend the second count, as above stated.

At the close of the defendant's case, the learned Judge proposed to leave it to the jury to assess the damages, supposing the plaintiff had a right of action, and then to

(a) The words within brackets were amendments made at the trial.

nonsuit the plaintiff, reserving leave for him to move to set aside the nonsuit, and enter the verdict for the amount assessed by the jury. The plaintiff's counsel declined to accede to this course; whereupon the learned Judge left it to the jury to say: first, whether the plaintiff was lawfully using the way in question on the day of the accident: secondly, whether the defendant was guilty of negligence in leaving the shaft in the state it was on that day. The jury answered both questions in the affirmative, and they [741] added that they found "that the shaft was not sufficiently fenced;" and they assessed the damages at 230l. A verdict having been entered for the plaintiff for that amount,

Coleridge, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury in not telling them that there was no obligation on the part of the defendant to fence the shaft; and also that the verdict was against the evidence.

Montague Smith and H. T. Cole now shewed cause. There was no misdirection. The plaintiff, at the time of the accident, was using the way with the permission of the owners of the soil. The defendant, who was allowed to erect a mortar-mill, erected it in a manner which was dangerous to persons passing along the way; it was therefore his duty to keep it sufficiently fenced. It is true that the plaintiff might, by going another way, have reached the water-closet without passing by the machinery, but he was under no obligation to do so, and the way he went was the shortest and most convenient. The plaintiff was not a trespasser. In *Corby v. Hill* (4 C. B. N. S. 556, 563), the owner of land having a private road for the use of persons coming to his house, gave permission to the defendant, who was engaged in building on the land, to place materials upon the road. The defendant availed himself of this permission by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage; and it was held that the defendant was liable to an action. Cockburn, C. J., there said: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. Could they have justified the placing an obstruction across [742] the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not. . . . If that be so, a third person could not acquire the right to do so under their licence and permission." [Channell, B. A shopkeeper may in one sense be said to allure people into his shop; and if a customer, being about to enter it, fell through the hole used for shooting coals into the cellar in consequence of its being insufficiently covered, the shopkeeper might be liable. There may be a distinction between a bare permission and an allurement. Wilde, B. Suppose a person gives another permission to walk across his yard in which he has placed a quantity of stones, and the latter on a dark night tumbles over them, would the former be liable?] The defendant having neglected properly to fence dangerous machinery, is equally liable as a person who keeps a dangerous animal. The plaintiff had a right to the use of the way unobstructed. In *Corby v. Hill* (4 C. B. N. S. 556, 567), Willes, J., said: "The question is, whether there is any legal remedy for a person lawfully using the road, to whom injury results from the act of a third person in negligently placing an obstruction upon the road. I should have thought that the bare statement of the proposition was enough. The defendant had no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury. That is so obvious that it is needless to dwell upon it." [Wilde, B. If A. gives B. permission to cross his yard in which there are several ways, and there is a pit in the yard which is usually covered, but on a particular night it being uncovered B. falls into it, I can understand that A. would be liable. But if the hole has always been uncovered, and B. in broad day walks into [743] it, would A. be liable? Martin, B., referred to *Seymour v. Maddox* (16 Q. B. 326). Pollock, C. B. The plaintiff was not obliged to go that way, and if he chose to use it he must do so with the danger attached to it. The authorities sanctioned his use of it so far that he might use it at his peril.] In *Hounsell v. Smyth* (7 C. B. N. S. 731), it was held that an owner of land is under no legal obligation to fence an excavation therein, unless it is made so near to a public road or way as to constitute a public nuisance; but that case is distinguishable, for there the quarry was on waste land. The provision of the 7 & 8 Vict. c. 15,

ss. 24, 25, with respect to actions for injury caused by unfenced machinery, has not abrogated the common law right to sue: *Caswell v. Worth* (5 E. & B. 849). In *Cornman v. The Eastern Counties Railway Company* (4 H. & N. 781), where it was held that the defendants were not liable for injury caused to the plaintiff by falling over a weighing machine standing on the platform of their railway, the declaration contained no averment that the plaintiff was lawfully there; and the accident was caused by his being driven by the crowd against the machine. This case is within the principle of the decision in *Cowley v. The Corporation of Sunderland* (6 H. & N. 565).

Coleridge and Thring appeared in support of the rule, but were not called upon to argue.

CHANNELL, B. I am of opinion that the rule must be absolute for a new trial. The declaration contains two counts. The first is founded on this—that the road across which the shaft was placed was a public road. I thought there was no evidence of that, and ruled that the plaintiff could not recover on that count. The second count was sub-[744]stantially the same as the first, except that it described the shaft as being placed across a certain close of land used as a road or footway, and along which the plaintiff was lawfully passing with the permission of the possessors thereof. It was objected that the plaintiff could not recover on the second count, because there was no obligation on the part of the defendant to fence the shaft. I thought that the case of *Corby v. Hill* (4 C. B. N. S. 556) presented some reason for assuming that the objection was good, but thinking that the defendant might possibly succeed upon the facts, I thought it the better course to hear the evidence on both sides, and reserve the question of nonsuit until the close of the defendant's case. The plaintiff's counsel then refused his assent to my directing a nonsuit and reserving the question, and that is the reason why the matter comes before the Court in the present shape.

The case resolves itself into this: Was there, upon the evidence, any obligation on the part of the defendant to fence the shaft? Because if not I was wrong in leaving any question to the jury, and there was a misdirection. On full consideration I am clearly of opinion that the defendant was under no obligation to fence the shaft. The case falls within the law as explained in *Hounsell v. Smith* (7 C. B. N. S. 731). We must assume that the plaintiff was not a trespasser, and that he was using the road with the permission of the owners of the soil, but he was not obliged to use it, for there were two other ways to the same place though less convenient. *Corby v. Hill* (4 C. B. N. S. 556) is to my mind distinguishable. In that case permission was given to the defendant to place materials on a private road, and the plaintiff, as one of the public, had a right to use the road on which the defendant had placed a quantity of slates.

But it is argued that, supposing the defendant was under [745] no obligation to fence the shaft, yet inasmuch as he had done so, and had put up an insufficient fence, he was liable. There might have been some force in that argument if the insufficiency of the fencing was unseen, but on the contrary it was apparent. If the defect had not been visible the case would be within the observations of Willes, J., in *Corby v. Hill* (4 C. B. N. S. 556). Here the jury have found that there was an insecure fencing, and if the defendant was under no obligation to fence at all, he is not liable because he has put up some fence or covering which was insufficient. No more liability can attach to him than if he had put up no fence at all. It appears to me that the objection ought to have prevailed at *Nisi Prius*, and I was wrong in not having nonsuited the plaintiff.

MARTIN, B. I am of the same opinion. The real objection to this action is that the plaintiff has failed to establish that there was any obligation or duty on the part of the defendant to have this path in any other condition than it was at the time of the accident. That should have been established in some way. If the plaintiff could have shewn any such obligation on the part of the defendant he would have made out a case, but that was a condition precedent, and the plaintiff has wholly failed to do so. The defendant had a right to erect the machinery, to erect it in the place he did, and to work it in the manner he was doing.

Then what is the true condition of the plaintiff? It is said that he had a right to go along the path across which the machinery was erected, for he was a workman employed in the dockyard, and had liberty to use the water-closet. But that is a fallacious argument. It is true the plaintiff had permission to use the path. Per-

mission involves leave and licence, but it gives no right. If I avail [746] myself of permission to cross a man's land, I do so by virtue of a licence, not of a right. It is an abuse of language to call it a right: it is an excuse or licence, so that the party cannot be treated as a trespasser. Inasmuch as there was another way by which the plaintiff might have gone, but voluntarily chose the one which was out of order, I think he has no right of action against the defendant, and that he ought to have been nonsuited at the trial.

WILDE, B. I am of the same opinion. It is of importance in all these cases that the facts upon which the decisions are based should be made plain. The plaintiff was one of a number of persons who obtained leave and licence from the dock-yard authorities to cross the yard from one place to another. The defendant had permission from the same authorities to put up certain machinery in the yard. The plaintiff while walking along the usual track fell down, not by reason of any obstruction, but in consequence of stumbling, and in trying to save himself, his arm came in contact with a revolving shaft and was lacerated.

I will decide the case as if it were a question between the plaintiff and the owners of the yard, because if they are not responsible for putting up the shaft, a fortiori the defendant is not. Then, was there any obligation on the owners of the yard not to put up machinery that might be dangerous to persons crossing it? None of the facts tend to shew that any such obligation existed. If what was put up was an obstruction to any person who used that way, the only consequence would be that he would have to go another way. That being so, it appears to me that this action cannot lie, because I agree that it is founded upon a duty, and none exists.

That disposes of the case; but I will add that I do not mean to say that if the defendant had made a hole in the yard, [747] and had covered it in a way that was insufficient, but which appeared to be sufficient, he would not have been liable. But here there was nothing of that character. The danger was open and visible; there was nothing which could be called a "trap."

POLLOCK, C. B., concurred.

Rule absolute for a new trial.

SINGLETON v. WILLIAMSON. Jan. 22, 1862.—Detinue will not lie on a refusal to deliver up cattle distrained damage feazant, where the tender of amends is after the impounding.

[S. C. 31 L. J. Ex. 287; 8 Jur. N. S. 157; 10 W. R. 301; 5 L. T. 645.

See p. 410, ante.]

Declaration. For that the defendant detained from the plaintiff the plaintiff's cattle, to wit, two bullocks, whereby they were injured, and the plaintiff was put to costs in and about endeavouring to procure a return of them.

Plea. That, before and at the time of the alleged detention, the defendant was lawfully possessed of closes of land situate in the parish of Gosforth in the county of Northumberland; and because the said cattle were then wrongfully in the said closes, doing damage there to the defendant, and eating and depasturing and treading down the corn, grass, and herbage of the defendant there then growing, the defendant then seized and took the said cattle in the said closes so doing damage as aforesaid, as a distress for the said damage, and led and drove the same out of the said closes in which &c., to a certain common pound, and there impounded the same, and kept the same impounded there, pursuant to the statute in such case made and provided, until the plaintiff paid the said costs to have the same released, as and for and the same being a reasonable satisfaction for the said damage so done, as it was lawful for the [748] defendant so to do for the cause aforesaid, he the defendant using no unnecessary force or violence and doing no unnecessary damage on such occasion, which is the alleged detention &c.

Replication. That after the defendant had so impounded the said cattle, the plaintiff was ready and willing and then tendered and offered to pay to the defendant the sum of 1l. 2s. 4d., which said sum was a reasonable and sufficient satisfaction and amends for the damage done by the cattle as in the plea mentioned; and all that the defendant was entitled to detain the said cattle for; and all things were done and happened to make the said tender a good tender, and to entitle the plaintiff to sue

the defendant for the subsequent detention hereinafter mentioned. And the plaintiff says that the defendant would not accept the said sum of 1l. 2s. 4d., when so tendered as aforesaid, but afterwards wrongfully detained the said cattle from the plaintiff, which is the detention complained of.

Demurrer and joinder therein.

Edward James (Kemplay with him), in support of the demurrer. The replication is bad. In *Pilkington v. Hastings* (Cro. Eliz. 813), "all the Court held that the tender came too late after the impounding, for being lawfully impounded, they were in custodia legis, and the party who distrained had not any interest in them, nor authority to deliver them." [Martin, B. How is the owner to get back his cattle? He admits that they have done damage, and he tenders sufficient amends, why is he not to have them?] The proper course is to replevy. The law is thus stated in *The Six Carpenters' case* (8 Rep. 146 a., 147 a.), by Lord Coke, who says "Note, reader, this difference that tender upon the land before the distress makes the distress tortious; tender after the distress and [749] before the impounding makes the detainer, and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law, to be there determined." In *Thomas v. Harries* (1 Man. & G. 695), the Court treated it as settled law that a tender after impounding is too late. By the 23rd section of the Common Law Procedure Act, 1860, a plaintiff in replevin may, in answer to an avowry, pay money into Court in satisfaction. The reason for that alteration in the law was that a tender after impounding was too late: Day's Common Law Procedure Acts, p. 273, note.

The Court then called on

Mellish (T. Jones with him), to support the replication. No case has decided that detainee will not lie upon the distrainer's refusal to restore the cattle upon the distrainee tendering the amount of the damage after the impounding. In the passage cited from *The Six Carpenters' case* (8 Rep. 147 b.), Lord Cole goes on to say, "But after the law has determined it, and the avowrant has return irreplevisable, yet if the plaintiff makes him a sufficient tender he may have an action of detainee for the detainer after: or he may, upon satisfaction made in Court, have a writ for the redelivery of his goods; and therewith agree the said books in 13 Hen. 4, 17 b., 14 H. 4, 4, Registr' Judici' 37, 45 E. 3, 9, and all the books before." If then detainee will lie after judgment in replevin it is difficult to see why it should not lie before, for the amount of the damage done by the cattle would not be assessed in the action of replevin, but the judgment would be either for the plaintiff with damages for the detention of the cattle, or for the defendant, that he have a return of the [750] cattle irreplevisable, with such damages as he has sustained by the delay of his remedy in consequence of the replevin. Therefore, after judgment of a return irreplevisable, the distrainee would still have to tender a sum sufficient to satisfy the damage done by the cattle. To meet the difficulty in the case of rent, the 17 Car. 2, c. 7, s. 2, enables the jury to find the amount due. [Martin, B. A person impounds cattle damage feazant: before the owner can get them back by tendering the amount of the damage, he is obliged to bring an action of replevin, in which, if the distress be lawful, he must fail and the cattle be returned to the distrainer, and then, upon a refusal to redeliver them after a sufficient tender, detainee will lie. That being so, I cannot understand why it should not lie before replevin.] In *Gulliver v. Cosens* (1 C. B. 788, 796) it was held that an action for money had and received would not lie to recover back an excessive sum demanded, and paid under protest, in respect of a distress damage feazant, but that the proper course was to bring detainee. There Tindal, C. J., said: "In the event of the defendant refusing to accept the sum tendered, and deliver up the sheep, he (the plaintiff) should have brought detainee." The reporter indeed adds, in a note, "Id est, upon a tender before impounding." There is no reason why the distrainee should go through the useless ceremony of bringing an action of replevin, when he must nevertheless make the tender in order to get back his cattle.

James, in reply, referred to *Glynn v. Thomas* (11 Exch. 870) and *Ladd v. Thomas* (12 A. & E. 117).

POLLOCK, C. B. I am of opinion that the defendant is entitled to judgment. In *Gulliver v. Cosens* (1 C. B. 788, 796), Maule, J., [751] said: "The defendant had an undoubted right to distress the plaintiff's sheep, and to keep them until the

damage done was satisfied. If a sufficient tender had been made before the impounding the defendant would have been bound to restore them, otherwise not." Therefore upon the question now before us, my brother Maule clearly and distinctly propounded a legal proposition which was assented to by the whole Court; viz., that after impounding the distrainer is entitled to hold the distress, notwithstanding a sufficient tender of the damage; and it is by no means clear that the Chief Justice did not mean (as stated by the learned reporter) a tender before impounding. After the authorities on the subject for so long a period, I do not see how we can decide differently. I do not concur in the disapprobation expressed by my brother Martin. I can well understand that a tender of damage after impounding may be as vicious as a tender of a debt after action brought. In such case the creditor may well say, "I have brought my action, pay the money into Court, do not tender it after I have called in the aid of the law to recover it." The doctrine of a tender after impounding seems to me analogous to that. For these reasons I am of opinion that the defendant is entitled to judgment.

MARTIN, B. No doubt such is the law, but it is very unsatisfactory. A valuable animal may have done damage to an inappreciable extent, by straying into a field on a dry day, and if he is impounded the owner has no means of getting him out until after he has brought an action of replevin. That state of the law is not remedied by the 23rd section of the Common Law Procedure Act, 1860.

CHANNELL, B. I am also of opinion that the defendant is entitled to judgment. It is clear from the authorities [752] that a tender after impounding is too late. My brother Martin does not say that such is not the law, but only that he does not comprehend the principle on which it proceeds. It may be founded on this, that after the goods are in the custody of the law, a tender to the distrainer is insufficient. Whether that be so or not, the authorities are too strong to be resisted.

Then the only question is whether there is any distinction as to the right to maintain detinue. I agree with what was said by Maule, J., in *Gulliver v. Cosens* (1 C. B. 788). The dictum of the Chief Justice was not necessary for the decision of that case, and the other members of the Court did not proceed on that ground. It seems to me that under these circumstances the action of detinue stands in the same position as trespass or case.

WILDE, B. I am also of opinion that a tender after impounding is too late. We could not hold this replication good without infracting that rule of law. Whilst it is so, whatever practical inconvenience may exist we cannot decide in favour of the plaintiff.

Judgment for the defendant.

[753] BEALEY v. STUART AND ANOTHER. Jan. 22, 1862.—The plaintiff agreed to let, and the defendants to take, for one year, at a stipulated rent, certain works and buildings; and the plaintiff agreed to supply to the defendants the whole of the chlorine still-waste as it came from their stills, neither adding to nor taking anything from the same, at the rate of 2s. 6d. for every 21 cwt. of waste so supplied, with the understanding that the defendants were to have the option of a lease of the premises for seven or fourteen years at the same rent, if they should feel disposed so to do, within three months from the date thereof. And the plaintiff agreed not to use or injure or part with any of the still-waste except to the defendants, so long as they should hold the said works. Held, that the defendants were bound to accept and pay for the whole of the plaintiff's chlorine still-waste during the year or such further term as they should hold the works, and that it was no answer to an action for not accepting it, that the defendants' manufacture failed and was discontinued, and the chlorine still-waste proved useless, and was no longer necessary for their manufacture.

[S. C. 31 L. J. Ex. 281; 8 Jur. (N. S.) 389.]

Declaration. That heretofore, to wit, on the 18th day of August A.D. 1860, the plaintiff and defendants agreed together in the words and figures following, that is to say:—

"Manchester, August 18, 1860.

"Memorandum of agreement, whereby Messrs. Bealey" (meaning the plaintiff)

"agree to let, and Messrs. Stuart and Edwards, of Smithwick" (meaning the defendants), "agree to take, for the term of one year from Michaelmas next, at the yearly rent of 60l. payable quarterly, the works and two outbuildings and cottage situate at Radcliffe Close, and known as the Higher Works, Radcliffe Close. And the said Messrs. Bealey and Co. further agree to supply to the said Messrs. Stuart and Edwards the whole of the chlorine still-waste as it comes from their stills, neither adding to nor taking anything from the same, at the rate of 2s. 6d. for every 21 cwt. of waste so supplied, with the understanding that the said Stuart and Edwards are to have the option of taking a lease of the said premises for seven or fourteen years at the same rent, if they shall feel disposed so to do, within three months from the date hereof; and that Messrs. Bealey are to clean the interior of the said buildings, and to keep them wind and weather tight during the term hereby agreed on. The rent before mentioned to include the use of the water to drive the water-wheel (except at such times as it cannot be spared by Messrs. Bealey without injury to [754] their own manufactory); all the fittings and things to remain on the premises; and Messrs. Stuart and Edwards are to have the use of the water-wheel and also a free right of way at all times to the said works. And Messrs. Bealey agree not to use or injure or part with any of the still-waste, except to Messrs. Stuart and Edwards, so long as they shall hold the said works. Messrs. Stuart and Edwards undertake to prevent nuisance, so far as in them lies, and not to damage the water by rendering it so acid as to injure the machinery" (iron work) "of Messrs. Bealey and Co. If any dispute should arise between the parties hereto, such dispute to be submitted to referee, and the award of referee to be binding." (Signed) "W. M'FARLANE for
"Stuart and Edwards. "R. BEALEY AND CO.

"Messrs. Stuart and Edwards to satisfy Messrs. R. Bealey and Co. as to the payment of the rent, and account for still-waste previously to entering upon operations."

Averments. That the plaintiff has duly performed the said contract on his part, and that whilst the defendants were bound by their contract to receive such supply as aforesaid and pay for the same, to wit, during the said year, divers large quantities of the said chlorine still-waste came from the said still, to wit, 1000 cwt. of the said chlorine still-waste, as the defendants well knew; that before suit all things had happened and all times had elapsed to entitle the plaintiff to a due performance by the defendants of the said contract on their part. Breach: that the defendants broke their contract in this, that they did not nor would accept from the plaintiff the whole or any of the said chlorine still-waste last aforesaid, nor did nor would the defendants pay the plaintiff the said price so to be paid for the same, or any part thereof, and the defendants wholly prevented the plaintiff from supplying them with the same waste, whereby [755] divers large quantities of the said chlorine still-waste were left in the plaintiff's hands, and they have been unable to sell the same, &c.

Demurrer and joinder therein.

Plea. That before and at the time of the making of the said agreement, the said chlorine still-waste was allowed by the plaintiff to run away to waste from his said stills, nor was the same of any use or value whatever to the plaintiff: that at the time of the making of the said agreement, the said Higher Works were unoccupied and out of repair, and that the defendants agreed to take the said works and entered into the said agreement for the purpose of endeavouring, by means of the said chlorine still-waste, to manufacture an article for purifying gas: that after the making of the said agreement they entered into occupation of the said works for the purpose aforesaid and held the same for the term of one year only, and during that term, and up to the time when the defendants discontinued their manufacture as hereinafter mentioned, took and received from the plaintiff divers large quantities of the said chlorine still-waste, and paid the plaintiff for all that he so supplied, according to the said agreement: that before the expiration of the said term the said manufacture so begun by the defendants failed and was discontinued, and the said chlorine still-waste proved useless and was no longer necessary for the said manufacture; and the defendants therefore required no longer to be supplied with the said chlorine still-waste by the plaintiff, of all which the plaintiff had notice; therefore the defendants then refused to take or receive any further quantity of the said chlorine still-waste from

the plaintiff, which is the same breach of contract of which the plaintiff has complained in his said declaration.

Demurrer and joinder therein.

[756] Edward James, for the plaintiff. The declaration is good and the plea bad. The declaration discloses a valid contract by the defendants to take, and pay for, the whole of the plaintiff's chlorine still-waste so long as they hold the premises. The plaintiff agrees to let the premises to the defendants for one year, and to supply them with the still-waste for a certain price, the defendants having the option of taking a lease for seven or fourteen years, and during the whole of that time the plaintiff undertakes not to use, injure, or supply the still-waste to any other person. That manifestly means that the plaintiff shall supply, and the defendants accept, the still-waste at the price named during the term of one year or the continuance of the lease. In *Wood v. The Copper Miners' Company* (7 C. B. 906), by an instrument under seal, it was agreed between the defendants and the plaintiff, that the defendants should grant a lease of certain premises to the plaintiff for twelve years, and that all the coals used by the plaintiff during the term should be purchased of the defendants, provided they could and should supply him with the quantity required; and that was held a covenant by the defendants to supply the coal, unless unable from some substantial cause. [Wilde, B. This is not only an agreement on the part of the plaintiff to supply, but an agreement by both parties that the plaintiff shall supply the still-waste during the term, and how can that be done unless the defendants will accept it?] In *Pilkington v. Scott* (15 M. & W. 657) there was an agreement by a workman to serve for seven years, but there was no express undertaking by the master to employ him for that period; and it was nevertheless held as well a contract by the master to employ, as by the workman to serve for seven years. *Hartley v. Cummings* (5 C. B. 247) is [757] a decision to the same effect. *Aspdin v. Austin* (5 Q. B. 671) only decided that, where parties have expressly covenanted to perform certain acts, they do not by implication covenant for every act convenient or even necessary for the perfect performance of their express covenants.

Quain, for the defendants. There is no contract binding the defendants to take the chlorine still-waste longer than they require it for their manufacture. The defendants were under no obligation to carry on the manufacture, and when it failed, and the chlorine still-waste became useless, they were no longer bound to take it. The parties having entered into a written agreement with expressed stipulations, no others can be implied unless it is plain that such was the intention of the parties. [Martin, B. I do not acquiesce in the ground on which Wilde, C. J., decided *Wood v. The Copper Miners' Company* (7 C. B. 906, 938), viz. "when two persons mutually agree that one of them shall purchase goods of the other, that amounts to a contract that the one shall sell and that the other shall buy." Maule, J., and Cresswell, J., put the case on a different ground. Maule, J., said: "I have no difficulty in seeing that their intention was that the plaintiff should buy his coal of the defendants, and that they should sell their coal to him." Here the plaintiff agrees to supply to the defendants the whole of his chlorine still-waste; and he further agrees "not to use, injure, or part with any of the still-waste, except to the defendants"—not so long as they are willing to take it, but "so long as they shall hold the works." The natural inference is, that there is an agreement on both sides—the one party to supply, the other to take.] In *Sykes v. Dixon* (9 A. & E. 693) a workman contracted in writing to work for the plaintiff in his trade, and for no [758] other person during twelve months, and so on from twelve months to twelve months, until the workman should give notice of quitting; and it was held that the agreement was void for want of mutuality, for though the workman was bound to serve one person only, that one was not bound to employ him. [Wilde, B. That was the case of an unilateral agreement. It was an agreement on the part of the workman only, and signed by him only. It is impossible for a man to serve without having a master, so that there must be two parties to the agreement.] In *Wood v. The Copper Miners' Company* (7 C. B. 906, 938), the intention of the parties, although not clearly expressed, was apparent on the face of the instrument. He also referred to *Burton v. The Great Northern Railway Company* (9 Exch. 507).

Edward James was not called upon to reply.

POLLOCK, C. B. I am of opinion that the plaintiff is entitled to recover. Every topic has been exhausted, and after all, the question is, what is the construction which

the Court are bound to put upon the language which the parties have used? It is true that there are many cases in which doubtful language has been construed by the Courts, but it does not throw a great deal of light on any case to bring forward what the Court has decided under other circumstances and when different language was used. It seems to me clear that it was intended that the plaintiff should supply and the defendants take the whole of the plaintiff's chlorine still-waste during the year. If the defendants had intended to take so much only as they required, they would have inserted in the agreement the words "or so much as we may require." The fair construction of the agreement is that the plaintiff is to supply the whole, [759] and the defendants to take the whole. The declaration is therefore good, the plea bad; and consequently the plaintiff is entitled to recover.

MARTIN, B. But for the decision in *Wood v. The Copper Miners' Company* (7 C. B. 906), I should have thought that there was an omission in the agreement. But that case is an authority by which we can give a construction to the agreement which I have no doubt was the real meaning of the parties.

CHANNELL, B. I am also of opinion that the declaration is good and the plea bad. Applying the rule of construction adopted in *Wood v. The Copper Miners' Company*, the point is tolerably clear. The case is distinguishable from *Sykes v. Dixon* (9 A. & E. 693). This is a contract between two parties and therefore it binds both. In *Sykes v. Dixon* the engagement was on one side only, with this qualification that so long as the plaintiff availed himself of the services of the workman he was bound to pay him, and according to the contract the workman had a right to put an end to the service upon giving twelve months' notice. This agreement is not unilateral; and it is a contract by both parties. In one respect it resembles a contract of guarantee, for the liability of the defendants to pay only attaches when the still-waste is supplied, but that liability continues whilst the agreement is in force.

WILDE, B. I am of the same opinion. This is a mere question of construction of this particular agreement. As I read it, the defendants desired to secure to themselves the whole of the plaintiff's chlorine still-waste for the period of a year and such further term as they might hold the works; and the plaintiff agreed that they should have it. The agree-[760]-ment expressly applies to the whole term. *Sykes v. Dixon* is distinguishable on the ground stated by my brother Channell; it was an unilateral agreement. Indeed it scarcely deserves the name of an agreement; it was merely an undertaking by one party to serve for a certain time. Here there is an agreement by the two parties: the plaintiff agrees to do certain things, and the defendants to do certain other things.

Judgment for the plaintiff.

YOUNG v. DAVIS AND ANOTHER. Jan. 24, 25, 1862.—No action lies against a surveyor of highways, appointed under the 5 & 6 Wm. 4, c. 50, for damage resulting from an accident caused by his neglect to repair the highway.

[S. C. 31 L. J. Ex. 250; 8 Jur. (N. S.) 286; 10 W. R. 524; 6 L. T. 363:
affirmed 1863, 2 H. & C. 197.]

The declaration stated that before and at the time of the happening and committing of the grievances, &c., the defendants were the joint surveyors of highways of and for the parish of Alkerton, in the county of Oxford (a parish maintaining, and liable and bound to repair and keep in repair its own highways), duly appointed in that behalf. Nevertheless the defendants, not regarding their duty in that behalf as such surveyors, conducted themselves so negligently, improperly and wrongfully in that behalf that by and through their (the defendants') said negligence, improper and wrongful conduct as such surveyors in that behalf, a certain public and common highway, called and known as Alkerton Hill, of and in the parish aforesaid, in the county aforesaid, which the said parish was then liable and bound to repair and keep in repair, and whereof the defendants then had as such surveyors the survey, care and superintendence, and which it was then their duty as such surveyors to repair and keep in repair, was negligently and wrongfully suffered and permitted by the defendants, before and upon the 19th of November, 1860, to be and become [761] and continue, and the said highway did then become and then was and continued out of repair and foundurous, and in a state and condition dangerous for foot-passengers passing along the said highway and the footpath thereof, and a certain hole dangerous to foot-passengers was then negligently and wrongfully suffered and per-

mitted by the defendants as such surveyors to be, and the same then was in the said highway, and uninclosed and open at the end of the footpath of the said highway, so that the said footpath terminated abruptly and dangerously to foot-passengers at the said hole, and the said hole was then negligently and wrongfully suffered and permitted by the defendants as such surveyors to be and the same then was left, after day-light had ceased, without any light or other means whatsoever, although means were necessary to warn passengers going along the said footpath of the said hole, and without any inclosure of the said hole, or any other means whatsoever, although means were then requisite and necessary to prevent passengers from stepping, slipping or falling from off the said footpath into the said hole. By reason and in consequence whereof the plaintiff, on the said 19th of November, 1860, whilst lawfully walking upon and along the said highway and the footpath thereof after day-light had ceased, and without any want of due care on his part, stepped and slipped from off the end of the said footpath into the said hole, and fell into the same and broke his leg, &c.

Pleas. First: not guilty (by statute 5 & 6 Wm. 4, c. 50, s. 109). Secondly: that the defendants were not the joint surveyors of highways of and for the parish of Alkerton as alleged. Issues thereon.

At the trial, before Keating, J., at the last Oxford Summer Assizes, it appeared that the defendants were the surveyors of highways for the parish of Alkerton in Oxfordshire. At a place called Alkerton Hill, which was a public highway, and which the parish was bound to keep in repair, there was a hole [762] in a part of the footpath which had been caused by the flow of water from the adjoining hills. On the night of the 19th November, 1860, the plaintiff, while walking along this path, fell into the hole and broke his leg. Shortly before the accident the hole in the footpath had become very much enlarged by unusually heavy rains. Some time before the accident notice was given to the defendants of the existence of the hole.

It was objected, on behalf of the defendants, that the action was not maintainable. The learned Judge left it to the jury to say whether the accident arose from the negligence of the defendants in not repairing the footpath, and a verdict was found for the plaintiff, with 100*l.* damages; leave being reserved to the defendants to enter a nonsuit or verdict for the defendants, if the Court should be of opinion that the action was not maintainable.

Mellish, in last Michaelmas Term, obtained a rule nisi to enter a nonsuit or a verdict for the defendants; or to arrest the judgment for the insufficiency of the declaration, upon the ground that no action could be maintained against surveyors of highways for omitting to repair a highway, whereby the plaintiff had been injured.

Huddleston and Dowdeswell now shewed cause. The defendants had notice that the highway was dangerous, and neglected their duty as surveyors in not repairing it. When a public officer is guilty of a neglect of duty, whereby an individual sustains an injury, he has a right of action. Surveyors of highways are officers of the parish, who have certain duties imposed upon them by statute. The 6th section of the 5 & 6 Wm. 4, c. 50, requires the inhabitants of every parish maintaining its own highways, in every year, to elect one or more persons to serve the office of surveyor, "which surveyor shall repair, and keep in repair, the several highways in the said parish for which he is appointed." No [763] doubt the inhabitants of the parish might be indicted for the non-repair of the highways within it, but the surveyor is under a statutory obligation to repair them. The 7th section prescribes the qualification of the surveyor. The 8th section imposes a penalty on any person who, being elected, shall refuse or neglect to take upon himself the office of surveyor, or provide a sufficient deputy. The 20th section imposes a penalty on a surveyor who shall neglect his duty. The 27th section empowers the surveyor to make a rate in order to raise money for the purposes of the Act. The 56th section imposes a penalty on any surveyor who shall lay any heap of stones, or any other matter or thing, upon any highways, and allow the same to remain there at night, to the danger or personal damage of any person passing thereon. The 57th section shews that though the surveyor is subject to a penalty, he is nevertheless liable to a civil action. The 94th section prescribes the mode of proceeding before justices if any highway is out of repair; and that provision applies not only to surveyors of highways, but to any other person who is bound to repair *ratione tenuræ*. Wherever a statute imposes a duty on an individual, he is liable to an action at the suit of a party who has sustained damage by his neglect of that duty; and it makes no difference that the statute which creates the duty also subjects him to a penalty

for the breach of it. Thus, in *Couch v. Steel* (3 E. & B. 402), it was held that a seaman might maintain an action against the owner of a vessel for a breach of duty in not having on board a proper supply of medicines as required by the 7 & 8 Vict. c. 112, although the Act imposes a penalty as a specific punishment for that breach of duty. [Martin, B. There the duty was imposed by act of parliament for the benefit of sailors only. Wilde, B. The duty was imposed for the benefit of a certain [764] limited class; here it is for the benefit of the public at large.] In *Whitehouse v. Followes* (10 C. B. N. S. 765) it was held that the trustees of a turn-pike road were liable for the negligent mode in which they constructed and kept a drain at the side of the road, whereby the plaintiff's land and colliery were flooded. [Pollock, C. B. Trustees of a turnpike-road may be considered in the light of trustees of a harbour, or of any other public trustees who obtain remuneration from tolls.] There are several instances in which actions have been maintained against surveyors of highways. *Roberts v. Read* (16 East, 215) was an action against the surveyors of highways who, in the execution of their office, undermined a wall adjoining the highway. *Alston v. Seales* (9 Bing. 3) was an action by a reversioner against a surveyor of highways for subtraction of a portion of his bank by the road-side. *Davis v. Curling* (8 Q. B. 286) was an action against a surveyor of highways, who placed gravel on the highway whereby the plaintiff's carriage was overturned. In *Ruck v. Williams* (3 H. & N. 308) it was held that the Cheltenham Improvement Commissioners were liable to an action for damage caused to the plaintiff by their removal of a flap or penstock from the mouth of a sewer. [Pollock, C. B. There "The Cheltenham Improvement Act" incorporated the 144th section of "The Public Health Act," which gives compensation out of the rates to persons sustaining damage. Wilde, B. As a general rule, if a public officer has done a wrongful act he may be indicted; or if an individual is thereby injured he may maintain an action, but does that doctrine apply where a public officer has omitted to do something?] It may be that a public officer is not liable for a mere act of omission, but in this case there is a breach of a statutory duty. [Pollock, C. B. In general, nothing is more easy to decide than whether a person is liable for an [765] act of commission. The only questions are, who did the act, and what is the amount of injury? But in the case of omission the shades of distinction may be so small as to render it difficult to come to any correct decision. A road may be ill drained, but then the question arises, to what extent. [In *Barry v. Arnaud* (10 A. & E. 646) it was held that a collector of customs was liable for nonfeazance in the execution of his office, as for refusing to sign a bill of entry without payment of an excessive duty. [Pollock, C. B. There the collector wrongfully demanded more than he was entitled to demand; therefore, whether there was an act of commission in making the demand, or of omission in not signing the bill of entry, is not worth inquiry.] In Com. Dig. tit. Action upon the Case for Negligence (A. 1), it is said, "So an action upon the case lies for negligence in a man's duty, though it be a nonfeazance, as if by the negligence of a servant cattle perish." In (A. 2) numerous instances are given where an action lies for neglect of duty in an office. The law is thus stated by Lord Tenterden, C. J., in *The Mayor of Lyme Regis v. Henley* (3 B. & Adol. 77, 92): "We think the obligation to repair the banks and sea shores is one which concerns the public, in consequence of which an indictment might have been maintained against the plaintiffs in error for their general default; from whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual, as in the ordinary case of nuisance in a highway by a stranger digging a trench &c., or by the act or default of a person bound to repair *ratione tenuræ*. An indictment may be sustained for the general injury to the public, and an action on the case for a special and particular injury to an individual." The Court will not deviate from the principles of law because inconvenience may result from holding the action maintainable. If the [766] action will not lie, there is a wrong without a remedy, and consequently a balance of inconvenience. [Pollock, C. B. Before the 5 & 6 Wm. 4, c. 50, the parish might have been indicted for the non-repair of a highway, but they were not liable to an action. The question then is whether the legislature, by that Act, intended to do more than create an officer who should do what the parish was liable to do, in order that they might more conveniently discharge their public duty. It seems to me that the legislature never could have intended to cast such a responsibility on the surveyor as to render him liable to an action for every accident which might arise from a road being out of repair.] The parish could not be sued, because at common law no action

would lie against the inhabitants at large for an injury sustained by an individual in consequence of their breach of their public duty: *Russell v. The Men of Devon* (2 T. R. 667). But where a duty is imposed upon an individual, either by common law or statute, an action lies against him for neglect of it: *Lane v. Cotton* (1 Salk. 17). [Martin, B. Is there any authority that an action will lie against a person bound to repair *ratione tenuræ*?] In Com. Dig. tit. "Action upon the Case for Negligence" (A. 3), under the head "For a neglect in doing that which by law he ought to do," it is said, "So, if bound to the repair of a bridge by the neglect whereof A. has a special damage." Reference is there made to *Steinson v. Heath* (3 Lev. 400), where it is said, on the authority of the Year Book, 11 Hen. 4, 82, 83, (d) that case lies [767] "for not repairing a bridge by which I am to pass." [Pollock, C. B., referred to *M'Kinnon v. Penon* (8 Exch. 319; in error, 9 Exch. 609).] Both upon principle and authority the action is maintainable, for there has been a breach of a public duty imposed by statute, whereby an individual has sustained an injury: *Wilkes v. The Hungerford Market Company* (2 Bing. N. C. 281), 4 Hawk. P. C., bk. 2, c. 25, s. 4; *Sutton v. Johnstone* (1 T. R. 493, 509); *Lacon v. Hooper* (6 T. R. 224); *Schinotti v. Bumstead* (6 T. R. 646); *Rex v. Robinson* (2 Burr. 800); *Ashty v. White* (1 Smith's Lead. Ca. 185).

Mellish, in support of the rule. This is the first instance of an attempt to render a surveyor of highways personally responsible for the non-repair of a road. The legal obligation to repair is in the parish, and the surveyor is merely an officer appointed by the legislature to do that which the inhabitants of the parish formerly did. The fact of a highway being out of repair is a public nuisance, and the remedy is by indictment. Surveyors of highways have been appointed ever since the statute of 2 & 3 Ph. & M. c. 8, but [768] there is no instance of such an action as this. The action will not lie, upon a principle not touched by the numerous cases cited. The alleged duty is only to do something which has been omitted to be done. Now in the case of principal and agent, master and servant, superior and inferior, where the breach of duty is an act of commission, an action may be maintained against either; but where the breach of duty is a mere nonfeasance the superior, and not the inferior, is liable. The duty of the superior is towards the public or the person who has sustained damage by the breach of it; the duty of the inferior is towards his superior. For instance, in the case of a sheriff, if he neglects to execute a writ, the remedy is not against the under-sheriff but the sheriff, and his remedy is against the under-sheriff. In the case of nonfeasance, the maxim "*respondeat superior*" applies. [Pollock, C. B. That is a technical mode of treating the case. It seems to me that the legislature never intended to make a surveyor of highways personally responsible.] No action can be maintained against the inhabitants of a parish, the remedy being by indictment. In *M'Kinnon v. Penon* (8 Exch. 319), Alderson, B., refers to Bro. Abr. tit. "Action sur le Case," pl. 93, where it is said, that inasmuch as the highway ought to be repaired by the public, an injury arising from that neglect cannot be the subject of an action. At common law there was no mode by which the inhabitants of a parish

(d) In the case in the Year Book, 11 Hen. 4, 82, 83: "John Popham, Knight, brought a writ of trespass against the Prior De Bremour, alleging that the said Prior, by reason of his mill in S., ought to repair and sustain, and that his predecessors and all those whose estate he then had in the said mill, at all times, &c., were accustomed to repair and sustain a bridge, over the water, which runs to the said mill; over which bridge the plaintiff by reason of his manor of S., and all those whose estate he has in the said manor were accustomed to pass and their provisions and other necessities, at all times to carry &c.: that the said Prior, for a long time, the said bridge had never repaired nor sustained, whereby the said plaintiff over the said bridge was not able to pass or carry, during that time, to his great damage." Skreene. Judgment of the writ: for the plaintiff has claimed the way appendant to his manor to go and carry over the water, and has not claimed the right of going or carrying to any freehold, nor to any other place certain: Judgment of writ, &c. Hawkins: "He has claimed the way to his manor of S. and has shewn title in himself in certain, and when he has passed the bridge with his carriage he shall go where he will, or throw down his baskets, if it be to his profit or disadvantage, for it is no concern of yours if he has had the way at all times," &c. Skreene then prays judgment of the writ on the ground that the plaintiff's remedy was by Assize of Nuisance, but the Court held that the action was properly brought.

could be made to appear to a writ, for they are not a corporation, and if liable, the damages must be levied on one or two inhabitants who would have no means of reimbursing themselves except by actions against the other inhabitants, and that would give rise to a multiplicity of suits: *Russell v. The Men of Devon* (2 T. R. 667). A surveyor of highways being a mere officer of the parish, and the legal liability being in the parish, no action would lie against a surveyor at common [769] law. Then, has the 5 & 6 Wm. 4, c. 50, rendered him personally liable? It is submitted that it leaves him in the same position as at common law. The 6th section says that the surveyor shall repair and keep in repair the highways "liable to be repaired by the parish." Therefore the statute recognizes the liability of the parish, and merely appoints him as an officer to carry out what it is their duty to do. The 83rd section also shews that a surveyor is merely a ministerial officer of the parish, and that the liability of the parish remains the same as before that Act. The 20th and 26th sections, which impose a penalty on the surveyor, also shew that the legislature never intended that he should be subject to an action. The 94th section prescribes the mode of procedure in case the highways are out of repair. The surveyor is to be summoned without reference to whether or no it is his fault, for he may have been appointed but a few days before. That shews that he merely acts as the officer of the parish. Moreover the justices are to determine whether or no any highway is out of repair, and if so, they are to convict the surveyor in a penalty not exceeding 5*l.*, and make an order on him to repair it. He was then stopped by the Court.

POLLOCK, C. B. I am of opinion that the rule must be absolute to enter a nonsuit. The question is, whether, under the Highway Act, 5 & 6 Wm. 4, c. 50, a surveyor of highways is liable to an action simply because a road is out of repair. It appears to me that question has been substantially decided by the case of *M'Kinnon v. Penson* (8 Exch. 319; in error, 9 Exch. 609), in which this Court arrested the judgment in an action against a surveyor of a county bridge, and the Court of Exchequer Chamber affirmed our decision. It is true that the argument in that case turned rather upon whether the legislature, having supplied a mode of suing the county by means of the [770] surveyor, an action would lie against him, which could not before have been brought against the county. But substantially that decision applies to the present case.

The way in which I am disposed to consider the subject is not quite so technical as the mode in which Mr. Mellish has treated it; and I think it is sometimes desirable to present a legal decision in a popular form. At common law such an action could not have been maintained against the parish. The rule with respect to persons who travelled on highways was this: a parish was bound to repair the highways within it, and there was a mode of compelling them to do so, but the traveller was expected to take care of himself, and if the road was a little out of repair, to proceed with caution, and not to travel with the same speed as if the road was in repair, and when he met with an accident throw on other persons the blame of that which was owing to his own want of caution. Then, the common law not having rendered a parish liable to an action simply because a road was out of repair (a matter upon which there must always be a difference of opinion, viz. whether it is good for all or ordinary purposes), the question is, whether, when the Highway Act passed, it was intended to transfer to the surveyor the duty of repairing the highways, and to render him liable to an action in the event of an accident arising from their non-repair. I think there is much weight in the remark of my brother Martin, that if this action could be maintained hundreds of actions against surveyors of highways might have been brought during the last century. But no such action has been brought; and that appears to me to amount to a contemporaneous exposition of the statute.

On looking however at the 5 & 6 Wm. 4, c. 50, all the reasoning in the judgment delivered by Coleridge, J., in *M'Kinnon v. Penson*, as reported in 9 Exch. 609 (affirming [771] the judgment of this Court as reported in 8 Exch. 319), applies to the present case. Reading the Act section by section would anybody believe that it was the intention of the legislature to make surveyors of highways personally responsible for any accident to a traveller from a road being out of repair? A positive obstruction of, or nuisance on, a road, whether caused by a surveyor of highways or any other person, would no doubt render responsible the person who caused the obstruction or nuisance; but looking at the statute and the course of legislation, I am clearly of

opinion that the legislature never intended to make a surveyor of highways personally responsible at the hazard of a jury finding him guilty or not guilty of negligence in not repairing the road. Coleridge, J., in delivering the judgment of the Court of Exchequer Chamber in *M'Kinnon v. Penson*, points out that the legislature never contemplated rendering the surveyor of a county bridge liable; and it must be observed that, as far as the two ends of the common highway are within the county, that is for one hundred yards at each end, (a) a surveyor of a county bridge is a surveyor of the highway. *M'Kinnon v. Penson*, confirmed as it has been by the Court of Exchequer Chamber, is a distinct authority, which enables us to say that this matter has been already decided; and if the plaintiff is dissatisfied with our judgment he must appeal to a Court of error.

Having however heard an able argument on behalf of the plaintiff, I think we ought to notice the topics which have been urged, and state the grounds on which we come to the same conclusion as in *M'Kinnon v. Penson*. My judgment is founded on this: that the legislature never intended to create this personal responsibility in a surveyor of highways. I admit the technical ground upon which Mr. Mellish contended—a surveyor of highways is appointed “in ease [772] of the parish” and as their officer to represent them; but, as Mr. Mellish pointed out, the act of parliament contemplates that the duty formerly belonging to the parish still remains in them, and that the surveyor acts strictly as their officer.

Upon these grounds I am of opinion that the rule ought to be absolute to enter a nonsuit. I am not sorry that an opportunity is presented to the plaintiff of taking the case to a Court of error. The question is of considerable importance, but it appears to me that if the plaintiff should succeed, we should enlarge the sphere of litigation and render it difficult to find persons willing to discharge the duties of a surveyor of highways; for the practical result would be, that a surveyor of highways would become a sort of insurer of every person who travelled along the road, and not a single accident would happen without an action being brought against him. In my opinion Judges ought to consider the consequence of their decisions as regards a multiplicity of actions; and not decide so as to open an endless flood of litigation.

For these reasons I think that the rule ought to be absolute to enter a nonsuit.

MARTIN, B. I am also of opinion that the action is not maintainable.

I do not differ from any of the cases cited on behalf of the plaintiffs. *Couch v. Steel* (3 E. & B. 402) seems to me very intelligible. There a duty was imposed by act of parliament with respect to a body of persons sailing in a ship. This case is different. The duty is not in respect of a limited body of persons, but of the community at large; every one who might happen to travel along a highway would have the same right to maintain an action as the plaintiff. *Davis v. Curling* (8 Q. B. 286) is also distinguishable. The circumstance of a person being a surveyor of highways will not relieve him [773] from the ordinary responsibility for an act done by him which causes injury to another. I should have been surprised if any case had been found in which it was determined that an action for non-repair was maintainable against a person bound to repair *ratione tenuræ*. The case in the Year Book, 11 Hen. 4, 82, 83 (ante, p. 766, note (d)), which was supposed to be an authority for that position, on being examined will be found not to be so. That was an action by a lord of a manor who relied on a prescription that he, and all those whose estate he had in the manor, had a right to have a bridge kept in repair by the owner of a mill. That is totally different from an obligation towards all the Queen's subjects passing along a highway.

The case then resolves itself into this: Surveyors of highways were appointed from the time of Philip and Mary and under the 13 Geo. 3, c. 78, which passed in the year 1733. At all events they have been appointed since the year 1835 under the 5 & 6 Wm. 4, c. 50, and there is no single instance of such an action against a surveyor of highways, although there must have been thousands of cases in which carts have been broken, horses have fallen down, and persons have been injured in consequence of the non-repair of highways. The circumstance of there being no instance of such an action is a strong reason why we should not make a precedent. I should require a cogent argument to satisfy me that the action lies. It would lead to endless litigation; for parish roads are not generally speaking kept in very good repair, and every person whose horse or donkey was injured on the road would bring an action against

(a) 22 Hen. 8, c. 5, s. 9.

the surveyor. According to Mr. Dowdeswell, the obligation did not exist before the 5 & 6 W. 4, c. 50, and it may be that the obligation is different from that under the 13 Geo. 3, c. 78. No doubt, the 5 & 6 Wm. 4, c. 50, says that the surveyor shall repair and keep in repair the [774] several highways in the parish, but it goes on by the 20th and 94th sections to say what shall be done in the event of his neglecting to do so; that is, he shall be liable to a penalty of 5l., and he shall on the justices viewing the road, or causing it to be viewed, put it in repair to their satisfaction. It seems to me that, upon a reasonable construction of this Act, that is the responsibility which a surveyor takes upon himself by becoming a surveyor of highways.

Another effect of allowing this action to be maintained would be to submit to a different tribunal than that appointed by the Act the question whether or no the road was in repair. A jury trying the action at Nisi Prius must necessarily determine that, and the circumstance of the justices having already adjudicated on the question under the 94th section might have no weight with them. They might truly say, "The surveyor was bound to keep the road in repair, and we will judge for ourselves whether he has done so, without regarding what the justices have determined." The real truth is, the duty is cast upon the parish; and there is nothing in the statute to cast a duty on the surveyor beyond imposing upon him the penalty of 5l. and requiring him to take proceedings whereby the road may be put in repair. The obligation to repair still remains in the parish. The surveyor has certain duties imposed upon him, and the consequence of not performing those duties is that he is subject to a penalty. There is nothing in the Act to justify us in holding that he is personally responsible, and that in the event of accident arising from the non-repair of the road, the person injured may maintain an action against him. *The Mayor of Lyme Regis v. Henley* is distinguishable. There a duty was imposed on the corporation by their charter. No doubt that judgment was right, but it seems to me a very different question from this, whether the obligation to repair, under the 6th section of the 5 & 6 [775] Wm. 4, c. 50, casts on surveyors of highways a personal responsibility beyond that which the statute has imposed upon them. As already observed, one consequence of holding a surveyor liable to this action would be, that no person would be willing to undertake the office of surveyor, and it would be impossible to carry out the Act. In my judgment the plaintiff has failed to make out his case, and there is enough on this record to entitle the defendant to enter a nonsuit, because it alleges a personal duty on the part of the surveyor, and a responsibility to which he is not subject.

CHANNELL, B. I agree with the Lord Chief Baron and my brother Martin, that the rule ought to be absolute in one or other of the forms proposed, and I also agree with them in the ground they have given in support of their opinions. That being so, but for the importance of the subject I should not feel it necessary to add anything to what has been already said, and therefore I will state shortly the grounds on which my judgment proceeds.

It seems to me clear that if we leave out of consideration the statute 5 & 6 Wm. 4, c. 50, there is no ground to maintain this action. Mr. Mellish has satisfied me that at common law this action could not have been maintained, and *M'Kinnon v. Person* is a strong authority in support of that proposition, though it is not conclusive, because there is a material difference between the statute relating to surveyors of county bridges and the 5 & 6 Wm. 4, c. 50. Then the question is reduced to this, whether the 5 & 6 Wm. 4, c. 50, has created such a liability on the part of a surveyor of highways as will justify the present action. Now this is not a case in which a surveyor of highways has done any act which of itself has caused [776] injury to the plaintiff. If, personally or by his servants, he had put a heap of stones in the road and left them there at night without being sufficiently protected, that would be an omission to do something to render harmless an act which he had affirmatively done. But this is not the case of a surveyor having done an act which he had authority to do, and not having taken precautions against accident arising from it, but it is a mere case of omission to repair a road; when it may be assumed he had funds in his hands with which he might have repaired.

Then is the defendant liable upon that state of facts? I do not attach much importance to the circumstance that the action is novel in its character. If it is created by the 5 & 6 Wm. 4, c. 50, of course we could not expect to find any precedent of such an action before that Act. It may however be observed that the Act passed

more than a quarter of a century ago, and I am not aware that an action like the present has ever been attempted to be sustained. I also agree with the Lord Chief Baron and my brother Martin that, in placing a construction on the Act, we may fairly take into consideration the inconvenience which would arise from a multiplicity of actions if we adopted the plaintiff's view. Then does the 5 & 6 Wm. 4, c. 50, create such a duty on the part of a surveyor of highways, that by reason of a breach of that duty he is liable to an action? I agree that it imposes on him a duty, but not such a duty as exposes him to this liability. I think that the intention of the legislature was to enable the parish, through the instrumentality of a surveyor, to do that which it was their duty to do; and that the parish still remains liable for the non-repair of the road. It seems to me that the object was to give facility to the parish to perform their work and do their duty through the assistance of a surveyor [777] not to cast upon him the liability now sought to be imposed. The case of *The Mayor, &c., of Lyme Regis v. Henley* is distinguishable. That case, simplified, is merely this. The corporation, who for this purpose may be considered an individual, took a portion of the sea shore by charter from the Crown, with a right to certain tolls or dues, and in consideration of those advantages they were under an obligation to repair a sea wall. It was argued that they were under no liability towards the particular individual who sued, because he was not shewn to have been the owner of an ancient messuage in existence at the time the charter was granted; but, according to the true construction of the charter, there was a liability on the part of the corporation to repair, for the benefit of the inhabitants of the borough, in consideration of the rights conferred by the charter on the corporation. Again, in the case of a mill, if the inhabitants of a certain parish were bound to grind their corn at a particular mill, that was a right to which a corresponding obligation attached on the part of the mill owner to maintain the mill, and if he neglected to do so an action might be brought against him by any person who had a right to have his corn ground at the mill. If the cases be looked into it will be found that all of them were cases of some right which was a personal benefit, there being on the other hand a corresponding obligation on the part of the person entitled to the benefit.

Upon these grounds I think that the action is not maintainable. I do not differ from the rule of law that where an indictment will lie for the non performance of a public duty, an individual who is specially injured by that breach of duty may maintain an action. But I do not think that kind of duty is imposed on a surveyor of highways by the 5 & 6 Wm. 4, c. 56. According to my view of that Act, the legislature not only never intended to create such a [778] liability as is now sought to be imposed, but have pointed out the course to be taken, namely, by an application to the justices to enforce the penalty, which was meant to exclude such an action as this.

Rule absolute to enter a nonsuit.

CARNES v. NESBITT. Jan. 22, 1862.—The plaintiff agreed to hire as his assistant in the practice as a surgeon and apothecary, and the defendant agreed to serve him for one month, and so on from month to month until either party should give to the other a calendar month's notice of his intention to determine the agreement, at a certain salary, the plaintiff to provide for the defendant a dwelling-house at C. to reside in, the defendant to be allowed all fees received from the practice of midwifery and any private practice; and in consideration of the premises and of the agreement for hiring, the defendant agreed that he would not practise as a surgeon, apothecary, or surgeon-accoucheur, within the distance of five miles from C. without the consent in writing of the plaintiff "under a penalty or penal sum of 100l., to be recoverable by the plaintiff as and for liquidated damages, the said sum of 100l. having been specified by the parties as the amount to be paid and recoverable by the plaintiff against the defendant for the breach or non-observance by the defendant of the last mentioned clause." The plaintiff having recovered 100l. damages. Held, that he was not entitled to an injunction to restrain the defendant from practising within the prescribed distance, since, upon the true construction of the agreement, the 100l. was liquidated damage, which the parties had agreed should be paid as an equivalent for so practising.—Held also, that the providing the defendant a dwelling-house was not a condition precedent to

the plaintiff's right to sue for a breach of the agreement not to practise. And that it was no answer that the agreement was determined by notice, as the restriction as to practising applied to the time when the defendant ceased to be assistant.

[S. C. 31 L. J. Ex. 273; 9 W. R. 811; 4 L. T. 558. On application for injunction, p. 158, ante.]

Declaration. For that heretofore, to wit, on &c., an agreement was made and entered into between the plaintiff and the defendant in the words and figures following (that is to say)—“Memorandum of agreement made the 13th day of February, 1860, between John Carnes, of &c., surgeon and apothecary, of the one part, and William Nesbitt, of &c., surgeon, of the other part, as follows:—The said J. Carnes agrees to hire as his assistant in the practice as a surgeon and apothecary, and the said W. Nesbitt agrees to serve him for one month, and so on from month to month until either party shall give to the other one calendar month's notice in writing of his intention to determine the said agreement, commencing from the day of the date hereof, upon the terms and conditions hereinafter mentioned. The salary of the said W. Nesbitt to be 70l. per annum, payable fortnightly by the said J. Carnes; and the [779] said J. Carnes, in addition thereto, to find and provide for the said W. Nesbitt a dwelling-house, furnished, at Cassop to reside in. The said W. Nesbitt to be allowed for his own use and benefit all fees received from the practice of midwifery, and also any private practice in the immediate neighbourhood of Cassop. In consideration whereof the said W. Nesbitt doth hereby agree to serve the said J. Carnes, and act as his assistant in the capacity aforesaid, according to the best of his skill and knowledge; and in consideration of the premises, and of the agreement for living hereinbefore contained, the said W. Nesbitt doth hereby promise and agree with the said J. Carnes, that he, the said W. Nesbitt, shall not nor will, either directly or indirectly, by himself or in conjunction with any other person or persons, practise as a surgeon, apothecary, or surgeon-accoucheur, within the distance of five miles from Cassop aforesaid, without the consent in writing of the said J. Carnes first had and obtained, under the penalty or penal sum of 100l., to be recoverable by the said J. Carnes as and for liquidated damages, the said sum of 100l. having been specified by the said parties hereto as the amount to be paid and recoverable by the said John Carnes against the said W. Nesbitt for the breach or non-observance by the said W. Nesbitt of the said last mentioned clause. As witness the hands of the parties,” &c. Averment: that the plaintiff did all things necessary on his part to entitle him to sue the defendant for the breach hereinafter mentioned, and to maintain this action, and to the injunction hereinafter claimed. Breach: that the defendant, after making the said agreement, did practise as a surgeon, apothecary, and surgeon-accoucheur, within the distance of five miles from Cassop aforesaid, without the consent in writing of the plaintiff first had and obtained, contrary to the said agreement. And the plaintiff claims 100l.; also a writ of in-[780]-junction to restrain the defendant from either directly or indirectly, by himself or in conjunction with any other person or persons, practising as a surgeon, apothecary, or surgeon-accoucheur within the distance of five miles from Cassop in the county of Durham, without the consent in writing of the plaintiff, first had and obtained, contrary to the agreement above mentioned, and from committing any breach of contract of the like nature.

Demurrer to so much of the declaration as does not relate to the plaintiff's claim to a writ of injunction.

Demurrer to so much of the declaration as relates to the plaintiff's claim to a writ of injunction.

Second plea. That the plaintiff did not find or provide for the defendant a dwelling-house furnished at Cassop, according to the said agreement.

Third plea. That after the making of the said agreement, and after the defendant had entered into the plaintiff's service according thereto, and before any breach by the defendant of the said agreement, the plaintiff gave to the defendant one calendar month's notice in writing of his intention to determine the said agreement, and by and in accordance with the said notice the said agreement was and became wholly determined and put an end to; and the said supposed breach of agreement took place after the expiration of the said calendar month, and after the defendant had ceased to be the plaintiff's assistant in the said practice as a surgeon and apothecary.

Demurrers to pleas, and joinders therein.

T. Jones, for the plaintiff. The declaration is good, and the pleas bad. With respect to the second, the providing a dwelling-house for the defendant is not a condition precedent to the performance by him of his undertaking not to practise within five miles of Cassop. As to the third, it is no answer that the defendant has ceased to be the plain-[781]-tiff's assistant. By the agreement, the defendant is allowed to practise in the immediate neighbourhood of Cassop whilst he is the plaintiff's assistant, and therefore the restriction must apply to the time when he has ceased to be so.

With respect to the injunction, this Court refused an application for an injunction on the ground that the plaintiff had claimed the penalty: *Carnes v. Nesbitt* (ante, p. 160). The authorities then relied on were *Saintier v. Ferguson* (1 M.N. & G. 286) and *French v. Macale* (2 Dru. & War. 269, 274). In *Saintier v. Ferguson* the defendant bound himself by contract not to practise as a surgeon and apothecary under a penalty of 500l. Having violated his agreement the plaintiff brought an action against him and obtained a verdict with 500l. damages, and Lord Cottenham, C., refused an injunction on the ground that the defendant had purchased the right to do the act, and was entitled to the benefit of his purchase. The authorities on the subject were reviewed in *French v. Macale* (2 Dru. & War. 269, 274) by Sir E. Sugden, C., who said: "The general rule of equity is, that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agrees to settle an estate and execute his bond for 600l. as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. So if a man covenants to abstain from doing a certain act, and agree, that if he do it, he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act, and just as, in the converse case, he cannot elect to break his engagement by paying for his violation of the contract." [Martin, B. The question depends on the construction of the contract, whether the party is restricted from [782] doing the act, although a penalty is attached to it, or whether he has a right to do the act on payment of the amount agreed upon.] Sir E. Sugden, in *French v. Macale*, refers to the following passage in a note in Fonblanque's *Treatise on Equity* (vol. 1, p. 154, note):—"But there are some circumstances which will induce the Court to interfere though stipulated damages be reserved; as where the lessee had covenanted not to plough ancient meadow, or if he did to pay an increased rent. The Court, upon his threatening to plough, appears to have granted an injunction: *Webb v. Clarke*, 8th May, 1782." Here the sum named as a penalty is merely the limit of the right to damages; and the payment of the penalty does not merge the obligation not to practise within the prescribed distance. [Channell, B. The defendant has only undertaken not to practise sub modo.] It is submitted that there is an absolute undertaking not to practise, and the ancillary provision, that he shall be subject to a penalty, does not give him the option of doing so.

No counsel appeared for the defendant.(b)

MARTIN, B. The judgment of Lord Cottenham in *Saintier v. Ferguson* (1 M.N. & G. 286) is conclusive as to the claim for an injunction. There will be judgment for the plaintiff, except as to the second demurrer, and as there will be no injunction the part of the declaration relating to the claim to it and the demurrer may be struck out.

[783] CHANNELL, B. I am also of opinion that the plaintiff is not entitled to an injunction.

POLLOCK, C. B., and WILDE, B., concurred.

Judgment accordingly.

(b) The defendant's points for argument were—"That the restraint imposed by the agreement was only intended to be in force durante servitio, and would otherwise have been unreasonable. That the plaintiff's claim to a writ of injunction could not be supported, the agreement being merely for the payment of a certain amount in the event of the defendant practising within the prescribed limit."

CLIFTON v. FURLEY. Jan. 25, 1862.—A superior Court has no power, under the 19 & 20 Vict. c. 108, s. 43, to direct a County Court judge to order a review of taxation of costs.—Semble, that where a plaintiff in a County Court claims an amount exceeding 20l. but recovers a sum under 5l., he is only entitled to costs upon the lower scale. But where the plaintiff claims more than 20l. and the defendant succeeds, he is entitled to costs upon the higher scale.

[S. C. 31 L. J. Ex. 170; 10 W. R. 358.]

In this case the plaintiff had sued in the County Court of Kent three defendants for an assault; and he claimed 25l. damages. The judge ruled that the three defendants were improperly joined; and the plaintiff, to prevent the plaint being dismissed, consented to strike out two of the defendants; and he obtained a verdict against the third, with 3l. damages. The plaintiff's costs were taxed on the lower scale, under the 9 & 10 Vict. c. 95, s. 91. The judge awarded to the other two defendants their full costs. The plaintiff applied to the judge for an order to review the taxation, upon the ground that he was entitled to costs upon the higher scale, as framed by the County Court judges, under the 19 & 20 Vict. c. 108, s. 33. The judge considered that as the plaintiff had only recovered 3l. damages, he was not entitled to costs upon the higher scale, and refused the application.

W. H. Cooke now moved, upon an affidavit of the above facts, for a rule calling on the judge of the County Court to shew cause why he should not order the registrar to review the taxation of costs. The plaintiff having claimed 25l. damages is entitled to costs upon the higher scale, although he has recovered 3l. only. Under the 13 & 14 Vict. c. 61, s. 14, an appeal lies where the amount of the claim exceeds [784] 20l., although judgment be given for a less amount: *Dressman, Appt., Harris, Resp.* (9 Exch. 485). [Martin, B. It could never have been intended that because a plaintiff claimed more than 20l. he was to have costs on the higher scale, although he recovered but 1s.] The 19 & 20 Vict. c. 108, which extended the jurisdiction of the County Courts, contemplates a different scale of costs from that mentioned in the 9 & 10 Vict. c. 95, s. 91. [Martin, B. The 9 & 10 Vict. c. 95 gave the County Court jurisdiction in all personal actions where the debt or damage claimed did not exceed 20l. Then, by the 88th section, "all the costs of any action or proceeding in the Court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the judge shall think fit, and in default of any special direction shall abide the event of the action." Therefore under that Act, if the plaintiff recovers less than 20l. the costs would follow the event unless the judge interfered to prevent it. The 19 & 20 Vict. c. 108, s. 24, extended the jurisdiction of the County Court to actions in which the debt or demand does not exceed 50l. Then, by the 33rd section, in actions where the debt or damages claimed exceeds 20l., five County Court judges are to frame a scale of costs. Upon the true construction of these Acts, the right of the plaintiff to costs does not depend upon the amount which he claims, but upon the amount which he recovers. The defendant's costs would be regulated by the claim; and if he succeeded he would be entitled to the costs of counsel and attorney to defend himself against the larger claim. Channell, B. That seems to me the literal construction of the Act; and it is in conformity with the view taken in the books of practice.] The scale of costs fixed by the five County Court Judges applies to all cases where the claim exceeds 20l. By the 19 & 20 Vict. c. 108, s. 43, "No writ of [785] mandamus shall henceforth issue to a Judge or an officer of the County Court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior Court, or a Judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer of a County Court, and also the party to be affected by such act, to shew cause why such act should not be done; and if after service of such rule or summons good cause shall not be shewn, the superior Court, or judge thereof, may by rule or order direct the act to be done." [Martin, B. The ordering a review of taxation of costs is not an act which a judge of a County Court is required to do, within the meaning of that section, but a proceeding in the cause; and we have no power to order him to take such a proceeding. If it were otherwise the consequence would be that wherever a judge refused to grant a new trial, an application would be made to a superior Court to require him to do so.] A suitor in a County Court cannot appeal unless the judge will state the facts, and if

he improperly refuses, a superior Court will direct him to do so. [Channell, B. A review of taxation is a matter within the discretion of the Judge: it is not such an act as, before the 19 & 20 Vict. c. 108, s. 43, the Court would have compelled him to do by mandamus.] It is obligatory on the judge to award costs where the plaintiff recovers damages. [Martin, B. No decision has gone to this extent, that where a County Court judge is required to do something in a cause, and he does not do it, or does it wrong, a superior Court will order him to do it, and do it right.] Here the act is one which the statute renders it his duty to do. [Martin, B. Suppose a County Court judge gave judgment for the defendant, when he ought to have given it for the plaintiff, this Court could not require him to alter [786] it. Channell, B. Where the act is in the discretion of the Judge, it is clear that we have no power to interfere.]

Per Curiam.(a) There will be no rule.
Rule refused.

MILNE AND SEVILLE v. LEISLER. Jan. 17, 1862.—In trover for goods, the question was whether the plaintiffs sold the goods to A. on his own account (through whom the defendant claimed) or to A. as agent for G. and Co., who, however, never authorized the purchase. At the time of the bargain A. referred the plaintiffs to B. for inquiry as to the responsibility of G. and Co., the plaintiffs alleging that the reference was required and given as to their responsibility as buyers, the defendant alleging that it was merely as to their responsibility as shippers on behalf of A. The plaintiffs wrote to their agent as follows:—"We wish you to call and see B. and inquire as to the trustworthiness of G. and Co., and also of A. who is making a rather large purchase of goods for the above party, and who refers us to B. Write by return." An answer was received, but not in evidence. Held, that the letter was admissible as evidence for the plaintiffs on the ground that it was part of the *res gestæ*, and that they were entitled to have the whole of it read and submitted to the consideration of the jury.

[S. C. 31 L. J. Ex. 257 ; 8 Jur. (N. S.) 121 ; 10 W. R. 250 ; 5 L. T. 802.]

Trover for 3000 pieces of calico shirtings, &c.

Pleas (inter alia). Not guilty, and that the goods were not the plaintiffs'. Issues thereon.

Wilde, B., commenced the trial of the cause at the last Liverpool Summer Assizes, but in consequence of his illness the trial was concluded before Martin, B. It appeared that the plaintiffs, Messrs. Milne and Seville, were cotton spinners at Oldham, and the defendant was a shipping merchant carrying on business at Manchester. According to the statement of the plaintiffs' witnesses, on the 16th May, 1861, Francis Atkins, who carried on business at Manchester under the name of Atkins and Company, went to the warehouse of the plaintiffs at Manchester to purchase some "shirtings." The plaintiffs' salesman remarked that he was a stranger, whereupon Atkins said, "I am not buying for myself. I will give you the house, if you prefer it, that I am buying for, and references respecting myself." Atkins [787] subsequently wrote the following order, having previously given the names of the three persons mentioned in it as referees. The words in italics were afterwards inserted by the plaintiff Seville. "Order from F. Atkins and Company, 15 New Cannon Street, [for Grant, Murdoch and Company, Liverpool], to Messrs. Milne, Seville and Company, 2000 pieces [describing them by trade marks], 2000 other [describing them], and 3000 [describing them], gold. To be completed in 4 to 6 weeks. F. Atkins and Company, 2 per cent. 14 days, or $\frac{1}{2}$ per cent. 30 days. F. Burton, of James Burton and Son ; James Leach and Company ; Lord, of E. L. Gault, 29 Booth St. [*J. C. Bond, of J. H. Littledale, Liverpool*]."

Atkins wanted to have the goods immediately, but the salesman refused until he had consulted his principals. On the following day, the plaintiff, Seville, was informed by the salesman of what had taken place between him and Atkins ; whereupon Seville made personal inquiries of the above named referees, and according to his evidence the result was that he "determined not to trust Atkins with the goods." A message was then sent to Atkins to meet the plaintiffs on the exchange in the afternoon. The salesman first met Atkins there, and told him that Seville required to have the name

(a) Pollock, C. B., Martin, B., and Channell, B.

of the person for whom he was buying the goods. Atkin said he would give him the name, and handed to him an envelope with "Grant, Murdoch and Co.," written upon it. The plaintiff, Seville, then came, and the salesman gave him the envelope and introduced Atkin to him. Seville then said aloud, "Grant, Murdoch and Company; are those the parties?" Atkin replied, "Yes." Seville then observed, "This firm are strangers to me, and before I can trust them with the goods I must have some reference, and know something about them." Atkin said he could give a respectable reference, and he gave the name, "J. C. [788] Bond, of J. H. Littledale and Company." Seville then wrote the name in pencil on the envelope, and said he would write to Liverpool and make the necessary inquiries, and if the answer was satisfactory the goods would be delivered. Atkin pressed to have some of the goods delivered immediately, to enable him to get them from the bleachers before the Whitsuntide holidays, and he said that he would send the money before the 28th of that month, and that the references would be all right. Seville thereupon consented to let Atkin have a portion of the goods; and, on his return to the warehouse, Seville inserted in the above order the words in italics. 2500 pieces of the shirtings were delivered to Atkin the same evening, and 500 the next morning. An invoice was sent with them headed "Grant, Murdoch and Company, per F. Atkin."

In the course of Seville's examination, the plaintiffs' counsel proposed to give in evidence a letter which Seville said he wrote on the 17th after his return to the warehouse, to Messrs. Francis and Corner, the plaintiffs' brokers in Liverpool. The defendant's counsel objected that the letter was not admissible in evidence, but Wilde, B., overruled the objection and received it. The letter was as follows:—

"Manchester,

"17th May, 1861.

"Gentlemen,—We wish you to call at J. H. Littledale and Company's, and see J. C. Bond, and inquire as to the trustworthiness of Messrs. Grant, Murdoch and Company, of your town; and also of F. Atkin and Company, of this city, who is making a rather large purchase of goods for the above party, and who refers us to Mr. Bond. Write by return directed to the mill.—Yours, &c.,

"Messrs. Francis and Co.

"J. SEVILLE."

An answer was received to this letter, but was not pro-[789]duced and the contents did not transpire. It subsequently appeared that Grant, Murdoch and Company had no knowledge whatever of the transaction, and that Atkin sent the goods to the defendant, who had previously undertaken to consign them to Singapore on Atkin's account, and had advanced him 857l. upon them. Atkin was afterwards declared bankrupt.

The case on the part of the defendant was that he had *bonâ fide* advanced the money to Atkin who had purchased the goods on his own account: that Atkin had given the name of Grant, Murdoch and Company as the shippers of the goods; and that the plaintiffs were desirous of ascertaining their responsibility, since it was the ordinary course of business for ship brokers to make advances, by giving their acceptances, when the shipments were made: that although a portion of the goods was delivered to the defendant for shipment, Atkin had previously arranged to ship a part of them through Grant, Murdoch and Company, with whom he had previous dealings.

Martin, B., left it to the jury to say whether they believed the witnesses on the part of the plaintiffs or the defendant. If the plaintiffs intended to sell the goods to Grant, Murdoch and Company, they were entitled to recover, because Grant, Murdoch and Company never did in fact buy them, so that there was no contract or sale at all. If, on the other hand, Atkin bought the goods on his own account, and they were sold by the plaintiffs to him, though the sale might have been avoided on the ground of fraud, yet as the plaintiffs had not elected to do so, Atkin, or any person to whom he sold or pledged the goods, would have a valid title to them, and the defendant would be entitled to the verdict. The learned Judge read the letter of the 17th of May, and observed that if it was a genuine letter written at the time [790] stated, it seemed to establish the plaintiffs' case. The jury having found a verdict for the plaintiffs,

Edward James, in last Michaelmas Term, obtained a rule nisi for a new trial, on

the ground of the improper reception in evidence of the letter of the 17th of May, and also on the ground of misdirection with reference to the contents of that letter.

Temple, Milward and Hopkins now shewed cause. First, the letter was admissible in evidence as part of the transaction. If the plaintiffs had written to Bond, the letter would have been clearly admissible, and it makes no difference that they wrote to Francis and Corner to make the inquiry instead of writing directly to Bond. [Martin, B. It is the same as if the plaintiffs had said to a person at Manchester, "go to Liverpool, and inquire of Bond as to the responsibility of Grant, Murdoch and Company."] In *Mortimer v. McCallan* (6 M. & W. 58, 69), Lord Abinger said: "The third point is, as to the admission of the evidence of what occurred between Taylor and the plaintiff immediately after the transaction. As a general principle, it is undoubtedly true, that conversations with an agent after the transaction are not evidence against his principal, but the question is whether this be not part of the *res gestæ*. It is part of the evidence to shew that the plaintiff did not trust Taylor, and I do not know how it could have been shewn otherwise. It is before the transaction is concluded, that is before payment is made; and I think it is receivable: it is not a conversation between an agent and principal after the transaction is concluded, but a conversation at the time he is dealing with him, and a part of the *res gestæ*." Francis and Corner were, for the purpose of the inquiry, [791] the servants of the plaintiffs. Suppose the plaintiffs had sent one of their clerks to Liverpool to make the inquiry, or suppose the plaintiff, Seville, had himself gone, would not that fact have been admissible? This letter is admissible on the same ground. The rule of law is thus stated in Starkie on Evidence, vol. 1, p. 62, 3rd ed.:—"In the next place, although the general principle above announced excludes the declarations, writings, acts, and conduct of strangers, as falling within the general description of *res inter alios acta*, the objection does not extend to a class of declarations already described as declarations accompanying an act; for these, when the nature and quality of the act are in question, are either to be regarded as part of the act itself, or as the best and most proximate evidence of the nature and quality of the act." Again, at p. 65, it is said: "The principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made." In an action for a false representation as to the solvency of a third person, Lord Tenterden admitted the declarations of the plaintiffs at the time they trusted him as evidence for them: *Fellows v. Williamson* (Moo. & M. 306). Secondly, the plaintiffs had a right to have the whole of the letter read. In the latter part of it, the plaintiffs go on to state the reason why they wished the inquiry, viz., that Atkin was making a rather large purchase of goods for Grant, Murdoch and Company. The plaintiffs in effect say, "in order that you may make the proper inquiry, I tell you that our object is to ascertain whether we can safely trust the persons for whom Atkin is purchasing the goods." That was a declaration connected with the transaction, and [792] was therefore properly submitted to the consideration of the jury.

Edward James and Aspland, in support of the rule. First, the latter was not admissible in evidence. The plaintiffs were bound to prove that the goods were sold on the credit of Grant, Murdoch and Company. Now, if the reasoning on the other side be correct, the plaintiffs might prove that fact by the production of their books in which they had debited Grant, Murdoch and Company with the amount of the goods; for the entry would be an act done at the time of the sale and would shew an impression on the mind of the plaintiffs that the goods were purchased for Grant, Murdoch and Company. But their books would clearly not be admissible for that purpose. [Wilde, B. Suppose a witness said, "I saw one of the plaintiffs when he was leaving the exchange, and he told me that they had just sold 2000l. worth of goods to Grant, Murdoch and Company," would that be admissible?] It would be no more admissible than if the plaintiffs had publicly proclaimed upon the exchange that they had sold certain goods to a certain person. [Pollock, C. B. Suppose the plaintiffs had gone immediately after the sale to their warehouse, and ordered the removal of the goods to another part of it, with the view of being delivered to Grant, Murdoch and Company, would not evidence of that fact be admissible?] As against the plaintiffs any declaration made or act done at the time of the sale would be evidence, but they cannot by their conduct, make evidence in their favour. [Wilde, B. Suppose one of the plaintiffs had said "I know we sold the goods to Grant, Murdoch and

Company, because at the time of the sale I told our warehouseman to mark the goods for them."] That would not be evidence for the plaintiffs. This letter [793] was no part of the *res gestæ*. Suppose an action had been brought by Atkin against the plaintiffs for not delivering the goods, the letter would be evidence for them that a reference was given, and that they had made an inquiry which proved unsatisfactory. That shews that the reference was not a term of the contract, but a mere permission for the plaintiffs to inquire, for the purpose of satisfying themselves that they might safely deliver the goods. The course of business was for Atkin to purchase goods for consignment to foreign countries, and to pay for them by the acceptances of the ship brokers who made advances on the security of the goods, and therefore the plaintiffs required a reference, not only as to the responsibility of Atkin, the purchaser, but also of Grant, Murdoch and Company, the shippers of the goods. *Mortimer v. McCallan* (6 M. & W. 58) is distinguishable because there the conversation was between the plaintiff and Taylor, who was in the position of Atkin, and no objection is made as to what took place between the plaintiffs and Atkin. Again, the authority given to the plaintiffs was not pursued. They were directed to inquire of Bond, but instead of doing so they wrote to Francis and Cromer to make the inquiry. That only would be evidence which was done under the authority. Moreover, the letter, if admissible, was only admissible conditionally ; that is, upon evidence being given that it was acted upon. But there was no evidence that anything was done under the letter. The mere direction to a servant to make an inquiry is not evidence without shewing that the inquiry was made. Secondly, the letter, if admissible, was not evidence of the fact of the purchase of the goods by Atkin for Grant, Murdoch and Company, and the part of the letter containing that statement ought not to have been read. To admit that as evidence against the defendant would be to make any declaration by [794] the plaintiffs to one of their servants, without the sanction or knowledge of the defendant, evidence against him. [Wilde, B. In *Chambers v. Bernasconi* (1 C. & J. 451, in error, 1 C. M. & R. 347), where a sheriff's officer returned that he had arrested the defendant at a particular place, after the death of the officer, the Court refused to receive the return as evidence of the arrest at that place. Pollock, C. B., referred to *Higham v. Ridgway* (10 East, 109).] In *Rex v. Clapham* (6 C. & P. 29) Lord Tenterden would not allow a parish register of baptism to be read for the purpose of proving the time of birth. If the statement in the letter had been the only evidence that the purchase was for Grant, Murdoch and Company, and the jury had acted upon it as proof of the fact, and found a verdict for the plaintiffs, the Court would have set aside the verdict. Thirdly, assuming that the letter was admissible, and that the plaintiffs were entitled to have the whole rent, the learned Judge ought to have made strong comments upon it; and to have cautioned the jury against regarding it as proof of the facts alleged in it. In that respect there was a misdirection.

POLLOCK, C. B. I am of opinion that the rule ought to be discharged. The grounds of the application for a new trial were, first, that the letter of the 17th of May, 1861, ought not to have been received in evidence ; secondly, that being received, that part of it which states the reason for making the application ought either not to have been read, or being read, the learned Judge ought to have made strong comments upon it, and to have cautioned the jury that it was no evidence of the purchase of the goods for Grant, Murdoch and Company. In my judgment there is no foundation for either of the objections, although I think the rule was properly granted, and the points worthy of consideration.

[795] The objection taken by Mr. Aspland rather late in the argument, I will first dispose of. He contended that the letter ought not to have been received because nothing was done under it ; and that it was only upon the application being made, the letter acted upon, and the answer put in, that it would become evidence. I am not sure the objection is well founded ; but assuming it to be, there is no doubt from the nature of the letter, that the application was made, and an answer obtained. But supposing there was no answer, the objection ought to have been taken before the letter was read.

Further, I do not agree that part of a letter may be excluded ; if read at all, the whole must be read. In that respect a letter differs from a public document ; and that is the distinction between this case and *Chambers v. Bernasconi* (1 C. & J. 451 ; in error, 1 C. M. & R. 347). A document which is received in respect of its being a public document, drawn up in pursuance of an act of parliament, or in the performance

of some public duty, is valid for that reason; and if any impertinence creeps into it, that is no part of the document, and ought not to be read with it. For that reason the Court, in *Chambers v. Bernasconi*, excluded the statement of the place where the arrest was made. For that reason, also, Lord Tenterden, in the case of *Rex v. Clapham* (4 C. & P. 29), would not allow a parish register of baptism to be read, for the purpose of proving the time of birth; for the time of birth was no part of the register. That is also the distinction between this case and *Higham v. Ridgway* (10 East, 109), for there it was no part of the duty of the medical man to make an entry that he had been paid for his attendance, and the circumstance of his having recorded it made it an entry against his interest, so that the whole might be read. There the question was, upon what day [796] was the child born? The medical man had entered not only that he had attended at the birth and been paid for it, but also that the child was born on a particular day; and that being part of an entry which was admissible in evidence, was held evidence of the time of birth, because made by a person against his interest.

It is difficult not to perceive from those cases that the Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue, and advance the search after truth. No doubt, for that reason, in the case of an exclamation by anyone in a crowd, when an accident occurs, and the conduct of a particular person is in question, it may be asked whether some one did not call out "shame," for it is part of the *res gestæ*. The exclamation may be the result of prejudice or passion, but it is admissible in evidence, and the jury must judge whether it did not proceed in the ordinary course of events, or whether any reliance can be placed upon it.

In this case the dispute is whether the purchase was made for one or other of two persons. A reference was required and given, and acted upon by the plaintiffs making an inquiry. If that had been no part of the transaction we must have excluded it, as in the case put by Mr. James,—if a man, on leaving his counting-house, said to his servant, "I have just sold so and so," that would not be evidence of the sale. Here, however, the reference was part of the transaction, and the letter had a strong tendency to confirm the other evidence. There was evidence that the plaintiffs were directed to refer, and they did so, and I think that the terms in which that was done are calculated to elicit the truth. No doubt the letter is not evidence of the fact in issue, and I should have told the jury that it was not received as evidence of the sale; and that if there was no other evidence, that fact would not be proved, but I [797] could not prevent them from forming a judgment upon the whole matter. I own that in the course of the argument I was not altogether free from doubt, but now I entertain no doubt whatever that this letter, being part of the transaction of a reference made in pursuance of the direction of the party purchasing, was admissible in evidence, and that the whole of it might be read. I also think that no part of the summing up of the learned Judge can be objected to as furnishing ground for a new trial. The rule will, therefore, be discharged.

MARTIN, B. I am of the same opinion. I never entertained the slightest doubt that my brother Wilde not only did right in admitting the letter in evidence, but that he would have done wrong if he had excluded it, and the plaintiffs would have been entitled to a new trial on that ground.

The facts are these:—On the 16th May, 1861, a person, named Atkin, negotiated with the plaintiffs for the purchase of some goods; and the question in the case was, whether Atkin bought the goods on his own account or for Grant, Murdoch and Company. According to the plaintiffs' statement, Atkin said he bought them for Grant, Murdoch and Company; and when the plaintiffs said they did not know Grant, Murdoch and Company, Atkin referred them to a person named Bond, at Liverpool. Afterwards the sale was completed. Now, I think the letter was evidence, because it was part of the transaction itself, and in my judgment was as much evidence as what Atkin said was the price he was to pay, or the plaintiffs said was the price they would take, for the goods. One objection suggested to-day is that it does not appear that Bond was communicated with, but that objection was not taken at the trial, and I have no doubt advisedly, because, if it had been, it [798] would have led to a piece of evidence which would have been conclusive in the case.

As to the use that may be made of a document when it is in evidence, I think the whole may be read; I never knew of any restriction. In this case one question was,

whether, when these goods were ordered, it was in the mind of the plaintiffs to sell them to Grant, Murdoch and Company. That being the matter in controversy, the plaintiffs, on the 17th of May, wrote to their agent saying:—"We wish you to call at J. H. Littledale and Company's and see J. C. Bond, and inquire as to the trustworthiness of Messrs. Grant, Murdoch and Company, and also of Atkin and Company, who is making a rather large purchase of goods for the above party, and who refers us to Mr. Bond." It was important to shew to whom the plaintiffs meant on that day to sell the goods, and it would be shutting out the truth to reject the latter part of the letter. With regard to the mode in which I summed up, it seems to me that it was correct.

CHANNELL, B. I am also of opinion that the rule ought to be discharged. It was obtained on two grounds; first, the improper reception of evidence; secondly, misdirection. The two questions are substantially the same, because there is no suggestion of misdirection other than this, that if the letter was admissible, undue weight was given to it by the learned Judge in his summing up.

Now, the main question in the cause was, whether the transaction shewed, in the mind of the plaintiffs as one of the contracting parties, a sale to Grant, Murdoch and Company, or either to Atkin or any person for whom he was acting as agent. Both the plaintiffs and defendant may be described as innocent parties, and whichever may ultimately be the sufferer, will be so in consequence of the [799] dishonesty of Atkin. But be that as it may, we are to see how the law stands as applicable to this case, and not be biassed by the consideration that the defendant has *bonâ fide* advanced money on the goods, without knowledge that the person in possession had no title to them. What we have to inquire into is the transaction between the plaintiffs and Atkin, because the defendant is setting up a title derived from them under Atkin, upon the supposition that there was a sale to him, voidable perhaps on the ground of fraud, but which not having been avoided, entitles him to retain the goods. We must therefore see the rights of the parties as between the plaintiffs, the sellers of the goods, and Atkin. It is clear that an order was given for the goods, and that the order was in a certain sense accepted, but a reference was required, and assuming the plaintiffs' case to be true, that reference was required, not as to the responsibility of Grant, Murdoch and Company, as shippers of the goods, but as the buyers of them. According to the evidence of Atkin, the reference was required, because it was of importance to the plaintiffs to know that the shippers of the goods were responsible. Now, suppose the letter had never been produced, and the case was to be viewed solely as regards the testimony of the witnesses, there was a case either for the plaintiffs or defendant according as the jury believed the evidence adduced by the one or the other. In that state of things the letter is produced; and I cannot doubt that it was admissible, provided it was acted upon. At the time it was written, an order for the goods had been given, and in a certain sense accepted, for before an answer was obtained, even before the inquiry was made, the sellers delivered part of the goods. Still, at the time the reference was given, the transaction was open to this extent, that if the sellers of the goods had received an immediate answer not satisfactory, they [800] would not have been bound to deliver the goods in execution of the contract. Therefore, I agree with my brother Martin, that the letter is as much a part of the transaction as any discussion about the price or quality of the goods.

Then it is said that the letter was never acted upon. Now, a distinction has been taken between a kind of general authority as to the mode in which an inquiry is to be made and as regards the extent and nature of the inquiry itself. But I think that if a reference is required of a purchaser, acting either as agent or on his own behalf, whether the vendor makes the inquiry himself, or by his clerk, or through the medium of a letter instead of sending a special messenger, that is part of the transaction. It is said that the letter is not admissible because, if the sellers of the goods had directed one of their clerks to make the inquiry and he had disregarded their commands, the letter would not have been receivable; and that this case is no more than that, because the plaintiffs failed to shew that anything was done under the letter. I am not prepared to say that if the case rested on mere direction, that would be sufficient; but here there is more, and if the objection had been taken that the letter was inadmissible because something had to be supplied, the omission would probably have been remedied.

Then, supposing the letter admissible, one other question remains, viz., whether

undue effect was given to any part of it by the learned Judge in his summing up. I do not mean to say that if a document is admissible for a certain purpose, so that the Judge could not exclude it, it becomes evidence of all the facts alleged in it. Where the document cannot be altogether excluded, it seems to me a safer and better rule for the Judge to caution the jury against acting upon that part of it which is not evidence. Here the learned Judge left it to the jury to deal with the letter; and the substance of his summing up was whether they believed [801] the plaintiffs' or the defendant's witnesses. The jury having to weigh the credit of the witnesses, if the letter was genuine and receivable at all, it was corroborative of the plaintiffs' case. It seems to me that the learned Judge in giving that weight to the letter did not exceed his authority, and that he properly explained it to the jury.

WILDE, B. As this is a case of some importance, I will add a few words. During the argument I entertained some doubt. My doubt rested on this, which was forcibly argued by Mr. James, that the transaction amounted to no more than if the plaintiff, Seville, had said to his clerk, "I have been referred to Mr. Bond, of the house of Littledale and Company, as to the trustworthiness of Grant, Murdoch and Company; you go and inquire of Bond what is their character." If the matter had stopped there, I can well understand that there would be ground for contending that it was no part of the *res gestæ*, but a mere conversation between the plaintiff and his clerk. If, however, that was the ground of the objection it ought to have been taken at the trial. No doubt, since the case of *The Irish Society v. The Bishop of Derry* (12 Cl. & F. 642), if a party objects at the trial to the admissibility of evidence on one ground, he may sustain the objection on another ground. But that rule is subject to this exception, that if the evidence is not admissible because of the absence of something which ought to be supplied, that must be pointed out at the trial, in order that the other party may have an opportunity of supplying it. Therefore, if the objection to this document rests on that ground, it fails, because it ought to have been taken at the trial.

Now, the plaintiffs directed their agent to inquire of Bond, and no doubt that was followed up by an inquiry. [802] Then the next question is whether, under those circumstances, the letter was admissible. It seems to me that the case is the same as if the plaintiff, Seville, had himself made the inquiry, and that it makes no difference whether he directed another person to inquire or himself wrote to Bond. Then would the fact that the plaintiff, Seville, wrote to Bond, and received a certain character, be admissible? I think it would, as part of the *res gestæ*. I do not think its admissibility could be supported on the ground suggested by the plaintiffs' counsel, viz., that it was something which the plaintiffs did when they had no interest to deceive. That ground of admissibility has been ably and decisively answered by Mr. James, who argued that if the evidence was admissible on that ground, everything a man said on the day when he made a bargain, and still more, everything he did, would be admissible. It seems to me that would be very dangerous ground, and the instances given by Mr. James satisfactorily shew that it cannot be sustained. The real ground is, that this was an inquiry made by the direction of the plaintiffs in pursuance of an authority from Atkin, and therefore was part of the *res gestæ*.

Then the question is whether, supposing the letter admissible, the whole of it is admissible. When the letter is looked at, it is plain that the whole is admissible. The authority was not to inquire of Bond generally as to the responsibility of Grant, Murdoch and Company, but as to their responsibility as regards this particular transaction. The latter part of the letter which says, "and also of Atkin and Company, who is making a rather large purchase of goods for the above party," had reference to the proposed purchase of 7000 pieces of shirting, and was of the very essence of the inquiry. Without that it would not appear that the inquiry was made with reference to this transaction.

[803] Then it is said, that assuming the whole of the letter admissible, it ought not to have been read as proof of the facts stated in it. No doubt, there are cases where documents which are admissible are not proof of all the facts stated in them. For instance, if a notice to quit is given in evidence, and on its being read it appears that the landlord has drawn it up thus: "In consequence of your not having paid your rent for the last year, and having ill-treated the farm, and allowed the premises to be out of repair, I hereby give you notice to quit" on such a day. Or, as the Lord Chief Baron reminds me, there is a forcible instance in the case of letters written by attornies before action brought, which often contain matter almost defamatory;

but though they might be admissible as against the parties to whom they were written, they would not be admissible as evidence of all the facts stated in them. Therefore, it is plain, that a document may be admissible and yet not proof of all the facts stated in it.

It may be that the defendant is right in saying that the letter was not admissible as proof that the purchase was on behalf of Grant, Murdoch and Company. I agree with the Lord Chief Baron, that if that were the only evidence in the case, there would be none to go to the jury. Then we must see whether there is any foundation for the suggestion that my brother Martin, in summing up, dealt with the letter in that way. I think there is none. All that he did was to state what the substance and meaning of the letter was. I am satisfied that the case could not have been more fairly or properly left to the jury, and I therefore think the rule ought to be discharged.

Rule discharged.

[804] HARRISON AND ANOTHER v. JAMES. Jan. 16, 25, 28, 29, 1862.—The defendant being desirous of apprenticing his son to the plaintiffs, it was verbally agreed between them, that the son should go on trial for a month, and if the parties were satisfied, he should be bound apprentice for four years, the defendant to pay a premium of 100l. by instalments. The son went on trial and remained above sixteen months, when the defendant removed him. No deed of apprenticeship was executed, or any part of the premium paid. Held, that the plaintiffs could not recover for the son's board and lodging during any part of the time he remained with them.

[S. C. 31 L. J. Ex. 248.]

The declaration stated, that the plaintiffs sued the defendant for money payable by the defendant to the plaintiffs for instruction, board and lodging, and other necessities by the plaintiffs found and provided for the defendant's son, at the request of the defendant.

Plea. Never indebted. Issue thereon.

At the trial, before Keating, J., at the Oxfordshire Summer Assizes, 1861, it appeared that the action was brought to recover the sum of 43l. 16s. for instruction, board and lodging provided by the plaintiffs for the defendant's son under the following circumstances:—In June 1859, the defendant applied to the plaintiffs, who were chemists at Banbury, to take his son, a youth of about fourteen years of age, as an apprentice. After some negotiation as to the terms, it was verbally agreed that the youth should go on trial for a month, and if the parties were satisfied with each other, he should be apprenticed for four years; and that the defendant should pay the plaintiffs a premium of 100l. by the following instalments, viz., 40l. upon the execution of the indenture of apprenticeship and 20l. a year for each of the three successive years. The plaintiffs were to provide the youth with board and lodging during the apprenticeship. On the 3rd of August, 1859, the youth went to the plaintiffs' place of business, and remained there until the 31st December, 1860. During that time he assisted in the shop, the plaintiffs providing him with board and lodging. The defendant had expressed a wish that his son should come home at Christmas, and when he left in December, 1860, he never returned. No deed of apprenticeship was executed. The [805] plaintiffs applied to the defendant several times for payment of the 40l., but no part of it was ever paid. The defendant refused to allow his son to return to the plaintiffs' place of business. One of the plaintiffs, on cross-examination, stated that the youth remained all the time with a view to apprenticeship.

It was submitted, on behalf of the defendant, that the action was not maintainable; and the learned Judge being of that opinion nonsuited the plaintiffs, reserving leave to them to move to enter a verdict for 43l. 16s., if the Court should be of opinion that the plaintiffs were entitled to recover: the Court to be at liberty to draw any inferences of fact.

Pigott, Serjt., in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that the defendant had refused to perform his part of the special contract, and that the plaintiffs were therefore entitled to recover on a quantum meruit for what they had done under it.

Gray (Huddleston with him) shewed cause. The plaintiffs have no cause of action. This is not the case of a contract which, having been rescinded by the one party, the other is entitled to recover upon a quantum meruit for what he has done under it. There never was any contract between the parties, or any intention that the period of trial should be paid for. In *Wilkins v. Wells* (2 C. & P. 231), Garrow, B., ruled that "If a person take a lad a month on liking, with the intention of his being bound as an apprentice if he and the lad suit each other, and the lad stay several months without the indenture being executed, if no fresh agreement were entered into he is not entitled to charge for the board and lodging of the lad whom he employed in his trade." [Wilde, B. If the whole period during which the [806] defendant's son stayed with the plaintiffs was not a continuance of the trial, some part of it was an entering upon the apprenticeship, and then the contract would be void under the 4th section of the Statute of Frauds, 29 Car. 2, c. 3, because it was not in writing.]

The Court then called on

Pigott, Serjt., and Dowdeswell to support the rule. The plaintiffs are entitled to recover. The principle is clear: where a person has entered into a parol contract and has done work under it, though the contract cannot be enforced because the law requires it to be in writing, he may recover upon a quantum meruit for the work done: *Planché v. Colburn* (8 Bing. 14). So, where the performance of a contract is prevented by the wrongful act of one of the parties, an implied assumpsit arises to pay the other the value of the work done under it. Upon the same principle, where a lease for years is void, because it is not under seal, if the lessee takes possession of the land, he is liable in an action for use and occupation. So, where tithes are demised by an instrument not under seal, the lessee may sue for their value. It is the same in the case of a demise of an incorporeal hereditament: *Bird v. Higginson* (2 A. & E. 696). [Martin, B. The plaintiffs agreed to take the defendant's son as an apprentice under an express contract that he was to serve for four years, and the defendant agreed to pay a premium of 100l. by instalments. Assuming that the defendant broke the contract, no action can be maintained upon it by reason of the 4th section of the Statute of Frauds; then how can another implied contract arise?] The law is thus stated in Smith's Lead. Cas., vol. 2, p. 17, 5th ed.—"It is an invariably true proposition, that wherever [807] one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may on doing so immediately sue on a quantum meruit for anything which he had done under it previously to the rescission." Here, inasmuch as the defendant has had a benefit under the contract, and has committed a breach of it, the plaintiffs are entitled to rescind it and sue upon a quantum meruit. *Archard v. Horner* (3 C. & P. 349), *Lilley v. Elwin* (11 Q. B. 742), *Smith v. Hayward* (7 A. & E. 544), *Earratt v. Burghart* (3 C. & P. 385), and *De Bernadi v. Harding* (8 Exch. 822), are authorities in support of the position contended for.

POLLOCK, C. B. I am of opinion that the rule must be discharged—not because I differ from what is laid down in the authority cited from Smith's Lead. Cases, for I do not wish to be understood as throwing the slightest doubt upon what is there stated to be law. My judgment is founded upon what I conceive was the intention and understanding of the parties at the time they made the contract. A month was allowed for trial, during which time it is admitted that the defendant was to pay nothing. That month gradually extended to two, three and four months, until at length the time amounted to more than sixteen months. If the plaintiffs had wished to insist upon payment, they might, at any time after the first month, have said to the defendant, "pay the 40l. or take your son away;" for no new contract was entered into. They did not, however, take that course, but went on upon the same footing. Probably the lad turned out so useful that it was a benefit to the plaintiffs to allow [808] him to remain, since he received no wages and was not provided with clothes, but only got his board and lodging. The agreement between the parties was never altered; and the plaintiffs never contemplated charging the defendant until after he had taken his son away. To apply to such a case the principle of the authorities cited would be most unreasonable. In my judgment the parties meant nothing more than the extension of the month's trial; and if the plaintiffs could not charge for the month (and it is admitted they could not), they cannot charge for a day over it.

In thus deciding we are not infracting an important principle of law, that where a party to a contract has done some work under it, from which the other party has derived a benefit, if he will not allow the former to complete the contract, he has no right to retain the benefit without paying its value. That is wholly inapplicable to this case, both with reference to the circumstances and the nature of the demand.

MARTIN, B. I have difficulty in distinguishing this case from the general rule laid down in Smith's Leading Cases; but I confess I do not understand the doctrine as there stated. If two parties enter into a contract, by which certain things are to be done on the one hand and certain other things on the other hand, there is the contract between those parties, and I do not comprehend why, because one party has committed a breach of that contract, the other has a right, not to recover damages, but to set up a totally different contract. If so, whenever a person broke his contract, we should be called upon to say that he had made a new contract. The defendant neither expressly nor impliedly made the contract now set up. I can well understand that if a person agrees to build a house upon the land of another for a certain sum, to be paid by instalments, if [809] the owner of the land absolutely prohibits the builder from completing the house, he would be entitled to recover compensation for what he had done, because it was agreed that he should be paid in a particular way and the other party prevented him from earning the money in that way. So, if a person is let into possession of land under a proposed lease, I can well understand how he is bound to pay for the occupation of the land. But here the plaintiffs had the benefit of the youth's service, and he had no benefit, for he served for several months under the expectation that he would be bound apprentice. There was no rescission of the contract; but, by reason of the breach of it, the one was deprived of his board and lodging, the other of the service.

WILDE, B. I am of the same opinion. I should be sorry to throw any doubt upon the cases which establish the rule of law adverted to; but the question is, whether this case comes within that rule, and I am of opinion that it does not. First, there was no special contract, because, although the terms were settled between the parties, the defendant's son was to come on trial, and therefore there was no obligation on the part of the defendant to execute a deed of apprenticeship. The defendant was to place his son with the plaintiffs for a month on trial, without paying for his board and lodging during the month; and if the parties agreed, at the end of that period a deed of apprenticeship for four years was to be executed. The plaintiffs are now seeking to recover for the youth's board and lodging during the extension of the month. That period extended to more than sixteen months by reason of the plaintiffs having allowed the same state of things to continue. The parties however never contracted with reference to any payment for the first month or for its prolongation. *Earratt v. Burg* [810]-*hart* (3 C. & P. 385) is distinguishable, because there it was left to the jury to say whether there was any contract. In this case there was no contract, for the one party never intended to pay, nor the other to claim, anything for the youth's board and lodging. (b)

Rule discharged.

NICHOLSON v. FIELDS. Jan. 21, 1862.—The "St. Ives (Hunts), Improvement Act, 1847," incorporates "The Commissioners Clauses Act, 1847." By section 2 of the Special Act, every male person of full age, rated to the relief of the poor in a certain amount, shall be Commissioner under that Act. By section 9 of the General Act, any person who after his "appointment as a Commissioner" shall "be concerned or participate in any manner in any contract" shall thenceforth "cease to be a Commissioner." By section 15, every person who shall act as a Commissioner "after having become disqualified" shall be liable to a penalty of 50l. In an action against the defendant for the penalty for having acted as a Commissioner after he was disqualified, an invoice was produced in the handwriting of the defendant addressed "To the Commissioners of St. Ives," and charging them for lime supplied on several occasions during four months. The defendant became a Commissioner by reason of possessing the qualification required by the second section of the Special Act.—Held: First, that the defen-

(b) Channell, B., had left the Court.

dant was "appointed" a Commissioner within the meaning of the 9th section of the General Act.—Secondly, that the defendant, by being concerned in a contract, became "disqualified" to act as a Commissioner within the meaning of the 15th section of that Act.—Thirdly, that the invoice was evidence from which the jury might find that the defendant was concerned or participated in a contract within the meaning of the 9th section of that Act.

[S. C. 31 L. J. Ex. 233; 10 W. R. 304. Followed, *Lewis v. Carr*, 1876, 1 Ex. D. 487. Commented on, *Fletcher v. Hudson*, 1881, 7 Q. B. D. 616.]

Declaration. For that after the passing and coming into operation of "The St. Ives (Hunts) Improvement Act, 1847," and "The Commissioners Clauses Act, 1847," respectively, to wit, on the 1st day of January, A.D. 1861, and on divers days, to wit, ten days before that day and the commencement of this suit, the defendant having heretofore been and acted as a Commissioner under the first-mentioned statute, and having afterwards become and being on each of the days and times aforesaid disqualified, within the true intent and meaning of that statute, to act as a Commissioner in the execution of the said first-mentioned Act, did, contrary to the said statute, to wit, on each of the times and days aforesaid, after having so become disqualified as aforesaid, act as a Commissioner in the execution of the [811] said first-mentioned statute, whereby and by force of the statutes in that behalf, he, for each and every such offence, to wit, on each and every of the aforesaid days, incurred and became liable to pay a penalty of 50l. And the plaintiff says that before action everything had happened and been done to entitle the plaintiff to issue a writ in this action, and to recover from the defendant the said penalties of 50l. and each and every of them, and that nothing has ever happened to disentitle him thereto, or to sue as aforesaid. Plea: Not guilty (by statute 31 Eliz. c. 5, s. 5; 21 Jac. 1, c. 4, s. 4). Issue thereon.

At the trial, before Wightman, J., at the last Huntingdon Summer Assizes, it appeared that the defendant had acted as a Commissioner under the St. Ives (Hunts) Improvement Act, 1847 (10 & 11 Vict. c. cclvi.), and that he became a Commissioner by reason of possessing the rating qualification required by the 3rd section of that Act, and of having signed the declaration required by the 12th section of "The Commissioners Clauses Act, 1847" (10 & 11 Vict. c. 16). It was proved by the minute book of the Commissioners, and the production of bills signed by the defendant, that on the 9th of August, 1859, the defendant was paid by the Commissioners 5l. 13s. 1d., the amount of a bill for timber supplied to the Commissioners in 1858 and 1859. In November, 1859, he received a further sum of 2l. 1s., and in May, 1860, 2l. 19s. 10d. He also sent to the Commissioners the following invoice, which was in his handwriting.

"The Commissioners of St. Ives.

"Dr. to James Fields.

"1860, March 30th.	1 cwt. Lime, 1s.;	May 16th,	s. d.
	1 cwt. Lime, 1s.		2 0
" July 17th.	1 ditto ditto, 1s.;	August 17th,	
	1 ditto ditto, 1s.		2 0
			4 0"

[812] This invoice was signed by the defendant, as paid. The course of business was for the surveyor of the Commissioners to order the materials, and the production of the invoice with the defendant's signature at the bottom was the warrant for payment. An account was also due to the defendant for timber supplied up to June, 1861.

It was submitted on behalf of the defendant, first, that there was no evidence that he was concerned or participated in a contract within the meaning of the 9th section of the "Commissioners Clauses Act, 1857" (10 & 11 Vict. c. 16): secondly, that the 15th section did not apply, inasmuch, as the defendant was not "disqualified" to act. The learned Judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for him for one penalty.

Macaulay, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that the acts proved to be done by the defendant came within the 10 & 11 Vict. c. 16, s. 9, and disqualified him from acting as a Commissioner under the 10 & 11 Vict. c. cclvi.

O'Malley and Keene now shewed cause. (a) First, the [813] defendant did not become a Commissioner by reason of his being "appointed" or "elected," and therefore the 9th section of the Commissioners Clauses Act, 1847, does not apply to him. There are three ways by which persons may [814] become Commissioners for carrying out undertakings of a public nature. First, by possessing the qualification required by the special Act; secondly, by being appointed Commissioners by the special Act; and, thirdly, by being elected under the provisions of the general Act. The 9th section of the 10 & 11 Vict. c. 16 applies to commis-[815]-sioners who have been "appointed" or "elected," but not to those who have become such by reason of possessing the requisite qualification. From the 6th to the 16th sections of the 10 & 11 Vict. c. 16, are a series of clauses relating to the qualification of Commissioners. With the 17th section commences another series of clauses relating to Commissioners who are appointed or elected. These statutes ought to receive a strict construction. Secondly, by the 9th section of the 10 & 11 Vict. c. 16, a Commissioner who shall be concerned in any contract shall thenceforth "cease to be a Commissioner;" but the 15th section imposes the penalty on a person who shall act as a Commissioner "after having become disqualified." The Act makes a distinction between "ceasing to be a Commissioner" and "being disqualified." A person who possesses the requisite qualification and has subscribed the declaration required by the 12th section, is qualified to act. The 8th section provides that no "bankrupt or insolvent, or person not qualified as required by the special Act, shall be capable of being or continuing a Commissioner." Such a person would be liable to the penalty imposed by the 15th section. By the 16th section, a Commissioner who for six months after his appoint-

(a) The following sections of the "Saint Ives (Hunts) Improvement Act, 1847," (10 & 11 Vict. c. clvi.), were referred to:—

Section 1. "Whereas the town of St. Ives, in the county of Huntingdon, is a large and populous place, having a considerable market, and it would be of great advantage to the inhabitants thereof and persons resorting thereto, and of public utility, if the said town and the neighbourhood, within the limits hereafter described, all within the county of Huntingdon, were properly paved, lighted, watched, sewered, drained, cleansed, and otherwise regulated and improved;" &c. Be it enacted, "That the several acts of parliament following, that is to say, 'The Lands Clauses Consolidation Act, 1845,' 'The Commissioners Clauses Act, 1847,' and 'The Towns Improvement Clauses Act, 1847,' and 'The Towns Police Act, 1847,' shall, save so far as they are expressly varied or altered by this Act, be incorporated with and form part of this Act."

Section 2. "That the Commissioners and their successors, qualified as hereinafter mentioned, shall be the Commissioners for the purposes of this Act," &c.

Section 3 (the marginal note of which is, "Appointment and qualification of Commissioners") enacts, "That every male person of full age, who shall be rated to the rate made for the relief of the poor, upon lands, tenements and hereditaments within the limits of this Act hereafter described in the net annual value of 40l. or upwards; or who shall be seised or possessed or in the enjoyment of the rents and profits, of lands, tenements, and hereditaments within such limits of the net annual value of 40l., for an estate not less than a life in being, for his own use, shall during the time that he shall be so rated or seised or possessed as aforesaid be a Commissioner under this Act."

Section 5. "That if any person having qualified under this Act to act as a Commissioner shall fail to act as such in the execution of this Act for two years, such Commissioner shall be deemed to have refused to act, and therefore shall cease to be a Commissioner for a period of two years from the time of his having so failed to act; after the expiration of which period, upon his again making the declaration required by this Act, he shall be capable of acting as a Commissioner until he shall disqualify himself as aforesaid, or become disqualified to act in any other manner before mentioned."

The following clauses of "The Commissioners Clauses Act, 1847" (10 & 11 Vict. c. 16) were referred to.

With respect to the qualification of Commissioners, be it enacted as follows:—

Section 6. "Where by the Special Act the qualification of Commissioners is made to depend upon their being rated in respect of property of a given amount, then if two or more persons be jointly rated in respect of any property, each of such persons shall, subject to the provisions herein and in the Special Act contained, be eligible to

ment neglects to subscribe the declaration, or for six months in succession is absent from all meetings of the Commissioners, shall "cease to be a Commissioner." The ceasing to be a Commissioner does not render the person liable to a penalty, but his acts are a nullity. A penal statute ought to be construed strictly. Thirdly, the defendant was not concerned in any contract within the meaning of the 9th section of the 10 & 11 Vict. c. 16. It is clear that every sale of goods is not a contract within the meaning of that section. If it were, every tradesman at whose shop a trifling article was purchased, as for instance, a pennyworth of nails, would thereby become disqualified to act as a Com-[816]-missioner. The object of the legislature was to prevent continuous contracts for the supply of goods. The 56th section shows the sense in which the word "contract" is used in the Act. *Woolley v. Kay* (1 H. & N. 307) and *Le Feuvre v. Lankester* (3 E. & B. 530) are authorities in favour of the defendant.

Macaulay and Naylor appeared to support the rule, but were not called upon to argue.

POLLOCK, C. B. This is an action against the defendant for acting as a Commissioner under the "St. Ives Improvement Act," after he had become disqualified by reason of having contracted with the body of Commissioners. The plaintiff's case was established by the evidence; but objections were raised upon the construction of the Act. The learned Judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for him for one penalty, if the Court should be of opinion that he was entitled to recover.

There has been some argument upon the merits of the case, that is, whether the dealing was a contract or not, but the greater portion of the argument was upon the

be chosen a Commissioner, provided the property in respect of which such persons are rated be of a rateable yearly value, which, when divided by the number of persons so rated, will give to each a sufficient rateable yearly value according to the provisions of this and the Special Act."

Section 9. "Any person who at any time after his appointment or election as a Commissioner shall accept or continue to hold any office or place of profit under the Special Act, or be concerned or participate in any manner in any contract, or in the profit thereof, or of any work to be done under the authority of such Act, shall thenceforth cease to be a Commissioner, and his office shall thereupon become vacant."

Section 12. "No person shall be capable of acting as a Commissioner, except in administering the declaration hereinafter mentioned, until he shall have made and signed, before one of the Commissioners, a declaration to the effect following," &c.

Section 14. "Every person elected or appointed a Commissioner shall, at the meeting of Commissioners at which he first attends as a Commissioner, make and subscribe the declaration herein required, and any Commissioner, whether he himself have made such declaration or not, may administer such declaration."

Section 15. "Every person who shall act as a Commissioner, being incapacitated or not duly qualified to act, or before he has made or subscribed such declaration as aforesaid, or after having become disqualified, shall for every such offence be liable to a penalty of 50l.; and such penalty may be recovered by any person, with full costs of suit, in any of the superior Courts; and in every such action the person sued shall prove that at the time of so acting he was qualified, and had made and subscribed the declaration aforesaid, or he shall pay the said penalty and costs without any other evidence being required from the plaintiff than that such person had acted as a Commissioner in the execution of this or the Special Act; nevertheless all acts as a Commissioner of any person incapacitated, or not duly qualified, or not having made or subscribed the declaration aforesaid, done previously to the recovery of the penalty, shall be as valid as if such person had been duly qualified."

And with respect to the election and rotation of the Commissioners, where the Commissioners are to be elected by the ratepayers or other like class of electors, be it enacted as follows:—

Section 17. "When by the Special Act it is provided that the Commissioners shall be elected by the rate-payers within the town, or other like class of electors, the first body of Commissioners, whether appointed by the Special Act, or elected under the provisions of this and the Special Act, shall go out of office according to the prescribed rotation, and at the prescribed times," &c.

grammatical construction of certain expressions used in the Act. The case differs from *Woolley v. Kay* (1 H. & N. 307), where some members of this Court expressed an opinion that a mere casual buying and selling, as, for instance, going into a shop and buying an article and paying for it over the counter, would not be a contract or bargain for "furnishing, supplying or selling an article," so as to render the party liable to a penalty if he continued to act as a Commissioner. But when the facts of this case are looked at, it will be found that there were several invoices, one of them shewing a dealing which extended over four months. The amount, indeed, is trifling, [817] but that is immaterial; for it was intended that every description of dealing by the Commissioners should be put an end to, so far as legislation could do it, and that the party to a contract should be rendered incapable of exercising the office of Commissioner, in other words, of dealing with himself. It is true that the language of the legislature might have been more plain by providing that no Commissioner shall be concerned, not merely in any contract, but in any buying and selling; but it is impossible to say that this is not a continuous contract for the supply of lime, first in the one month, then in the next, then in the third, and so on. The defendant signed receipts to the bills charging the St. Ives Commissioners, and there was a dealing by him with them.

I admit that the common distinction between penal and remedial Acts, viz., that the one is to be construed strictly, the other liberally, ought not to be erased from the mind of a Judge, yet, whatever be the Act, be it penal, and certainly if remedial, we ought always to look for its true construction. In that respect, there ought to be no distinction between a penal and a remedial statute. If the remedial statute does not extend to the particular matter under consideration, we have no power to legislate so as to extend it. Undoubtedly, we are thus far bound to a strict construction in a penal statute, that if there be a fair and reasonable doubt, we must act as in revenue cases, where the rule is, that the subject is not to be taxed without clear words for that purpose.

In this case there was evidence for the jury that the party charged with the penalty had been dealing with the Commissioners, and was concerned in a contract with them. Applying the ordinary meaning of the language of the 9th section of the 10 & 11 Vict. c. 16, can it be said that there is not evidence that the defendant was concerned or participated in a contract with the Commissioners, and supplied them with lime under that contract? Although [818] the word "disqualified" is not found in the 9th section, expressions are used in the Act which shew that when a Commissioner has supplied goods under a contract he is "disqualified" from acting as a Commissioner, and if he acts notwithstanding that disqualification he is liable to the penalty imposed by the 15th section. For these reasons, I am of opinion that the rule ought to be absolute to enter the verdict for the plaintiff for one penalty.

MARTIN, B. I am of the same opinion. I apprehend that, in the construction of every act of parliament, we must endeavour, as far as we can, to ascertain its true meaning, and in a penal action not to apply the Act unless the case is clearly within its terms. But the contention of the plaintiff's counsel amounts to an application to us to misread the language of the Act, and misinterpret it for the purpose of relieving the defendant from a penalty.

The question depends on two acts of parliament. The first is a local Act, "for paving, lighting, watching, draining, cleansing and improving the town of St. Ives and the neighbourhood thereof." It recites that St. Ives is a large and populous place, and that it would be of great advantage to the inhabitants thereof, and persons resorting thereto, and of public utility, if the town and neighbourhood were properly paved and lighted, and it then goes on to enact that "The Commissioners Clauses Act, 1847," and certain other Acts shall be incorporated with and form part of the Act, except so far as they are expressly varied or altered by it. So that, in plain language, it is provided that the "St. Ives Improvement Act" and the "Commissioners Clauses Act, 1847," shall be read together. The second section of the special Act enacts that the Commissioners and their successors, qualified as thereafter mentioned, shall be the Commissioners for the purposes of the Act. The third [819] section enacts, that every male person of full age who shall be rated to the rate made for the relief of the poor upon lands, tenements and hereditaments within the limits of this Act hereafter described, in the net annual value of 40l. or upwards, or who shall be seised or possessed, or in the enjoyment of the rents and profits of lands,

tenements and hereditaments within such limits, of the net annual value of 40l., for an estate not less than a life in being, for his own use, shall during the time that he shall be so rated, or seised, or possessed as aforesaid, be a Commissioner. The defendant was a Commissioner by reason of his being rated to lands of that value, and if he was not appointed a Commissioner by virtue of that Act, I do not know what language can be applied to the case. Persons who understand language prepare acts of parliament, and the framer of this Act says, in the marginal note to the 3rd section, that it relates to "the appointment and qualification of Commissioners;" yet we are called upon to say that the defendant was not appointed under that Act. It is clear that a Commissioner possessing the qualification required by the 3rd section is appointed a Commissioner under the Act.

By the 6th section of "The Commissioners Clauses Act, 1847," which is headed, "With respect to the qualification of Commissioners," it is enacted that, "Where, by the special Act, the qualification of the Commissioners is made to depend upon their being rated in respect of property of a given amount, then if two or more persons be jointly rated in respect of any property, each of such persons shall, subject to the provisions herein and in the special Act contained, be eligible to be chosen a Commissioner, provided the property in respect of which such persons are rated be of a rateable yearly value, which, when divided by the number of persons so rated, will give to each a sufficient rateable yearly value, according to the provisions of this and the [820] special Act." Reading the two Acts together, it is plain that the legislature is dealing with persons appointed Commissioners under those Acts. The general Act goes on to enact, by section 9, that, "Any person who at any time after his appointment or election as a Commissioner, shall accept or continue to hold any office or place of profit under the special Act, or be concerned or participate in any manner in any contract, or in the profit thereof, or of any work to be done under the authority of such Act, shall thenceforth cease to be a Commissioner." In the introduction to the 17th section there are provisions with respect to the election of Commissioners, and to my mind it is plain that when the 9th section speaks of an "appointment," it means a person appointed by having a right conferred on him by reason of being rated in respect of property to a given amount, as distinguished from a person "elected" under the 17th section.

Then it is said that the word "disqualified" is improperly used, in this declaration, for the denomination of such a person as the defendant. The 15th section of the Commissioners Clauses Act imposes a penalty upon every person who shall act as a Commissioner after having become disqualified. Section 10 enacts that, "no person being a shareholder or member of any Joint Stock Company, established by act of parliament, shall be prevented from acting as a Commissioner by reason of any contract entered into between such Company and the Commissioners." Again, the marginal note to that section says: "Shareholders in Companies not disqualified by reason of contracts." So that the word "disqualified" is used as indicating the consequence of being concerned in a contract. This is a general Act, prepared with care by competent persons, and conferring a benefit on the public, for instead of a private Act with a long series of clauses, the same object is attained at a comparatively [821] small cost, and it ought therefore to receive a liberal construction.

The next question is, whether there was evidence for the jury that the defendant "was concerned or participated in any manner, in any contract or in the profit thereof"? It was necessary for the plaintiff to give evidence that the defendant was concerned in some contract, and the evidence was that under his own hand he made out an invoice, which bears his receipt, and in which he debited the Commissioners of St. Ives with the sale of lime to them. It cannot be said that that is not evidence for the jury of being concerned in a contract. A case was put of the Commissioners buying some trifling article at a shop kept by one Commissioner, and paying for it over the counter. It seems to me that is not a contract within the statute; but I am by no means prepared to say that if articles were so supplied from time to time upon credit, there would not be a contract. The buying a pennyworth of nails may not be a contract, but that is different from supplying lime on credit. Here there was evidence for the jury of a continuous dealing and supplying on credit of an article which the Commissioners must buy, because they are bound to light and drain the town, and lime would be required in making gas as well as in constructing the sewers. Then the 15th section enacts "that every person who shall act as a Commissioner, being

incapacitated, or not duly qualified to act," &c., "or after having become disqualified, shall for every such offence be liable to a penalty of 50l." I should say that "incapacitated" is the more apt and proper term for describing the effect of the act, which, upon being done, prevented the defendant from acting as a Commissioner; but either word would plainly shew that the meaning of the legislature was to prohibit persons who were Commissioners from being concerned in [822] contracts. It was the object, and a beneficial one no doubt, to prevent abuse in these matters. The question is, not whether the defendant entered into this contract from any bad motive, but whether we are justified in drawing the inference that he has entered into a contract prohibited by the Act, and thereby made himself liable to the penalty. I think that is the proper conclusion to be drawn from the facts, and therefore the rule ought to be absolute.

CHANNELL, B. I am also of opinion that the rule ought to be absolute. The rule seeks to enter the verdict for the plaintiff for one penalty, on the ground that the defendant acted as a Commissioner at a time when, according to the declaration, he was "disqualified." It has been argued that the defendant "ceased to be a Commissioner," and that the ceasing to be a Commissioner, and being "disqualified" are not one and the same thing. I think it is impossible to read the 5th section (ante, p. 813) of the special Act without seeing that they are. Therefore that argument entirely fails.

It was also contended that, although that may be so, the defendant was not within the 9th or 15th section of the general Act, on the ground that he was not "appointed or elected as a Commissioner." It seems to me, for the reasons already given, that the defendant was a Commissioner "appointed" within the 9th section.

Then comes the important question, that is, upon the merits—the only question upon which I entertained any doubt; and it is said that looking at the acts of the defendant as shewn by the evidence, he has not been "concerned or participated" in any contract. I think he has. An invoice was produced, which included four transactions of the supply of lime by him to the Commissioners. I [823] do not wish to express any opinion whether an isolated transaction, for instance a sale over the counter, would be a contract within this or any similar act of parliament. I say nothing in derogation of the cases of *Woolley v. Kay* (1 H. & N. 307), and *Le Feuvre v. Lankester* (3 E. & B. 230). When the invoice was put in, that disclosed evidence which might properly be submitted to a jury, as to whether the defendant was concerned or participated in any manner in any contract.

For some time I doubted whether we ought to enter the verdict for the plaintiff, as the learned Judge did not reserve to us power to draw inferences; but then we are in this situation—the point upon which the learned Judge acted at the trial was, that ceasing to be a Commissioner and being disqualified were not one and the same thing, and acting upon that impression he directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for him; but when he reserved the leave it must be understood that, with the assent of both parties, it was on this footing, that if the objection in point of law failed, and the Court were of opinion that the ceasing to be a Commissioner and the being disqualified were one and the same thing, the verdict should be entered for the plaintiff. The Act was intended to guard against, not merely actual abuse, but the possibility of abuse, and we should be defeating the object of the legislature if we did not make the rule absolute.

WILDE, B. I agree with the rest of the Court; that a penal Act should be construed as any other Act, according to its true meaning. The contrary has been pressed upon us, and we have been invited by an ingenious argument to strain the act of parliament and read it in a vicious sense. [824] The Act has been framed for the general benefit, and in substance it says that a Commissioner shall cease to be such if he shall be concerned or participate in supplying goods to the body of Commissioners.

It is said that does not apply to the defendant; and it is argued that the 10 & 11 Viet. c. 16 contemplates three classes of Commissioners: first, Commissioners created by the special Act in respect of qualification; secondly, Commissioners specially and individually nominated and appointed by that Act; and, thirdly, Commissioners elected under that Act, and the general Act; and we are invited, upon no substantial ground, to draw a distinction between these classes, and to hold that these provisions,

which were intended to prevent abuse, apply to the two latter classes of Commissioners, and not to the former. That argument would lead me naturally to say that the Act ought clearly to indicate an intention to exempt a particular class of Commissioners before we came to such a determination. But so far from that, there is nothing but an ingenious and refined argument arising out of the words of the Act. I will say no more than that the defendant was appointed a Commissioner within the 9th section of the Commissioners Clauses Act, 1847.

The second point was that, although the defendant may have been appointed a Commissioner, yet he has only "ceased to be a Commissioner," and that is different from being "disqualified." That argument, however, is met by the terms of the 5th section (ante, p. 813) of the special Act, which treats as the same thing the "being disqualified" and "ceasing to be a Commissioner."

As to the argument upon the merits, I can only say that the question is whether there was evidence for the jury that what the defendant did is within the terms of the act of [825] parliament. Amongst other evidence there was an invoice, shewing a supply of lime for some months. The invoice was directed to the St. Ives Commissioners, and was in the handwriting of the defendant. It seems to me that was evidence from which the jury might properly find that the defendant had been concerned or participated in a contract.

But it has been suggested that every sort of contract would not be a contract within this section. I should be sorry to go so far as to say that it would; but, on the other hand, the distinctions which have been attempted to be drawn are by no means satisfactory to my mind. It seems to me that it does not signify whether it be one contract or several, and that it would not be lawful for a Commissioner to make one contract with the body of Commissioners for the supply of coal for making gas. Again, I cannot imagine that the mere amount can make any difference. There may be a difference arising from some trifling act of purchase, where the article is bought and paid for at the time by some servant of the Commissioners. Upon that point, however, I would rather not express an opinion, but will only observe that in the case of *Woolley v. Kay*, although some expressions are used which might lead to the inference that the Court thought that the contract ought to be a continuing one, yet that case was not decided upon any such distinction, but upon this ground, that the person who was supposed to be liable to the penalty made the contract for the sale of the land before he became a Commissioner, so that at the time he made the contract he was in no way incapacitated or restricted from making it.

For these reasons I think that the rule ought to be absolute to enter the verdict for the plaintiff.

Rule absolute.

[826] BUTLER v. HUNTER. Jan. 13, 14, 1862.—Where a person employs another to do a lawful act, it must be presumed, in the absence of evidence to the contrary, that he employed him to do it in a careful and proper manner; and unless the relation of master and servant exists between them, the employer is not responsible for the negligent manner in which the act is done.—Therefore, where the plaintiff and defendant were owners of adjoining ancient houses, and an architect employed by the defendant to superintend the repairs of his house, having considered it necessary to pull down and rebuild the front wall, agreed with a contractor to do the work for an estimated price, and the workmen of the contractor in pulling down the wall removed a breast-summit which was inserted in the party wall between the defendant's and plaintiff's house, without taking any precautions by shoring or otherwise, in consequence of which the front wall of the plaintiff's house fell: Held, that there was no evidence for the jury of any liability on the part of the defendant.

[S. C. 31 L. J. Ex. 214; 10 W. R. 214. Disapproved, *Hughes v. Percival*, 1883, 8 A. C. 447. Referred to, *Lemaitre v. Davis*, 1881, 19 Ch. D. 292. Applied, *Kiddle v. Lovett*, 1885, 16 Q. B. D. 611. Referred to, *Hardaker v. Idle District Council*, [1896] 1 Q. B. 341.]

The first count of the declaration stated that the plaintiff, at the time of the committing by the defendant of the grievances, &c., was possessed of a certain house,

and then occupied the same and carried on a certain trade and business therein, to wit, a baker, and the defendant during all the time aforesaid was also possessed of another house next adjoining the plaintiff's said house: Yet the defendant pulled down part of the said house so negligently, carelessly, and improperly, and in so unskilful, negligent and improper a manner, that the plaintiff's said house was greatly shaken, cracked, weakened and injured, and became unsafe; and the plaintiff was put to expense in repairing his said house, and was prevented from carrying on in his said house his aforesaid business for a long period of time, &c. Second count: that the plaintiff, before and at the time of the committing by the defendant of the grievances, &c., was possessed of a certain house, and carried on therein a certain trade and business, to wit, a baker, and the defendant during all the time aforesaid was possessed of another house next adjoining the said house of the plaintiff; and the plaintiff's said house was of right supported, and ought of right to have been supported in part by and against the defendant's said house: Yet the defendant, whilst the plaintiff was possessed and entitled as aforesaid, made certain alterations in his said house whereby such support to the plaintiff's said [827] house was diminished and in part withdrawn during the making thereof, and omitted to cause the plaintiff's said house to be shored up or otherwise supported during the making of the said alterations, whereby the plaintiff's said house was left without sufficient support, and was not supported as of right it ought to have been supported for a long space of time, and thereby the same became and was weakened, cracked and injured, and unsafe; and the plaintiff was put to expense in repairing the same, and in shoring up the same and an adjoining house, and was unable to carry on therein his said business for a long space of time, &c.

Pleas. First: not guilty. Secondly, to first count: That the defendant was not possessed of the said house as alleged. Thirdly, to second count: That the plaintiff's house was not of right supported, nor ought the same of right to have been supported in part by and against the defendant's house. Fourthly, to the second count: That the defendant was not possessed of the house as alleged. Issues thereon.

At the trial, before Martin, B., at the London Sittings after last Trinity Term, the following facts appeared. The plaintiff was lessee and occupier of a house, No. 150 Tottenham Court Road, London, in which he carried on the business of a baker. The defendant was the owner and occupier of the adjoining house. The houses were separated by a party wall fourteen inches thick, and in front of the defendant's house was a brest-summer, one end of which was inserted into the party wall to the depth of six inches. Both houses were ancient houses. In consequence of a fire it became necessary for the defendant to repair his house, and for that purpose he employed an architect named Redding. In the course of the works Redding considered it necessary to pull down and rebuild the front of the defendant's house, and he requested one Johnson, the builder [828] employed to do the repairs, to estimate the expense. Johnson, through one Moore, his clerk of the works, sent in an estimate for 45l. Redding afterwards agreed with Johnson, that he should do the work for that sum, and Moore directed one Harrison, a foreman in the employment of Johnson, to commence the work. The workmen in doing it removed the brest-summer which was inserted in the party wall, and in consequence the front wall of the plaintiff's house fell, and he expended upwards of 100l. in rebuilding it. The work might have been done with safety if the plaintiff's house had been shored up, which was the usual precaution in such cases, but Redding, who was there from day to day, never gave instructions to shore it up, and no shoring was used. It did not appear that the defendant was privy to the arrangement between Redding and Johnson.

It was submitted, on behalf of the defendant, that under these circumstances he was not liable. The learned Judge was of that opinion, and nonsuited the plaintiff.

Denman, in last Michaelmas Term, obtained a rule nisi to set aside the nonsuit and for a new trial, on the ground that there was evidence to go to the jury of the defendant's liability.

Huddleston and T. Chitty shewed cause. There was no evidence to fix the defendant with liability. The accident occurred in consequence of the removal of the brest-summer, but the defendant did no act to cause its removal. He merely employed Redding, the architect, who contracted with Johnson to do the repairs. [Martin, B. Johnson had the general superintendence of the work. I thought the liability was in him. His negligence in removing the brest summer caused the

plaintiff's wall to fall. When a person employs a builder to do certain work, and he does it negligently, the employer is not liable unless he personally interferes.] [829] This case is distinguishable from *Hole v. The Sittingbourne and Sheerness Railway Company* (6 H. & N. 488), for there the Company committed a nuisance by obstructing the navigation of the river, and the mischief was the direct result of the act which the Company employed the contractor to do. But when, as in this case, the injury is caused by negligence in a matter collateral to the contract, the person who did the act, not the employer, is liable. Upon that principle it was held, in *Reedie v. The London and North Western Railway Company* (4 Exch. 244), that the Company were not responsible for the negligence of their contractor's servant, who allowed a stone to fall upon a person passing along the highway. [Wilde, B. Suppose a person employed a contractor to pull down a house, and he omitted to put up a hoarding so as to prevent bricks falling on persons passing, who would be liable?] The contractor. *Steel v. The South Eastern Railway Company* (16 C. B. 550) decided that where work is done for a railway Company under a contract (parol or otherwise), the Company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it and to direct what shall be done. [Martin, B. The relation of master and servant must exist before any other person can be made liable than the person who did the act which caused the mischief.] Assuming that the act was done by Johnson, he was the servant of Redding, not of the plaintiff. The defendant is no more liable than he would be for injury sustained by a passenger in consequence of bricks being negligently thrown down.

Denman (with whom was H. James), in support of the rule. These were ancient houses, and consequently the [830] plaintiff had acquired a right to the support of the defendant's wall. Applying the test, whether the relation of master and servant existed between the defendant and the person who took down the wall, there was evidence for the jury that the defendant was liable as master. In *Steel v. The South Eastern Railway Company* (16 C. B. 550, 553), Cresswell, J., said: "If it could have been shewn that the plaintiff's land was flooded in consequence of something done by the orders of Phillips, the Company's surveyor, it might have been said that that was the same as if Phillips had done it with his own hands, and then the Company would have been responsible. But it seems that the order given by Phillips was to do the work in a different manner from that adopted by Furness's men." In *Addison on Torts*, p. 257, it is said: "The general rule is, that the party injured by the negligence of another, cannot go beyond the party who actually did the injury, unless he can establish that the latter stood in the relation of a servant to the defendant, or that the injury was the natural result of the orders given by the latter, and that those orders could not be carried into effect without causing the mischief." The defendant is within the latter branch of the proposition. It was a question for the jury whether, when he ordered his wall to be pulled down, he did not order an act to be done which must necessarily cause injury to the plaintiff's house. [Martin, B. There was no evidence that the defendant ordered the work to be done otherwise than carefully and properly.] It was for the jury to say whether the giving the order did not involve something more. [Wilde, B. If a person employs a builder to pull down a wall, do you say that the employer is responsible if the builder allows it to fall on persons passing? In the case of almost every house that is built, the owner employs an architect, the architect employs a builder, [831] and the builder employs workmen; but the owner of the house is not responsible for the negligence of the workmen.] If the necessary consequence of the act ordered to be done is that injury will result, the person who has employed another to do it is as responsible as if he had done it himself. The brest-summer could not have been removed without causing the plaintiff's wall to fall, unless it was shored up. [Martin, B. Johnson was required to give an estimate of the expense of taking down the wall; that means an estimate of every expense of doing it properly, including the shoring. In the first place the person who did the act is liable; next the person who stands in the relation of master and servant. But the relation of master and servant does not exist between the defendant and Johnson. There is another class of cases where the employer personally interferes. In *Hole v. The Sittingbourne and Sheerness Railway Company* (6 H. & N. 488) the Company were empowered by act of parliament to construct a bridge across a navigable river, and they employed a contractor who did it in such a way as to obstruct the navigation of

the river. That was a nuisance caused by the Company. The case resembles that of *Ellis v. The Sheffield Gas Consumers' Company* (2 E. & B. 767), where the defendants were held liable for the illegal way in which they laid down their pipes.] In *Burgess v. Gray* (1 C. B. 578), the owner of a house was held responsible for the negligence of the workmen of a builder, although the latter had the sole superintendence of the work. *Knight v. Fox* (5 Exch. 721) proceeded on the principle that, where there is negligence on the part of a sub-contractor, the contractor is not liable. Applying that test to this case, was Johnson guilty of negligence? [Martin, B. Johnson would be liable because the relation of master and servant [832] existed between him and the person who did the act which caused the mischief.] *Ellis v. The Sheffield Gas Consumers' Company* (2 E. & B. 767) decided that though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong. [Martin, B. That was the case of a public nuisance.] It was a question for the jury whether the defendant, by ordering the work to be done, had not caused the mischief. [Wilde, B. It must be assumed that a person who is directed to do work, is directed to do it properly.]

POLLOCK, C. B. We are all of opinion that the rule must be discharged.

The case has been ably argued, and it is unnecessary to repeat the facts. The argument of Mr. Denman amounts to this—That where a person employs a tradesman to do work which may be dangerous to another, he is bound to shew that he directed all care to be taken, and specifically pointed out in what way the danger was to be guarded against, or, at all events, to shew that he did enough to exempt himself from responsibility.

I agree with my brother Martin, that there is no evidence that the defendant stood in the relation of master and servant to the person whose negligence caused the injury. It must be assumed that directions were given to do the work in the ordinary way, and to take all the proper precautions not to cause any mischief. No doubt, where the act is in itself a nuisance, the party who employs another to do it is responsible for all the consequences, for there the maxim [833] "*qui facit per alium facit per se*" applies; but where the mischief arises, not from the act itself, but the improper mode in which it is done, the person who ordered it is not responsible, unless the relation of master and servant exists. On these grounds I think that the rule ought to be discharged.

WILDE, B. I also think that the rule should be discharged. The complaint in the declaration is that the defendant so negligently pulled down part of his house that the plaintiff's house was injured. It appeared upon the evidence that the mischief was caused by the removal of a brest-summer from the wall of the defendant's house, and that the brest-summer might have been safely removed if a shoring had been put up, and also that such was a reasonable and ordinary precaution.

The question therefore is, whether the person who pulled down the defendant's house, namely, Johnson, the contractor, is the person responsible, or whether the responsibility can be traced up to the defendant. It seems to me that the case is very plain. *Hole v. The Sittingbourne and Sheerness Railway Company* is distinguishable. There it is said, that where the act itself has caused the injury, the person who ordered it is responsible; but where the injury happened from something collateral in the course of carrying out the order, he is not responsible. It seems to me that the absence of a shoring is like the absence of a proper hoarding, or any one of the ordinary precautions which belong to the careful taking down of a wall. Then it is said that the defendant ought to have given orders to do the work in a tradesmanlike way, or ought to have pointed out what was requisite. But it seems to me, that it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done. I think that, [834] as a matter of fact, if a man gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesmanlike way. For these reasons, I think that the nonsuit was right, and that the rule ought to be discharged.

MARTIN, B. I am of the same opinion. I thought the case was governed by *Reedie v. The London and North Western Railway Company*, and I see no reason to alter that opinion.

Rule discharged.

BROCKBANK v. THE WHITEHAVEN JUNCTION RAILWAY COMPANY. Jan. 22, 1862.—

The 40th section of the Common Law Procedure Act, 1852, which provides, that “in any action brought by a man and his wife for injury done to the wife, in respect of which she is necessarily joined as a plaintiff, it shall be lawful for the husband to add thereto claims in his own right,” is permissive only, not imperative.

[S. C. 31 L. J. Ex. 349.]

Declaration. For that whereas the said Company, before and at the time of the committing of the grievances, &c., were the owners and proprietors of a railway, and were common carriers of passengers for hire by railway trains upon the said railway; and Mary Brockbank, who at all the times hereinafter mentioned was and still is the wife of the plaintiff, at the request of the defendants became and was a passenger, and was received as such passenger by the defendants as such common carriers, to be carried by them in one of their said railway trains on the said railway on a certain journey. Yet the defendants did not use due and proper care or skill in and about the carrying of the said Mary Brockbank while she was such passenger on the said journey, but took so little care, and so negligently and unskilfully conducted themselves in and about the carrying of the said Mary Brockbank on the said journey, that the train of the defendants, by which the said Mary [835] Brockbank was travelling on the said journey upon the said railway, came into collision with another train of the defendants upon the said railway, whereby the said Mary Brockbank was greatly shaken, hurt and injured, and became sick and ill, and permanently disabled; and whereby the plaintiff lost the comfort and society of the said Mary Brockbank for a long time, and incurred and became liable to pay great expences in nursing her, and in and about paying for journeys taken by her to recover her health, and for medical attendance upon her, and whereby the plaintiff lost the services of the said Mary Brockbank for a long space of time, and for want of such services was during that time prevented from carrying on the business of a dealer in fish and dealer in game so beneficially as he otherwise might and would have done, &c.

Plea. That after the accruing of the said causes of action, and before this action, a certain other action was brought in this Court by the said William Brockbank and the said Mary Brockbank against the said Whitehaven Junction Railway Company, in respect of the matter of complaint against the defendants contained in the declaration in this plea set out, the proceedings in which said action, as appears by the record thereof now remaining in this Court, were and are as follows:—(The plea then set out the record of the action by William Brockbank and Mary his wife against the Whitehaven Junction Railway Company, in which the declaration alleged, “that before and at the time of the committing of the grievances, &c., the defendants were lawfully possessed of two railway trains, which were under the care, government and direction of certain servants of the defendants, and in one of which trains the plaintiff Mary was lawfully travelling as a passenger. Yet the defendants by their said servants, so negligently, carelessly and improperly managed, governed and directed their [836] said trains, that by means of the breach of duty, negligence, carelessness and improper conduct of the defendants by their servants in that behalf, one of the said trains ran into and struck against the other of the said trains of the defendants; whereby the plaintiff, Mary, was severely injured and underwent great pain.” The record proceeded to state that the defendants pleaded not guilty, on which issue was joined: that the issue was tried, and the jury found that the defendants were guilty, and assessed the damages at 500l. &c.) **Averments:** that judgment for the plaintiffs was before this suit signed in the said action for the amount of damages and costs by the plaintiffs therein so recovered as aforesaid: that the matters of complaint against the defendants in the said action complained of, and for which such judgment was so recovered as aforesaid, were and are the same matters of complaint as in the declaration in this action mentioned and none other: that the causes of action arose, and the said former action was brought, after the passing of the act of parliament, 15 & 16 Vict. c. 76.

Replication, on equitable grounds. That after issue was joined in the said action in the said plea mentioned, Sir H. S. Keating, then being one of the Judges of the Court of Common Pleas, issued his summons, at the instance of the plaintiffs in the

said action, whereby he required the defendants to shew cause why the declaration in the said action should not be amended, and the plaintiff allowed to insert into the said declaration a count charging the defendants in respect of the causes of action and damages in the declaration in this action mentioned and set forth, to the end that the now plaintiff might recover in the said action in the said plea mentioned in respect of the cause of action and damages in the declaration in this action mentioned: that the defendants and the plaintiff appeared before Sir J. P. Wilde, then being one of the Barons of the [837] Court of Exchequer, at the return of such summons, and were heard by the said Baron in support of and opposition to the said summons respectively; and the defendants thereupon objected before the said Baron to the said Baron making any order upon the said summons; whereupon the said Baron refused to make any order on the said summons: that the said verdict was a verdict found by the jury by consent of the plaintiffs and defendants in the said action, and that before the finding of the said verdict it was agreed between the plaintiffs and defendants in the said action that the said verdict should be found, and the said verdict was found, on the terms that such consent should not be an admission on the part of the defendants that the plaintiffs in the said action, or either of them, had any right in law or in fact to any further action: nor an admission on the part of the plaintiffs that the plaintiffs in the said action, or either of them, had not a right of action at law and in fact in respect to the negligence alleged in the declaration in this action, or the consequences thereof.

Demurrer and joinder therein.

Temple (Milward with him), in support of the demurrer. The replication affords no answer to the plea. By the 40th section of the Common Law Procedure Act, 1852, "in any action brought by a man and his wife for injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the Court or a Judge shall think fit." The words, "it shall be lawful," have sometimes been construed as imperative and sometimes as permissive only; the rule being that the words "shall and may" are to be construed as imperative where it is for the public benefit, or it appears from the statute that such [838] was the intention of the legislature: *Rex v. The Commissioners of the Flockwold Inclosure* (2 Chit. Rep. 251). [Martin, B. The power to consolidate can only be exercised where the two actions are brought contemporaneously.] To bring an action first in the names of the plaintiff and his wife for injury done and damage accruing to her, and then to bring another action in the plaintiff's name for damage resulting to himself from the same injury, is an evasion of the power to consolidate. If the plaintiff does not bring the two actions at the same time, he must be considered as having elected to abandon one of them. The order of a Judge cannot give the plaintiff a right to maintain an action which he has abandoned by not inserting the claim in his declaration. [Pollock, C. B. Before the Common Law Procedure Act, 1852, s. 40, the plaintiff might have brought, first, one action and then the other; and the statute has not interfered with that right by making it imperative to join the causes of action, but has only permitted it to be done, giving to the Court or a Judge a discretionary power to consolidate separate actions. Martin, B. I think the plea is bad.]

T. Jones appeared in support of the replication, but was not called upon to argue.

Per Curiam.(b) There must be judgment for the plaintiff.

Judgment for the plaintiff.

[P. 839 contains REGULA GENERALIS.]

[840] HILARY VACATION, 25 VICT.

THE ATTORNEY GENERAL v. THE OXFORD, WORCESTER AND WOLVERHAMPTON RAILWAY COMPANY; ALEXANDER SHERIFF AND WILLIAM ADCOCK. Feb. 27, 1862.—Prior to the year 1845, the Birmingham and Gloucester Railway Company made a line of railway between those places, passing at some little distance from

(b) Pollock, C. B., Martin, B., and Channell, B.

Droitwich and Worcester. In the year 1845, the Oxford, Worcester and Wolverhampton Railway Company made a line of railway from a place on the Birmingham and Gloucester line, called Abbott's Wood, through Worcester and Droitwich, to another place on the Birmingham and Gloucester line, called Stoke Prior. This line was about fourteen miles long, and was called the "Loop Line." By the Act incorporating the Oxford, Worcester and Wolverhampton Railway Company (8 & 9 Vict. c. clxxxiv. s. 133), the Birmingham and Gloucester Railway Company were empowered to use the "Loop Line" for the purpose of the traffic passing between Birmingham and Gloucester, and other places on their line, with their own engines and carriages, on payment of an annual sum in lieu of tolls, but subject to the proviso that they should not carry on any traffic between Abbott's Wood and Stoke Prior, unless it should have passed, or be intended to pass over some part of the Birmingham and Gloucester line, between Birmingham and Stoke Prior, or Gloucester and Abbott's Wood. The Birmingham and Gloucester Railway Company was afterwards consolidated with the Midland Railway Company. In 1855 the Midland Railway Company, who were the owners of a direct line of railway, about twelve miles long, running from Stoke Prior to Abbott's Wood, discontinued using the same for passenger traffic, and exclusively used the "Loop Line" belonging to the Oxford, Worcester and Wolverhampton Railway Company for the conveyance of passengers between the stations on their own line and those on the "Loop Line." The arrangement, under which the Midland Railway Company used the "Loop Line," was, that in respect of traffic to or from the Midland Railway system, to or from stations on the "Loop Line," the Midland Railway Company should pay the Oxford, Worcester and Wolverhampton Railway Company 50l. per cent. of the gross receipts; and in respect of the traffic passing from the Midland Railway system through the "Loop Line," the Midland Railway Company should pay the Oxford, Worcester and Wolverhampton Railway Company 1200l. a year as way leave. The clerks and servants of the Oxford, Worcester and Wolverhampton Railway Company collected and received the money at the stations on their line (as they alleged) as agents of the Midland Railway Company. By the 7 & 8 Vict. c. 85, s. 6, "All passenger railway Companies shall, by means of one train at the least to travel along their railway from one end to the other of each trunk, branch or junction line, belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, branch or junction line, once at the least each way, on every week day," provide for the conveyance of third class passengers to and from the terminal and other ordinary passenger stations of the railway, under the conditions (amongst others) that the train shall start at an hour approved of by the Board of Trade; that the train shall, if required, take up and set down passengers at every passenger station on the line, and that the fare for each passenger shall not exceed 1d. per mile. By section 9, no tax shall be levied on the receipts for the conveyance of such passengers. It being considered that the exemption did not apply to the case of passengers conveyed by one railway Company on the line of another, the Board of Trade withdrew their approval of the Midland Railway Company's cheap traffic trains, so far as they were trains for the conveyance of passengers over the "Loop Line." The Midland Railway Company paid duty upon the money received by them for the conveyance of passengers by their cheap traffic trains over the "Loop Line," but they declined to pay duty upon that portion of the money derived from the conveyance of such passengers over the "Loop Line" which had been received on their account by the Oxford, Worcester and Wolverhampton Railway Company at the stations on the "Loop Line." On an information against the Oxford, Worcester and Wolverhampton Railway Company to obtain payment of duty on the money received by them for the conveyance of passengers over the "Loop Line" by the cheap traffic trains of the Midland Railway Company:—Held, First, that, assuming the duty was payable, the Oxford, Worcester and Wolverhampton Railway Company, and not the Midland Railway Company, were liable to pay it: *Per totam Curiam*.—Secondly, that as the cheap traffic trains did not comply with all the conditions of the 6th section of the 7 & 8 Vict. c. 83, inasmuch as they did not start at an hour approved of by the Board of Trade, or take up and set down passengers at every passenger station on the line, the Oxford,

Worcester and Wolverhampton Railway Company were liable to pay duty in respect of them: Per Pollock, C. B., Channell, B., and Wilde, B. Martin, B., dissentiente.

[S. C. 31 L. J. Ex. 218: affirmed nomine *Great Western Railway v. Attorney General*, 1866, L. R. 1 H. L. 1.]

Information in equity by the Attorney General (so far as material) as follows:—

1. The object of this information is to obtain payment from the above named Company of the duty in respect of so much of the money received by the Company for the [841] conveyance, from stations on their Loop Line between Stoke Prior and Abbot's Wood, of Midland Railway passengers by cheap traffic trains belonging to the Midland Railway Company, as is derived from the conveyance of such passengers over such Loop Line. The defendant Alexander Sheriff is the general manager, and the defendant William Adecock is the secretary of the Company.

2. By the 5 & 6 Vict. c. 79, a duty at the rate of 5l. per cent. was made payable in respect of all sums received for the conveyance of passengers upon railways, and such duty still continues to be payable, except so far as it is remitted under the provisions of the 7 & 8 Vict. c. 85, in respect of cheap traffic trains approved of by the Board of Trade.

3. By 5 & 6 Vict. c. 79, s. 4, it is provided in effect, that every Railway Company shall keep an account of all money received by them for the conveyance of passengers, whether on their own railway only or on their own railway and any other railway, and in respect of all which sums of money the duties charged by the Act shall be paid by the Company receiving the same. And that the Company receiving such money shall in like manner keep an account of all [842] money paid or accounted for, or to be paid or accounted for by them to any other Company upon whose line any of such passengers shall be conveyed, as their share or proportion of the money so received. And that every such Company shall, within five days after the first Monday in every calendar month, deliver to the proper revenue officer a true copy of the accounts so directed to be kept, so far as relates to the money received and paid or accounted for as aforesaid during the preceding four or five weeks, as the case may be. And shall at the time of delivering every such account pay to the Receiver General for the use of her Majesty the duties chargeable under the Act in respect of the money so received and contained in such accounts.

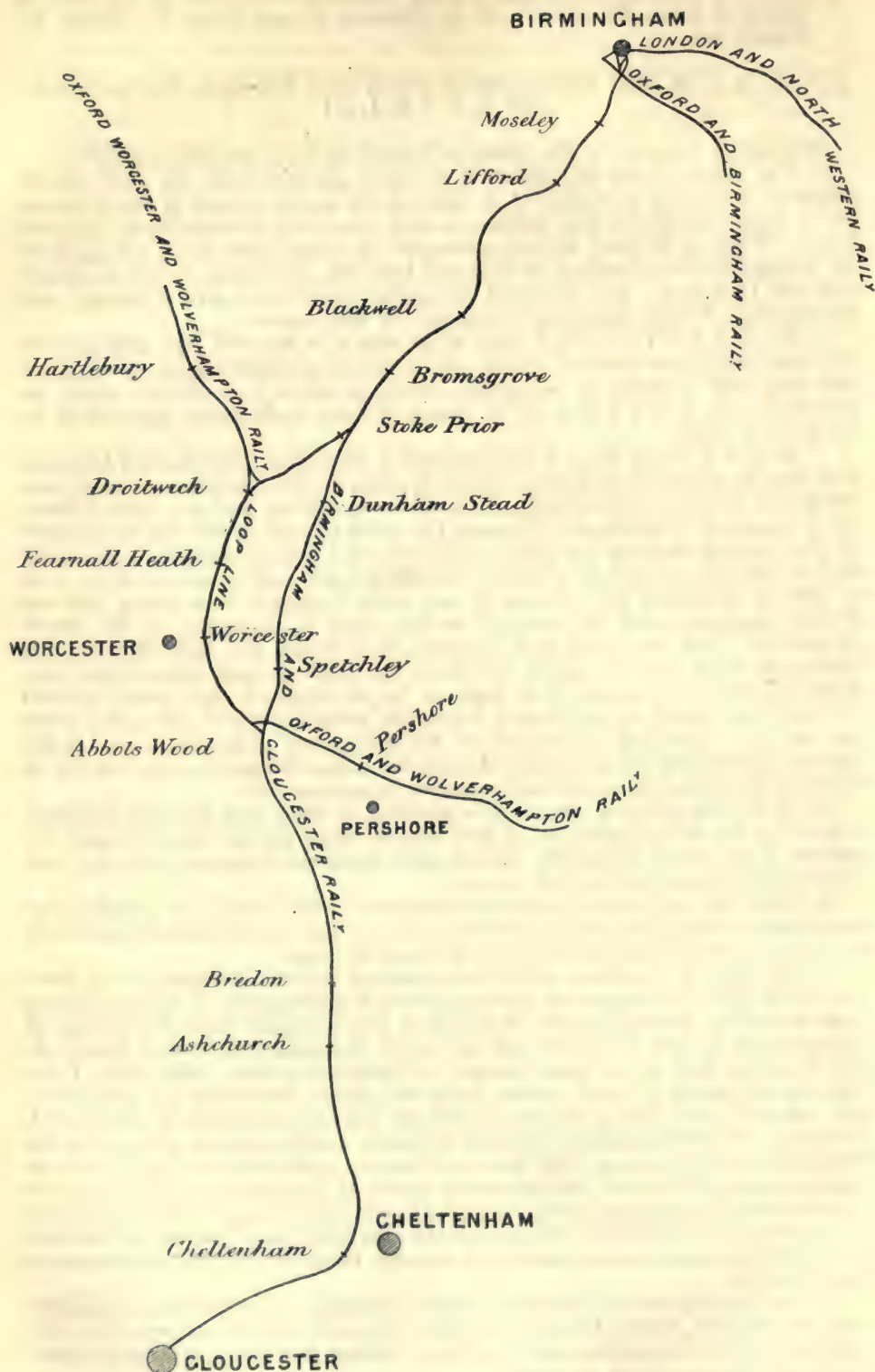
4. By the 5th section of the Act it is provided, in effect, that any such Company may deduct out of the monies to be paid over by them to any other Company the amount of the duties chargeable thereon, and which the Company receiving such monies shall have paid or be liable to pay.

5. Under the provisions of certain statutes made in that behalf, the collection and management of the duties payable under the before stated act of parliament has become and is now vested in the Commissioners of Inland Revenue.

6. The Oxford, Worcester and Wolverhampton Railway Company were incorporated, in 1845, for the purpose (amongst others) of making a line of railway running from the railway belonging to the Birmingham and Gloucester Railway Company at a place called Abbott's Wood, through the city of Worcester and town of Droitwich, and returning back to the same Company's Railway at a place called Stoke Prior. Such line of railway is about fourteen miles long, and is hereinafter for distinction's sake referred to as "The Loop Line." And the Act of incorporation of the Oxford, Worcester and Wolverhampton Railway Company contains clauses securing to the Birmingham and Gloucester [843] Railway Company, (who had then lately made an unsuccessful application to Parliament for power to construct a similar line), the right of using with engines and carriages properly constructed, on payment of an annual rent and subject to certain conditions, the said Loop Line and the stations thereon for the conveyance of passengers between those stations and the stations on their own line.

7. The Birmingham and Gloucester Railway Company was afterwards consolidated with the Midland Railway Company, in whom the rights and powers secured by the said Act to the Birmingham and Gloucester Railway Company, as before stated, thereupon became and now are vested.

8. The Midland Railway Company are themselves the owners of a direct line of



railway, about twelve miles long, running from Stoke Prior to Abbott's Wood, but ever since the 1st day of October 1855, they have discontinued using the same for passenger traffic, and in exercise of the right reserved to or vested in them for that purpose, as before stated, they have made some arrangement in pursuance of which they began and still continue to make use exclusively of the Loop Line belonging to the Oxford, Worcester and Wolverhampton Railway Company for the conveyance of passengers between the stations on their own Railway and those on the Loop Line; and the latter Company have collected and received the money paid for the conveyance of passengers from the stations on their Loop Line to the stations on the railway of the Midland Railway Company.

9. The provisions of the 7 & 8 Vict. c. 85, with regard to the remission of duty in respect of money received for the conveyance of passengers by the cheap traffic trains therein mentioned are not applicable to the case of passengers conveyed by one Company on the railway belonging to another, [844] and consequently the Board of Trade so soon as they became aware of the said arrangement, withdrew their approval of the Midland Railway Company's cheap traffic trains so far as they were trains for the conveyance of passengers over the Loop Line in question. And thereupon the Midland Railway Company were called upon to pay, and did ultimately pay the duty upon so much of the money received by them for the conveyance of passengers by their cheap traffic trains as was derived from the conveyance of such passengers over the Loop Line, but they declined to pay the duty upon that portion of the money derived from the conveyance of such passengers over such Loop Line which had been received on their account at the stations on the Loop Line, alleging, as the fact is, that such duty is properly payable by the Oxford, Worcester and Wolverhampton Railway Company, by whom such money was received.

10. Application has accordingly been made to the Oxford, Worcester and Wolverhampton Railway Company for payment of such lastly mentioned duty, but they refuse or neglect to pay the same and deny their liability in respect thereof, and they allege that under the arrangement in pursuance whereof the Midland Railway Company use the Loop Line, the clerks and servants of the Oxford, Worcester and Wolverhampton Railway Company collect the monies paid for the conveyance of passengers from stations on the Loop Line to stations on the Midland Railway Line, acting therein as the agents of the Midland Railway Company. But the contrary is the fact, and as evidence thereof the Attorney General shews that the last mentioned Railway Company do not use the Loop Line upon the terms under which the right of using the same is secured to them as before stated. And they do not pay any annual rent in respect of their user thereof, and do not employ their own engines or carriages in conveying passengers thereon or otherwise, or in [845] fact observe the conditions upon which such right is secured to them. And the defendants ought to state what are the terms of such arrangement, and whether the same is in writing, and when and between whom it was made and entered into.

11. The said last named Company have hitherto, from time to time, rendered the accounts required by law of the money received by them for the conveyance from stations on their Loop Line of Midland Railway passengers by first and second class trains, and have paid the duty payable in respect of such money, and they ought in like manner to render accounts of the money received by them for the conveyance of such passengers by other trains, and to pay the duty payable in respect of the money so received.

12. The Attorney General claims the sum of 100l. 11s. 5d. for duty on all that portion of the money received by the Oxford, Worcester and Wolverhampton Railway Company between the 7th day of January, 1856, and the 30th day of November, 1858, for the conveyance from stations on their Loop Line of Midland Railway passengers by cheap traffic trains belonging to the Midland Railway Company, which is derived from the conveyance of such passengers over the Loop Line.

Prayer. That it may be declared that the Oxford, Worcester and Wolverhampton Railway Company is liable to pay duty in respect of so much of the money received by them since the 7th day of January, 1856, or to be received by them at any time hereafter, for the conveyance from stations on their Loop Line between Stoke Prior and Abbott's Wood, of Midland Railway passengers by cheap traffic trains belonging to the Midland Railway Company, as is derived from the conveyance of such passengers over such Loop Line. And that they may be decreed forthwith [846] to deliver

proper accounts of the monies so received and the duty payable thereon. And to pay the amount of such duty &c.

The defendants by their answer admitted the facts stated in the information, but denied their liability. They stated that the terms of the arrangement under which the Midland Company used the said Loop Line were as follows:—In respect of traffic from or to the said Midland Railway system to or from stations in the said Loop Line, the said Midland Railway Company pay to the Oxford, Worcester and Wolverhampton Railway Company 50 per cent. of the gross receipts; and in respect of traffic passing from the said Midland Railway system through the said Loop Line the said Midland Railway Company pay to the Oxford, Worcester and Wolverhampton Railway Company 1200*l.* a year as way leave, which last payment is subject to be discontinued at any moment; that such arrangement was entered into on or about the 1st day of January, 1853, between the said Companies, and that the terms of such arrangement are not contained in any writings or writing; and they say that the Midland Railway Company employ their own engines and carriages in conveying passengers on the said Loop Line under the said arrangement, and do not make any payment or payments other than is hereinbefore mentioned to the clerks and servants of the Oxford, Worcester and Wolverhampton Railway Company for collecting the monies, which defendants, the Oxford, Worcester and Wolverhampton Railway Company, receive as agents of the Midland Railway Company.

The Attorney General and Solicitor General (with whom were Mellor and Hanson) argued for the Crown in last Hilary Term (Jan. 23). First, assuming that the duty is [847] by law payable, the Oxford, Worcester and Wolverhampton Railway Company are liable to pay it. The 5 & 6 Vict. c. 79, which repealed the former duties, by section 2 granted in lieu thereof, “for and in respect of all passengers conveyed for hire upon or along any railway, a duty at and after the rate of 5*l.* for 100*l.*, upon all sums received or charged for the hire, fare, or conveyance of all such passengers.” The 4th section enacts, that the proprietors of railways and every other person who shall carry or convey, or cause to be carried or conveyed, any passenger for hire on any railway, shall keep an account of all sums of money received by them for the conveyance of passengers on their railways; and that in respect of such money, the duties shall be paid by the proprietors so receiving or charging the same; and that the proprietors of railways shall also keep an account of all sums of money paid by them to the proprietors of any other railway upon which such passengers shall be conveyed, as his share of such money so received or charged, or as toll for the use of the last mentioned railway. The 5th section enables the proprietors of railways to deduct the duty from the monies to be paid over to the other proprietors. It is evident from these provisions that the legislature intended that the duty should be paid by the Company who received the fare. The machinery provided for ascertaining and collecting the duty is not applicable to any other Company. It will be argued that in order to render a Company liable to pay the duty, they must not only receive the fares but also be the Company carrying the passengers. But if that view be correct, where the fares are received by one Company and the passengers carried by another no duty would be payable. Besides the 4th section uses the words “carry or convey, or cause to be carried or conveyed.” It will be further argued that the Oxford, Worcester and Wolverhampton Company [848] merely receive the fares as the agents of the Midland Railway Company, but the statutes make the duty payable by the Company who actually receive the money.

Secondly, the duty is by law payable. The 7 & 8 Vict. c. 85, s. 6, after reciting “that it is expedient to secure to the poorer class of travellers the means of travelling by railway at moderate fares, and in carriages in which they may be protected from the weather,” enacts, that all passenger railway Companies “shall, by means of one train at the least to travel along their railway from one end to the other of each trunk, branch, or junction line belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, branch, or junction line, once at the least each way on every week day” &c., “provide for the conveyance of third class passengers to and from the terminal and other ordinary passenger stations of the railway,” &c., subject (amongst others) to the following conditions:—“Such train shall start at an hour to be from time to time fixed by the directors, subject to the approval of the Lords of the Committee of Privy Council for Trade and Plantations. Such train shall, if required, take up and set down passengers at every passenger

station which it shall pass on the line. The fare or charge for each third class passenger by such train shall not exceed one penny for each mile travelled." The 7th section imposes a penalty of 20l. a day for non-compliance with the provisions of that Act. Section 9 enacts, "that no tax shall be levied upon the receipts of any railway Company from the conveyance of passengers at fares not exceeding one penny for each mile by any such cheap train." It will be contended that there is an exemption from all duty under the provisions of that Act, but it is submitted that this case is not within it. The Oxford, Worcester and Wolverhampton Railway Company [849] were incorporated by the 8 & 9 Vict. c. clxxxiv. By the 44th (a)¹ section the Company are required to lay down and [850] maintain upon the whole extent of their railway, between the point of junction thereof with the Birmingham and Gloucester Railway at Abbott's Wood, as well as on the branch railways to Kingswinford and Stoke Prior, additional rails adapted to the gauge of the Birmingham and Gloucester Railway. The 133rd (a)² section empowers the

(a)¹ Section 44. "And whereas the railway by this Act authorized to be made is intended to be connected with the Birmingham and Gloucester Railway at Abbott's Wood, and with the Grand Junction Railway near Wolverhampton, and the branch railway to Stoke Prior by this Act authorized is also intended to be connected with the said Birmingham and Gloucester Railway, and it is expedient that on the line of the said branch railway, and on the line of the said branch to Kingswinford by this Act authorized, as well as on the main line between the said Birmingham and Gloucester and Grand Junction Railways, additional rails should be laid down, so as to adapt the said lines as well to the gauge of the said Birmingham and Gloucester and Grand Junction Railways as to the gauge of the rails of the Great Western Railway, for the purpose of admitting the free and uninterrupted passage of carriages, waggons, or trucks passing from or to the said Birmingham and Gloucester and Grand Junction Railways respectively: Be it therefore enacted, that the said Company hereby incorporated shall and they are hereby required to lay down and maintain, upon the whole extent of the railway hereby authorized, between the point of junction thereof with the said Birmingham and Gloucester Railway at Abbott's Wood and the point of junction thereof with the said Grand Junction Railway near Wolverhampton, as well as on the said branch railways by this Act authorized to Kingswinford and Stoke Prior aforesaid, such additional rails adapted to the gauge of the said Birmingham and Gloucester and Grand Junction Railways respectively as may be requisite for allowing the free and uninterrupted passage as aforesaid of carriages, waggons, and trucks passing to or from the said Birmingham and Gloucester and the said Grand Junction Railways respectively, or from the last mentioned railway to the said Birmingham and Gloucester Railway, or passing from one portion of the said Birmingham and Gloucester Railway to another portion thereof, or to or from any intermediate place between the said two railways to the one or the other of them; and such additional rails shall be laid down and maintained and used to the satisfaction and approval of the Board of Trade, and all necessary facilities and accommodations shall be afforded by the Company hereby incorporated, or their lessees, for the convenient use thereof; and it shall be lawful for the said Board at any time, on complaint made by any Company or person interested in the question that such additional rails have not been laid, or that such facilities or accommodations are not afforded, to order and direct the said Company hereby incorporated, or their lessees aforesaid, to adopt such regulations as they may see fit to require with reference to the laying down of such additional rails, or to the use of the said additional rails and other conveniences aforesaid, and for the purpose of securing such free and uninterrupted passage thereon as aforesaid."

(a)² Section 133. "And whereas so much of the railway by this Act authorized to be made which lies between the Birmingham and Gloucester Railway at Abbott's Wood and also at Stoke Prior might be beneficially used by the Birmingham and Gloucester Railway Company, or their lessees, or other Company owning the Birmingham and Gloucester Railway for the time being, for the purposes of the traffic passing on that railway between Gloucester and Birmingham, and between other places on the said Birmingham and Gloucester Railway, and it is just and expedient that the said last mentioned Company should be entitled to the use of the same for the purposes of such traffic: Be it therefore enacted, that it shall be lawful for the said

[851] Birmingham and Gloucester Railway Company to use the portion of line between Abbott's Wood and Stoke Prior, subject to the bye-laws and regulations of the Oxford, Worcester and Wolverhampton Railway Company, and on payment to them of an annual sum in lieu of tolls; provided that the passengers, goods, &c., along the line between Abbott's Wood and Stoke Prior, shall have passed or be intended to travel or pass in the same train over some portion of the Birmingham and Gloucester Railway between Abbott's Wood and Gloucester, or between Stoke Prior and Birmingham. So, that although the Midland Railway Company may use the Loop Line, they cannot take up or set down passengers on that line only; they can only use it with passengers or goods which have been conveyed from some portion of their line to the Loop Line, or from the Loop Line to some portion of their line. By the 134th (a) section the [852] Birmingham and Gloucester Railway Company are

Birmingham and Gloucester Railway Company, or their lessees, or other Company as aforesaid, to use the said portion of line by this Act authorized to be made between Abbott's Wood and Stoke Prior aforesaid, or any part thereof, at proper and convenient times, as hereinafter provided, with engines and carriages properly constructed, but subject to the bye-laws and regulations of the Company hereby incorporated, or their lessees, or of the Company to whom the railway hereby authorized shall for the time being belong, for the purpose of conveying any passengers, animals, or goods which may have passed or be intended to pass from or to any part of the said portion of line on to the said Birmingham and Gloucester Railway, or any part thereof, on payment to the Company hereby incorporated, or their lessees, or the Company who for the time being may be owners of the railway hereby authorized, of an annual sum in lieu of tolls or in respect thereof, as hereinafter mentioned; and if any difference shall arise between the said Birmingham and Gloucester Railway Company, or their lessees, or other Company as aforesaid, and the Company hereby incorporated, or any such other Company as aforesaid, respecting the times when the said Birmingham and Gloucester Railway Company, or their lessees, or other Company as aforesaid, shall be allowed to use the said portion of railway, or the mode of such use, or as to any matter connected therewith, such difference shall be settled by arbitration or by the Board of Trade, at the option of the said first-mentioned railway Company, and the decision of the said Board or of the said arbitration shall be binding and conclusive on both the said Companies: Provided always, that the said Birmingham and Gloucester Railway Company, or their lessees, or other Company as aforesaid, shall not be permitted to convey any passengers, goods, animals, or other traffic along the said line between Abbott's Wood and Stoke Prior, or any part thereof, unless such passengers, goods, or animals, or other traffic, shall have passed or be intended to travel or pass in the same train over some portion of the Birmingham and Gloucester Railway between Abbott's Wood and Gloucester or between Stoke Prior and Birmingham."

(a) Section 134. "And be it enacted, that the price or remuneration which the said Birmingham and Gloucester Railway Company shall pay to the Company hereby incorporated, or their lessees, or to the Company to whom the railway hereby authorized shall for the time being belong, in respect of the use, for such purposes as aforesaid, of the said portion of line between Abbott's Wood and Stoke Prior, shall be for the first two years after such use shall commence a yearly sum by way of toll for each passenger and animal and for each ton of goods or other traffic conveyed by them equal and amounting to 50 per cent. of the average charge per mile which the said Birmingham and Gloucester Railway Company shall demand or receive as fares or charges for the conveyance of the same and other passengers travelling in the same class of carriages, and of the same and the like animals, goods, and other traffic conveyed by them in their own waggons or trucks on the said Birmingham and Gloucester Railway, the numbers of the said respective passengers and animals, and the number of tons and description of the goods or other traffic, being ascertained by accounts to be kept by the said Birmingham and Gloucester Railway Company, and to be accessible to some one impartial person appointed by the said two Companies, or in case of dispute, by the Board of Trade; and after the end of the said first two years the said Birmingham and Gloucester Railway Company shall pay, by equal quarterly payments, for the next three years an annual rent in respect of the said portion of railway equal to the sum which they shall have paid upon the average

to pay for the use of the line between Abbott's Wood and Stoke Prior, for the first two years a yearly sum, by way of toll for each passenger and animal and each ton of goods, equal to 50 per cent. of the average charge per mile. It appears, however, by the defendants' answer, that the arrangement under which the Midland Railway Company use the Loop Line is not in accordance with that enactment. By section [853] 135, (a) such payment of 50 per cent. is to include the use of any passenger or goods station; but the Birmingham and Gloucester Railway Company are required to defray any additional expenses and pay any additional clerk, porters or servants. After the construction of the Loop Line, the Midland Railway Company discontinued using their line between Stoke Prior and Abbott's Wood for the conveyance of passengers, and have since exclusively used the Loop Line. But unless the provisions of the 7 & 8 Vict. c. 85 apply to [854] them, and they comply with all the conditions of the 6th section, they are not exempt from the payment of duty. Now, the provisions of the 7 & 8 Vict. c. 85 do not apply to the case of passengers conveyed by one Company on the railway of another; and consequently the Board of Trade have withdrawn their approval of these cheap traffic trains on the Loop Line. Again, the Midland Railway Company having only a modified use of the Loop Line cannot comply with all the conditions of the 6th section of that Act. They cannot take up and set down passengers at every passenger station on the Loop Line only. [Pollock, C. B. Suppose the train travelled at the rate of eleven miles an hour, would that deprive the Company of the exemption from duty; or are the conditions directory only, the non-compliance of which subjects the Company to a penalty?] They cannot avail themselves of the exemption, unless they comply with all the conditions. Moreover the Midland Railway Company is under no obligation to run a cheap traffic train on the Loop Line. The 6th section of the 7 & 8 Vict. c. 85 requires railway Companies to run a cheap traffic train on each "trunk, branch, or junction line belonging to or leased by them." The Midland Railway Company are not the owners of the Loop Line, neither is it held on lease by them. They have a mere right to run trains on the Loop Line, just as any person, under the 92nd section of the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), may use any railway with locomotive engines and carriages. That is not the interest contemplated by the 6th section of the 7 & 8 Vict. c. 85; it must be an interest equivalent to that of a proprietor or lessee. Suppose the 133rd section of the 8 & 9 Vict. c. clxxxiv. had never passed, could it be said that the Midland Railway Company would fulfil the condition of being proprietor or lessee of the Loop Line, so that if they did not run a cheap traffic train they would be liable [855] to the penalty? If so, every person who might use a railway under the provisions of the Railway Clauses Consolidation Act would also in such case be liable.

during the said first two years; and at the end of the said three years, and thereafter at the end of each succeeding period of three years, the said Birmingham and Gloucester Railway Company shall pay such annual sum in respect of the use hereby authorized of the said portion of railway for such purposes as aforesaid as may be agreed upon between them and the said Company hereby incorporated, or the Company to whom the railway hereby authorized to be made shall for the time being belong or be on lease, or, in the event of difference between them as to the accuracy of the accounts so kept or the amount so to be paid, as may be settled by arbitration, or by the Board of Trade on the application of either of the said Companies, the amount of such rent being fixed and determined as nearly as possible according to the then existing traffic during the two preceding years, on the principle of payment hereinbefore specified with regard to the two first years' use by the said Birmingham and Gloucester Railway Company of the said portion of railway."

(a) Section 135. "Provided always, and be it enacted, that such payment of 50 per cent. as aforesaid shall be held to include the use of any passenger or goods station or building for the accommodation of the public which may be constructed by the said Company hereby incorporated, or by the lessee or owner of the said line for the time being, for the use of their own traffic in passengers or goods passing to or from the said railway at any station between Abbott's Wood and Stoke Prior; but in case the said Birmingham and Gloucester Railway Company, or their lessees, or any other Company, as aforesaid, shall require any separate or additional station or building for passengers or for goods or for other purposes, the same shall be con-

Lush, for the defendants. First, assuming that the duty is by law payable, the Oxford, Worcester and Wolverhampton Railway Company are not liable to pay it. The Midland Railway Company can only convey along the Loop Line passengers coming from or going to some part of the Midland Line, and therefore some portion of the fares must necessarily be paid at the stations on that line. In respect of the fares which the Oxford, Worcester and Wolverhampton Company may receive, they are merely the agents of the Midland Railway Company; and the remuneration for that service is included in the 50 per cent. payable to them. By the 134th section, the fares are to be demanded and received by the Midland Railway Company for passengers conveyed by them, and the number of such passengers is to be ascertained by accounts kept by them. [Martin, B. The Oxford, Worcester and Wolverhampton Railway Company have not acted in accordance with the provisions of the 134th section; but have taken upon themselves to demand the fares and keep the accounts.] An arrangement made between the two Companies, for their own convenience, cannot affect that enactment. Can it be said that if a passenger started from Birmingham he is conveyed by the Midland Railway Company; but if he gets into one of their carriages on the Loop Line, he is carried by the Oxford, Worcester and Wolverhampton Company; if so, two passengers in the same carriage would be carried by different Companies. The Oxford, Worcester and Wolverhampton Railway Company have no control over the trains of the Midland Railway Company, either with respect to the fares or the time of starting. The fares are received for the conveyance [856] of passengers in carriages of the Midland Railway Company; and by the 4th section of the 5 & 6 Vict. c. 79, the duty is payable by the Company who carry. The money received for fares belongs to the Midland Railway Company. The clerks who deliver the tickets act as the clerks of that Company, and the books in which the accounts are entered are their books; and by the 135th section of the 8 & 9 Vict. c. clxxiv., they may construct additional stations and appoint additional clerks and other servants. Suppose a passenger was entitled to recover back money overcharged, must he not bring it against the Midland Railway Company? If he brought it against the Oxford, Worcester and Wolverhampton Railway Company, the answer would be "we received it as agents only and have paid it over to our principal." The 5th section of the 5 & 6 Vict. c. 79 enables one Company to deduct the duty from the monies to be paid over to another Company. The bond required by the 7th section must be given by the Midland Railway Company. By the 134th section, after the end of the first two years, the Midland Railway Company are required to pay for the next three years an annual rent equal to the average sum paid during the first two years; and at the end of the three years, and each succeeding period of three years, such annual sum as may be agreed upon.

Secondly, the 7 & 8 Vict. c. 85, s. 6, has imposed upon railway companies the obligation of conveying passengers by a cheap traffic train upon every line on which they carry passengers, whether it be their own line or that of another Company. If not, this consequence would follow, that where a railway Company has ceased to run

structed and maintained by the Company hereby incorporated, or by the lessee or owner of the said line for the time being, at the cost and expense of the said Birmingham and Gloucester Railway Company, or of their lessee or other Company, as aforesaid, and shall be under the control of the said last mentioned Company; and the said Birmingham and Gloucester Railway Company, or their lessee or other Company, as aforesaid, shall defray any additional expenses, and shall appoint and pay any additional clerks, porters, or other servants to be employed by them in the management of the said traffic, and in such extra stations or buildings, the amount of which cost and expenses shall be determined, in case of difference, by arbitration; it being further provided, that no such building or station shall be required which may interfere with the use of the said line or stations by the Company hereby incorporated, or by their lessees or parties owning the line for the time being; and in the event of any question arising between the said parties whether the said Company hereby incorporated, or their lessee, or the owner of the line for the time being, has provided sufficient accommodation, it shall be referred to the Board of Trade to determine the same, subject with the understanding that any increased expense incurred in consequence of the Birmingham and Gloucestershire Railway Traffic is to be defrayed by that Company."

trains upon their own line, and uses the line of another Company, they would not be bound to provide a cheap traffic train. The object of the 7 & 8 Vict. c. 85 was to secure to the poorer classes the means of travelling by railway at moderate fares; [857] and a line over which a railway Company has by arrangement with its owners obtained power to run passenger trains is a line "belonging to" such Company within the meaning of the 6th section of that Act. Though the soil of the Loop Line does not belong to the Midland Railway Company, yet for the purpose of running trains the line belongs to them. [Wilde, B. According to your argument, if ten different Companies use the line of another Company, there must be ten cheap traffic trains. Pollock, C. B. In my opinion it would be sufficient if the ten Companies, amongst them, provided one cheap traffic train daily, each way.] The obligation to take up and set down passengers at every passenger station on the line, is only "if required;" and who is to require it, the Board of Trade or the passengers? Here neither required it. The circumstance, that the Midland Railway Company cannot take up and set down passengers at every station on the Loop Line, does not affect the question, because the 133rd section of the 8 & 9 Vict. c. clxxxiv. operates as a repeal of that condition in the 6th section of the 7 & 8 Vict. c. 85. The inability to stop at every station does not subject them to the penalty imposed by the 7th section.

The Solicitor General, by desire of the Court, replied upon the second point only.

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered.

MARTIN, B. This was an information, at the suit of the Attorney General, against the Oxford, Worcester and Wolverhampton Railway Company, and their manager and secretary, to recover payment of duty in respect of fares [858] received by the Company for the conveyance of passengers by a cheap traffic train belonging to the Midland Railway Company, from a line called in the information the "Loop Line," to stations on the line of the latter Company.

The circumstances under which the duty is claimed would be scarcely intelligible without reference to a plan (ante, p. 842) which accompanied the pleadings. Prior to the year 1845 a Company, called the Birmingham and Gloucester Railway Company, had made a line of railway between those two places, which is shewn on the plan by a black line, but which is at some little distance from the town of Droitwich and the city of Worcester. This Company had made an unsuccessful application to parliament for power to construct a line the same as that called the "Loop Line," which is coloured red. In the year 1845, the Oxford, Worcester and Wolverhampton Railway Company obtained their Act (8 & 9 Vict. c. clxxxiv.) to make a railway upon the broad gauge from Oxford to Worcester and Wolverhampton, with a branch railway from the main line to Stoke Prior, which was and is upon the Birmingham and Gloucester line. This railway was also to be crossed by the Oxford, Worcester and Wolverhampton Railway at Abbott's Wood. The 44th section enacts that the Oxford, Worcester and Wolverhampton Company shall lay down between the points of junction at Stoke Prior and Abbott's Wood, rails adapted to the gauge of the Birmingham and Gloucester Railway, which was the narrow gauge, and the 133rd section enacts that the Birmingham and Gloucester Company, or other Company owning that railway for the time being, shall be entitled to use the same for the purposes of the traffic passing between Birmingham and Gloucester, and other places on their line, with their own engines and carriages, on payment of an annual sum in lieu of tolls, but subject to the [859] proviso that they should not be permitted to carry any traffic between Abbott's Wood and Stoke Prior unless it shall have passed or be intended to pass over some part of the Birmingham and Gloucester line, between Birmingham and Stoke Prior, or Gloucester and Abbott's Wood respectively. This proviso was obviously meant to secure to the Oxford, Worcester and Wolverhampton Company all the traffic belonging properly to their own line, and in my opinion had no other object. The 134th section enacts what the annual sum to be paid shall be, and how ascertained. The Oxford, Worcester and Wolverhampton Company made their line and branches, including the line coloured red, which is called the "Loop," and laid down upon it rails upon the narrow gauge, in fact made two railways, one upon the broad and the other upon the narrow gauge. Before the year 1855 the Midland Railway Company became the owners of the Birmingham and Gloucester Railway, and in October of that year discontinued passenger traffic on the original line from Stoke Prior to Abbott's Wood: and in

exercise of the right conferred upon them by the Oxford, Worcester and Wolverhampton Act, have ever since exclusively used the Loop Line for the conveyance of all their passenger traffic between Birmingham and Gloucester and the intermediate stations. By the 7 & 8 Vict. c. 85, s. 6, an obligation is imposed on railway Companies to run trains at the rate of one penny a mile, which are ordinarily called the "parliamentary trains," and the Midland Railway Company appointed and ran the train in respect of which the duty is now claimed, at the parliamentary rate, from Birmingham to Gloucester, passing over the "Loop Line" in the same way as their other passenger trains. This is mentioned in their 9th paragraph of the information. It assumes the question now in controversy, viz., that the remission of duty granted by the before mentioned statute, 7 & 8 [860] Vict. c. 85, did not apply to this cheap train; and states that consequently the Board of Trade, when they became aware of the circumstances, withdrew their approval of the Midland Companies cheap traffic train, so far as it was a train for the conveyance of passengers over the Loop Line.

From the statement contained in the information and the defendants' answer, it seems to me clear that the two Companies, the Oxford, Worcester and Wolverhampton Company and the Midland Company, never conducted the business arising upon the Loop Line in the manner provided by the 133rd and 134th sections of the 8 & 9 Vict. c. clxxxiv., but in all probability, for their mutual convenience, the Oxford, Worcester and Wolverhampton Company themselves received the fares from the passengers taking tickets on the Loop Line for places upon the Midland Line, and accounted to the Midland Company for their share. If the business had been conducted strictly in accordance with the above sections, the present question with the present defendants could not have arisen, for they would never have received the fares at all. But the Oxford, Worcester and Wolverhampton Company did not so act, and it seems to me that they have placed themselves in the position contemplated and provided for by the 4th section of the statute 5 & 6 Vict. c. 79, and are bound to account for, and in the first instance pay to the Crown the passenger duty, if it be by law payable.

This was the first point argued on behalf of the defendants. During the argument we all stated our reasons for the opinion above expressed, and it seems not necessary to repeat them, as I think it clear the Oxford, Worcester and Wolverhampton Company were under no obligation to act as they have done; but having done so, I think they have brought themselves within the provisions of the 4th section, and that the real question in the case is whether by law any duty is payable.

[861] The duty is imposed by the 5 & 6 Vict. c. 79, at the rate of 5l. for every 100l. received for the conveyance of passengers, and the exemption, in the 7 & 8 Vict. c. 85, is that no tax shall be levied upon the receipts of any railway Company for the conveyance of passengers at fares not exceeding one penny a mile by cheap trains, as provided by the Act; and the substantial question is, whether the exemption extends to the receipts upon the Loop Line in respect of the Midland Company's cheap train, as well after as before the withdrawal of their approval by the Board of Trade. There is nothing in the statement in the pleadings to shew that this cheap train was not the one which the Midland Company *bonâ fide* intended to run in obedience to the act of parliament; but what was mainly contended on behalf of the Attorney General was, that the Midland Company were under no obligation to run a cheap train over the Loop Line, and that the obligation to run the train and the exemption from the duty were correlative. The 6th section of the exempting Act recites, that "it is expedient to secure to the poorer classes of travellers the means of travelling by railway at moderate fares," and enacts, that passenger railway Companies "shall, by means of one train, at the least, to travel along their railway from one end to the other of each trunk, branch, or junction line, belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, branch, or junction line, once at the least each way, on every week day &c., provide for the conveyance of third class passengers to and from the terminal and other ordinary passenger stations of the railway," under certain obligations, immunities and conditions; which conditions are seven in number, the first being, that such train shall start at an hour to be fixed by the directors, subject to the approval of the Board of Trade: the third being, that the train, if required, shall take up and set down passengers at every passenger station which it shall pass on [862] the line. The 7th section enacts, that the refusal or wilful neglect to comply with the provisions of the Act, or an attempt

to evade the operation of the order (I presume of the Board of Trade), shall subject the Company to a forfeiture not exceeding 20l. a day.

It was suggested, in the course of the argument, that the withdrawal of the approval of the Board of Trade subjected the Company to the duty. I think it had not such an operation. The Board of Trade have vested in them, for the benefit of the public, a power to secure a proper and convenient hour for the starting of the parliamentary train; and a railway Company refusing to comply with or evading their order would subject themselves to the penalty of 20l. a day, and to be proceeded against under the 17th section; but I do not think their refusal or evasion would subject them to the duty, or, in other words, I do not think the approval of the Board of Trade a condition precedent to the remission of the tax. It was also argued on behalf of the Attorney General that the circumstance, that by virtue of the provisions of the Oxford, Worcester and Wolverhampton Act the Midland Company could not take up and set down passengers on the stations on the Loop Line, subjected them to the duty. I think this argument is unfounded. The Oxford, Worcester and Wolverhampton Act was subsequent to the 7 & 8 Vict. c. 85, and it seems to me the provision referred to has in no way affected the liability to duty, and was introduced and intended (as I have before stated) for an entirely different object. The cheap passengers on the Loop Line are no doubt provided for by the cheap traffic train of the Oxford, Worcester and Wolverhampton Company.

In my opinion, therefore, the real question is whether the Birmingham and Gloucester Railway Company were, and the Midland Company now are, under a legal obligation to run a parliamentary train over the Loop Line, or [863] indeed upon the Birmingham and Gloucester Line at all; for, if the argument on behalf of the Attorney General be correct, it seems to me to follow that the obligation upon the Company to run the cheap train is at an end. The argument is that, to entitle the Company to the exemption, the cheap train must run upon a trunk line, or a branch line, or a junction line, "belonging" to the Company, in the sense that the soil of the line belongs to them; or that the line is "leased" by them in the sense in which the term "leased" is understood by conveyancers and lawyers. It is clear that the original trunk line was the line coloured black, but the Company have ceased to convey passengers over the line between Stoke and Abbott's Wood, and as the obligation to provide the cheap train only exists so long as they shall continue to carry other passengers over the line, they are now not bound to run a cheap train between Stoke and Abbott's Wood. If the Company have now a trunk passenger line at all, it is the line to Stoke, thence over the Loop to Abbott's Wood, and thence to Gloucester. But the Attorney General contends, and it is the foundation of his case, that this is not their trunk line. Again, the lines from Birmingham to Stoke, and from Abbott's Wood to Gloucester, are not the trunk line; they are parts of it, but parts only; so also they are neither branch lines nor junction lines. The Loop is a junction line, but, according to the Attorney General's view, it is not a junction line within the 6th section, and the result of the argument seems to be that, in consequence of the Oxford, Worcester and Wolverhampton Act, and what the Midland Company have legally done under it, they no longer run a train over a trunk line, or a branch line, or a junction line, within the meaning of the 6th section; and, if this be so, the obligation to run a cheap train does not exist. But I do not think that this is the true result. When the 7 & 8 [864] Vict. c. 85 became law, in August, 1844, the poorer classes of travellers between Birmingham and Gloucester obtained the privilege and right of being conveyed between those two places at the parliamentary rate by a train running continuously from end to end at a speed not less than twelve miles an hour. The Birmingham and Gloucester Company sought to obtain from parliament power to make a line, similar to the Loop between Stoke and Abbott's Wood, of their own, but were unsuccessful. Had they been successful, and made the line, it would clearly have been a junction line within the 6th section. But by the Oxford, Worcester and Wolverhampton Act, which received the Royal assent on the 4th of August, 1845, this Company was placed under the obligation of laying down rails upon the narrow gauge from Stoke to Abbott's Wood, for the use of the Birmingham and Gloucester Company and the Grand Junction Company; and by the 133rd section these Companies were authorized to use these narrow gauge rails as of right, and, so far as regards the Birmingham and Gloucester Company, at a remuneration or rent to be fixed and ascertained in the manner prescribed by the 133rd section. It does not

appear whether the Grand Junction Company ever availed themselves of the right so conferred, but the Birmingham and Gloucester Company did, and have ceased to run passenger trains from Stoke to Abbott's Wood over their line, and run them all over the Loop, as they are lawfully entitled to do; and if, by so doing, they have released themselves from the obligation of running a cheap train direct from Birmingham to Gloucester, they are liable to the duty; but if they are still subject to the obligation, they are entitled to the exemption. Birmingham and Gloucester are two very large and populous towns; they are the two terminal stations of the Birmingham and Gloucester Railway, and there is not a word to be found [865] in the Oxford, Worcester and Wolverhampton Act to shew that, by the right given to the Birmingham and Gloucester Company to use the narrow gauge line to be provided for them, the legislature meant to relieve them from the obligation of running the cheap parliamentary train. If it has such an operation it was unforeseen, and would defeat the plain and obvious and manifest spirit and intention of the 7 & 8 Vict. c. 85. The point therefore seems to me to be, am I constrained to put such a construction upon the 6th section as would defeat this intention? The Act extends to Scotland as well as England, and according to the judgment of Lord Campbell in *Lord Braybrooke v. The Attorney General* (9 H. L. Cas. 150), delivered in the House of Lords, 19th May, 1861, is to be construed, not according to the technicalities of the law of real property in England or Scotland, but according to the popular use of the language employed. The train is to be for the conveyance of third class passengers to and from the terminal and other ordinary passenger stations of the railway. It is to be continued so long as they carry other passengers over the line, and it is to travel along the railway from one end to the other of each trunk or branch or junction line belonging to or leased by them. The Loop is a junction line, and does it either belong to or is it leased by the Midland Company within the meaning of the section? They have an absolute right to use it. They do use it in exercise of their right, and no one can lawfully prevent them. If the word "belonging" is to be construed in the sense of their being the owners of the soil, it does not belong to them; but if "belonging" is to be construed in the popular sense of having the absolute right to use it in the only way in which a railway can be used, viz., by running trains over it, it is not a very strained use of the word "belonging" to say that the line belongs to [866] them. A road may be said with perfect propriety to belong to a man who has the right to use it as of right, although the soil does not belong to him. Again, the right which the Midland Company really possess is to have maintained for their use, by the Oxford, Worcester and Wolverhampton Company, a line of railway on the narrow gauge, subject to an annual payment to the Oxford, Worcester and Wolverhampton Company. This Company are the owners of the soil and of the rails, but the Midland Company have an absolute right of way over it, at an annual payment, which, in popular language, may be well called a rent: and, in my opinion, their right may be properly enough described as a railway or line demised to or leased by them at an annual rent.

It was said that the public may have the benefit of the 6th section, by a cheap train of the Midland Company from Birmingham to Stoke, a cheap train of the Oxford, Worcester and Wolverhampton Company from Stoke to Abbott's Wood, and a cheap train of the Midland Company from Abbott's Wood to Gloucester. Assuming the public to have this right, it is a very different one from the right to a train running continuously from Birmingham to Gloucester with the same carriages, which is what the 6th section intended to secure. It was also said that the right of the Midland Company was a mere running power, well known and recognised at the time of the passing of the Act. The authority cited for this was the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20): but this was an error, for that Act did not pass until the following year. It was also said that the Midland Company had submitted and paid the duty. I am inclined to think it requires no great amount of argument to satisfy a railway Company that they are not under the obligation to run a parliamentary train; they can recoup themselves for the [867] duty by increasing the fare 5l. per cent., and are freed from the obligation to carry at the rate of one penny a mile.

In the result, I am of opinion that upon the true construction of the 7 & 8 Vict. c. 85, and the Oxford, Worcester and Wolverhampton Act, the Midland Company were and are bound to run a cheap train from Birmingham to Gloucester over the whole line, including the Loop, and of consequence are entitled to the exemption.

POLLOCK, C. B. The facts of this case have already been so fully stated by my brother Martin, that it is quite unnecessary for me to repeat them, and I proceed at once to deliver the judgment of my brother Channell, my brother Wilde and myself upon the question before us.

This is a claim made by the Attorney General on behalf of the Crown (under the 5 & 6 Vict. c. 79) for duties on the money received by the railway Company for conveyance of passengers on their line.

The defence of the Company is two-fold. First, they say they are not the parties liable to be called upon to pay the duty at all,—it ought (they say) to be paid by the Midland Railway Company, for whom they receive it. Secondly, they contend, that admitting their liability to pay the duty, if due, it is claimed in respect of receipts for the conveyance of passengers at fares not exceeding a penny for each mile, by a cheap train which the Midland Railway Company are compelled to run, by the 7 & 8 Vict. c. 85, s. 6; and by the 9th section of that Act no tax shall be levied upon such receipts. arising from any such cheap train.

With respect to the first point made by the defendants, there is no difference of opinion on the Bench. The duty is created by the 5 & 6 Vict. c. 79, and by the 4th section of that Act the duty is made payable by the party receiving [868] the money. The defendants allege that they receive it, not for themselves, but as agents for the Midland Railway Company; we are all of opinion that as they actually receive the fares from the public they are responsible to the Crown for the payment of the duty, whatever may be the arrangement between them and any other Company as to the mode in which the receipts are to be disposed of or divided. And this is the point that is principally urged in the answer of the defendants to the information of the Attorney General, for the Midland Railway Company themselves appear to have paid the duties in question as to the other parts of the line.

As to the second ground of defence, viz., that the duty cannot be claimed from either Company, it appears to me that in order to be entitled to exemption from duty the train in respect of which the exemption is claimed must be a compulsory train; and it must substantially comply with the conditions under which alone such a train is by the 6th section allowed to run.

In my opinion the train in question, so far as it travels on what is called the "Loop Line," is not a compulsory train; and I think no one can entertain a doubt that, as a matter of fact it does not comply with all the conditions, for it does not and cannot stop and put down passengers at every passenger station which it passes on the line. It may be observed that this is a case where the defendants claim the benefit of an exemption from a duty granted in very clear terms, and I think they must bring themselves precisely within the terms which create the exemption; for as there is no equitable liability to a tax by coming as near as possible to the circumstances which make it payable, so also there is no equitable exemption by doing the best that can be done to come within the terms of the exemption.

Now, first, is this a compulsory train? Is the Midland [869] Railway Company bound to run a parliamentary train (as it is called) on the Loop Line? The words of the compulsory clause (the 6th) are "all passenger railway Companies &c., shall by means of one train at the least, to travel along their railway from one end to the other of each trunk, branch, or junction line belonging to or leased by them, so long as they shall continue to carry other passengers over such trunk, &c., once at the least each way," &c., provide for the conveyance of third class passengers under certain conditions. Now, the Loop Line is not the railway of the Midland Railway Company; it does not belong to them, and is not leased by them. They have merely a limited and restricted permission to use it. Had they continued to use their old line for the conveyance of passengers, the compulsory clause would clearly have applied to the whole of their line; but it seems to me very doubtful whether they could be compelled to run a parliamentary train on the Loop Line inasmuch as on the Loop Line they cannot comply with one of the conditions mentioned in the 6th section; and, in my opinion, they could not be compelled to run a parliamentary train on that line. If this be so, the train is voluntarily adopted for their own benefit, and a remission of the duty, or an exemption from the tax, cannot be claimed in respect of any cheap train, except a cheap train adopted under the compulsory powers of the 6th section. But another question, I think, arises before we can decide that the train in question is "such a cheap train" as the Act contemplates—does it comply with the conditions of the 6th section?

The object of the legislature appears to have been to secure "to the poorer class of travellers," first, a convenient period of starting. Secondly, a reasonable speed in travelling. Thirdly, power to stop at every passenger station passed by on the line. Fourthly, such accommodation in [870] respect of protection from the weather as might be satisfactory to the Lords of the Committee of Privy Council. Fifthly, a charge not exceeding a penny for each mile travelled.

The cheap or parliamentary train is therefore made subject to certain conditions as to the hour of starting, which is to be fixed by the directors, subject to the approval of the Lords of the Committee. It is to stop (if required) at every passenger station which it shall pass on the line (which, I apprehend, means that the general arrangements of the train shall be such as to admit of a passenger stopping at any passenger station he may pass). There are other regulations which need not be more particularly specified.

Now, I am unable to say which of these conditions is the most important, or that any of them can be dispensed with at the pleasure or convenience of the railway Company. The cheap train that is entitled to be free from the duty, quoad the receipts of the cheap fares, is made subject to all the conditions, and to all equally. Cheapness in point of fare cannot be said to be the principal condition, and certainly it is not the only one. I should be clearly of opinion that such a cheap train, if the carriages had no seats, and the requirements of the lords of the committee were altogether disregarded, and there were no protection from the weather at all, would be liable to duty though only a farthing a mile was charged. The health of the traveller is quite as important, in a public point of view, as a saving of his time or his money.

Now, the train in question does not comply with the first of the conditions. It does not start at an hour approved of by the Lords of the Committee of Privy Council for Trade and Plantations. The lords of that committee have declined to approve or to give any sanction to the train at all, because it runs on a line a portion of which does not [871] belong to the Company, and of which portion the Company have a limited use only. They have not power to stop at every passenger station on the line and the question is whether the circumstances under which this occurs are such as to entitle the Company to claim remission of the duty, though they do not comply with the condition of stopping (if required) at every passenger station they pass.

It has been suggested in the argument, and this view has been adopted by my brother Martin, that the 133rd section of the 8 & 9 Vict. c. clxxxiv. (public local Act) has in effect repealed the 7 & 8 Vict. c. 85, so as to dispense with the condition of stopping at every passenger station. That section gave to the Birmingham and Gloucester Railway Company (now represented by the Midland Railway Company) the privilege of using the Loop Line on the payment of what the defendants call a "rent"; but the clause itself calls it, "a payment in lieu of tolls." But the use by the Midland Railway Company is subject to a restriction which prevents them from taking any passenger from one part of the Loop Line to another part, and the argument is that, having a parliamentary right to use the Loop Line, subject to a restriction, they are entitled to a remission of duty, although the restriction prevents them from complying with the condition of stopping at every passenger station.

The arrangement made under the 133rd section is one which might have been made by an agreement between the parties. As a mere agreement, it could not have affected the conditions of the 6th section of the 7 & 8 Vict. c. 85, or have dispensed with the obligation to stop at every passenger station, and its insertion in the private Act is nothing more than a sanction of that agreement. It is quite contrary to all the rules of the construction of statutes to hold that such a clause, which merely registers an agreement [872] between two Companies should operate by implication as a repeal of a public general Act as to one of them. But the Midland Railway Company are under no obligation to use the Loop Line; if, however, they voluntarily abandon their own line and cease to take passengers upon it, and voluntarily take to a line of which they have only a restricted use, and upon which they cannot comply with the conditions under which alone a cheap parliamentary train is required to run, in my judgment they cannot claim a remission of the duty under the 9th section; first, because the Loop Line is not their own line, nor is it leased to them; they have

merely a restricted use of it on payment of a sum in lieu of tolls; and, secondly, because the restriction is such as to prevent them from complying with a condition which the legislature has annexed to a parliamentary cheap train.

Decree accordingly.

MOSTYN v. COLES. Feb. 4, 1862.—In an action against a bailee for injury to and destruction of goods, the jury returned a verdict for the plaintiff, with nominal damages. Held, that it was no ground for a new trial that, according to the evidence, the damage, if any, must have been more than nominal, and that there was uncontradicted evidence of a loss of goods to the extent of 2l.

[S. C. 31 L. J. Ex. 151; 10 W. R. 355.]

This was an action to recover damages for injury to, and the detention and destruction of goods deposited with the defendant for safe keeping for reward in that behalf.

At the trial before Bramwell, B., at the Middlesex Sittings in last Hilary Term, it appeared, that the defendant was the proprietor of the Pantechneion Store Rooms in Tottenham Court Road, used for the purpose of storing furniture and other goods. Certain goods of the plaintiff consisting of household furniture, wine, and other effects, had been removed there from other store [873] rooms in London belonging to another person, where they had previously been deposited. There was evidence, as to which there was no contradiction at the trial, that a case of wine had, while under the care of the defendant, been broken open, and several bottles of wine of the value of 2l. abstracted. There was also evidence of damage to some of the furniture, particularly a wardrobe; but evidence was adduced on the part of the defendant to shew that the furniture was in a damaged condition at the time it was removed from the warehouse in which it had been previously stored, and before it came into the hands of the defendant. The jury returned a verdict for the plaintiff, with one farthing damages.

A rule was subsequently obtained, on the application of the plaintiff, to set this verdict aside, and for a new trial, on the ground that the verdict, so far as the damages were concerned, was against the evidence, and that it was irrational and absurd.

Huddleston and Day shewed cause against the rule. As regards the damage to the furniture the evidence was conflicting, and it cannot be said that, with respect to it, the verdict was against evidence. Then, as to the loss of the wine, that is a matter of small value; and the rule that a new trial will not be granted on the ground of the verdict being against evidence where the damages are less than 20l. applies. The plaintiff is in a better position with a verdict for nominal damages than if the verdict had been for the defendant; and if, in the latter event he would not have been entitled to a new trial, neither is he, where he has recovered nominal damages. It is no ground for setting aside a verdict, that the amount awarded by the jury cannot be reconciled with the facts; for the jury being absolute judges of the facts, and giving credit to some parts of the evidence and disbelieving others, may arrive at a conclusion [874] which, although not reconcileable with any suggested view of the facts, is consistent with the view which they, in the exercise of their functions, took of them. [Bramwell, B. It is clear that the jury were divided in opinion upon the question whether the verdict ought to be for the plaintiff or defendant, and that ultimately they came to a compromise that the verdict should be for the plaintiff with nominal damages. The question therefore is whether, where the verdict is manifestly the result of a compromise, and is such that they could not on any rational grounds have arrived at it, that is ground for setting it aside.] There are, perhaps, few cases where nominal damages are given in actions the subject of substantial damage, which can be reconciled with any rational view of the facts. It is a result of requiring that the jury should be unanimous that compromises take place; but it is no ground of disturbing the verdict that there has been such a compromise.

Edward James and Tapping, in support of the rule. This case, in which the damage admits of a certain pecuniary estimate, differs from cases of slander and other actions of that character, in which the question of damages is left at large for the consideration of the jury. In cases of that nature it is reasonable that the jury should have power to return a verdict which will give to neither party the advantage of success, by finding for the plaintiff with nominal damages. But such a verdict is

absurd in an action for the loss of goods, in which the damage, if the case of the plaintiff be true, must be substantial, and, if false, no damages whatever ought to be given. When juries were subject to attainder for a false verdict, an attainder would have lain in such a case as the present: *Fitzherbert*, Nat. Brev. 105, n. They referred to an action against a railway Company, tried before Lord Campbell, in which the jury gave one farthing damages for a serious personal injury.

[875] POLLOCK, C. B. I am of opinion that this rule ought to be discharged. It was obtained on the ground that the jury have returned a verdict which is inconsistent with any view of which the facts are susceptible; inasmuch as, if the plaintiff is entitled to anything, he is entitled to more than nominal damages, and if he is entitled to nothing, the verdict ought to have been for the defendant. I do not think that this alone, in a case like the present, affords any ground for disturbing the verdict. It might, indeed, be possible to suggest a case in which the inconsistency would be so gross that the verdict ought not to be allowed to stand. As, for example, if, where an action was brought on a policy of life assurance for 5000*l.*, and the defence was that the assured had destroyed his own life, or that the policy had been vitiated by his going abroad, the jury were to find a verdict for the plaintiff with nominal damages. In such a case it would be impossible to suggest any process of reasoning by which such a result could be attained. But I cannot, in a case like the present, merely because the verdict is illogical or inconsistent, regard that as a valid ground for ordering a new trial. A case was referred to in the argument of a verdict for nominal damages in an action for a personal injury. I think it might be possible to reconcile such a verdict. Take, for example, the instance of an action to recover damages for a serious injury sustained by a railway accident; where the defence set up is, that the plaintiff contributed to the mischief; the jury, being divided in opinion upon this question, and being unable to agree upon it, might, nevertheless, succeed in arriving at a unanimous verdict for the plaintiff with nominal damages. It seems to me possible to reconcile this verdict as the result of an opinion, that although the negligence or misconduct of the plaintiff had not occasioned the injury, it had in some way contributed to it. Perhaps, [876] however, the most satisfactory way of disposing of this rule will be, by inquiring whether we should have set aside the verdict in case it had been found for the defendant. I do not think we should. Further, I am not sure, having regard to the smallness of the amount in dispute, that this case does not fall within the rule that a new trial will not be granted, on the ground that the verdict is against evidence, where the damages are under 20*l.* The rule ought, therefore, to be discharged.

WILDE, B. I am of the same opinion. The verdict is impeached on the general ground that the finding of the jury in favour of the plaintiff with nominal damages is inconsistent with the evidence, inasmuch, as the damage must either have been more, or there was no cause of action; and it has been contended that, where this is the case, the Court will set aside the verdict and grant a new trial. I cannot subscribe to that position. Such a verdict is a result of trial by jury, and it affords no ground for setting the verdict aside. We may, however, inquire whether there is anything which shews that real justice has not been done. With a view to test this, we may regard the case as if the verdict had been for the defendant, and ask whether we should have set it aside if it had been so. My brother Bramwell, who tried the case, is not dissatisfied with the verdict, at least not beyond the small item for the loss of the wine. That is very much below 20*l.* And, therefore, inasmuch as we should not have set aside the verdict if it had been returned for the defendant, I think we ought not to interfere on the application of the plaintiff, merely on the ground that he has recovered nominal damages.

BRAMWELL, B. I was struck with the argument of Mr. James, that if in former times the jury had returned such a verdict, they would have been subject to an attainder. But on [877] referring to Com. Dig. tit. "Attainder" (B.), I find that would not have been so; for it is there laid down, that an attainder "does not lie if the damages are too small." I should have wished, if this case had been of greater immediate importance, that we should have given more consideration to it, but having regard to the smallness of the damages, I think we ought not to interfere.

Rule discharged.(a)

BIFFIN v. BIGNELL. Feb. 4, 1862.—Where a husband consents to his wife living apart from him, on the terms that she shall accept an allowance, which is paid, she has no authority to pledge his credit, though the allowance is inadequate.—The wife of the defendant having been confined in a lunatic asylum, in consequence of mental disease induced by intoxication, before her discharge therefrom, and after her recovery, he told her that unless she consented to live away from him on an allowance of twelve shillings a week, she should be sent to another asylum; and she consented to the proposed arrangement: Held, no duress; and that so long as she remained away and the allowance was paid she had no authority to bind him for necessities supplied to her.

[S. C. 31 L. J. Ex. 189; 8 Jur. (N. S.) 647; 10 W. R. 322; 6 L. T. 248. Applied, *Eastland v. Burchell*, 1878, 3 Q. B. D. 437. Discussed, *Latter v. Braddell*, 1880, 50 L. J. C. P. 169.]

The declaration was for board, lodging, washing and other necessities supplied by the plaintiff to and for the defendant's wife, at his request.

Plea. Never indebted.

At the trial, before Bramwell, B., at the Middlesex Sittings in last Hilary Term, it appeared that the wife of the defendant had left his house under the following circumstances: For some months previous to February, 1860, she had become addicted to habits of intemperance, which she carried to such an excess as to induce an attack of delirium tremens. Her reason became impaired, and in that month she was consigned to a private lunatic asylum, upon the report of two medical practitioners. She remained in the asylum till the month of April following, when she was discharged, cured. Previous to leaving the asylum, the defendant sent a person to her, who, by his authority, told her that the defendant would allow her twelve shillings a week to live apart from him; and that if she would not agree to [878] accept this maintenance, and should come to his house, he would send her to another asylum. She did agree to the terms proposed, and upon leaving the asylum went to live with her sister, and afterwards took apartments in the plaintiff's house, her allowance of twelve shillings a week having been regularly paid at both places. The plaintiff claimed 36l. for three months' board and lodging. It appeared that the defendant was a publican; and that his business, though not large, was profitable.

The learned Judge told the jury that if the defendant's wife was living apart from her husband under an agreement by which she was to receive a weekly allowance, which was paid, she could have no authority to pledge his credit, and the defendant would be entitled to their verdict; but that if there was no bargain, and her residence apart from her husband was enforced by him, she had a right to pledge his credit for such necessities as were proper with reference to the means of the husband and his position in life. In answer to a question by the jury, whether, if the assent of the wife to the agreement was obtained by the threat that if she did not consent she should be sent to another asylum, the agreement would be binding upon her, the learned Judge said, that if that were so the agreement would not be binding, and the husband would be liable. The jury thereupon returned a verdict for the plaintiff for 25l.

A rule was subsequently obtained for a new trial on the ground of misdirection, against which

H. Matthews shewed cause. There was no misdirection. It being admitted that if the wife were living apart under an agreement for separate maintenance she had no authority to pledge her husband's credit, it became material to inquire whether such an agreement existed. With reference to that point, the direction was proper, that if [879] the wife assented under the coercion of a threat, that if she did not she would be sent to a lunatic asylum, an assent so obtained would not constitute, as against her, a binding agreement. There was evidence that the allowance was insufficient in relation to the means of the husband. The principle upon which the Court acted in *Houlston v. Smyth* (3 Bing. 127) applies. In that case it was laid down, that where a wife leaves her husband under such an apprehension of personal violence as a jury shall esteem to have been reasonable, her husband is liable for necessities furnished for her support. In the present case the jury considered that an apprehension reasonably excited by the threat, induced the wife to live apart on the condition proposed.

Denman and Laxton, in support of the rule, were not called upon to argue.

POLLOCK, C. B. There was nothing in the language used, or in the circumstances under which it was employed, amounting to any species of duress. It, indeed, appears to me to have been little more than telling the wife what would probably be the consequence if she again returned to her husband. The rule will, therefore, be absolute for a new trial.

BRAMWELL, B. I am of the same opinion. It was held, in *Johnston v. Sumner* (3 H. & N. 261), that a plaintiff, seeking to recover for necessities supplied to a wife living apart from her husband, must shew her authority to bind him. That if she lives apart without his consent, she has no authority. If with his consent and in the enjoyment of an adequate provision, she has no authority. A doubt was expressed in that case whether she would have authority where the separation was by consent and there was no adequate provision. [880] I think the doubt was unfounded, and this case shews it; for if a husband consents to his wife living apart from him on the terms that she shall not bind his credit, that consent is conditional; and if she does not perform such condition she is not living apart with his consent. This is not a technical or artificial view of the case; for, a husband may well say "I do not wish you to go, but I will not coerce you; I cannot support you apart from me, if you cannot keep yourself you must remain with me: I only consent to your going on these terms." If the wife left, not agreeing to those terms, she would not be living apart with her husband's consent; and it is the same if, having gone away on those terms, she attempts to stay away on others. If so, the right question in such case is, was the wife justified by the conduct of her husband in leaving him without his consent; if not justified, did he agree she might pledge his credit? If that be so, the question in this case was not properly left to the jury. No doubt the question, "was she justified by his conduct in leaving against his consent?" is nearly the same as that submitted to the jury. But this case affords an example of the advantage of putting a question in the right form of words; for if that had been done there could have been no doubt of the answer, that the defendant's conduct did not justify her in leaving him against his consent. She was in no danger of any unlawful act or wrong. The threat, if any, was not of anything contrary to law, at least it is not to be so understood. And even were it otherwise, in my opinion the peril would not have amounted to duress (2 Inst. 483). I think, therefore, that I misdirected the jury; and that this rule ought to be absolute.

WILDE, B. I shall say nothing with regard to the general principles regulating the authority of a wife, and the liability [881] of a husband, where they are living separate; but confining myself strictly to the point raised in this case, content myself with saying, that there does not appear to me to have been anything in the conduct of the husband amounting to duress; nor indeed, anything, either in the terms offered, or in what was said, in which, under the circumstances, the husband was not justified.

Rule absolute.(a)

FOSTER v. GREEN. Feb. 5, 1862.—The manager of the plaintiff's bank obtained the signature of the defendant to a cheque, purporting to be drawn upon the bank by the defendant, under the pretence that it was a receipt (the defendant being unable to read it), and then paid him a private debt of his own with the banker's money. The transaction was entered in the books of the bank as a loan from the bank to the defendant, upon his cheque: Held, that the banker was not entitled to maintain an action against the defendant to recover back the money, the cheque having been obtained by the fraud of his agent.

[S. C. 31 L. J. Ex. 158.]

Appeal from the Staffordshire County Court, holden at Wolverhampton.

By the case stated on appeal, it appeared that the action was for money due to the plaintiff from the defendant, and paid to him on his cheque; and for money due on an account stated.

At the trial, in the County Court, it appeared that the plaintiff was a banker at Bilston, and carried on business under the name of John Foster and Company. The manager and cashier of his bank, Thomas Cross, was the proprietor of ironworks in

the neighbourhood. The defendant was engaged at the ironworks, and was in the habit of receiving payment in respect of the ironworks from Thomas Cross, sometimes at the ironworks and sometimes at the bank. In the month of November, 1859, Thomas Cross was indebted to the defendant on account of the ironworks in the sum of 70l. On the 11th of that month, the defendant applied to Cross at the bank for payment of 40l. on account. Cross required the defendant to sign a document which [882] he told him was a receipt; and the defendant who was an illiterate man, and unable to write further than to sign his name, signed the document, as requested: and Cross, thereupon, paid him the money out of a bowl in the bank till. The document was a cheque in the following form:—"Bilston, Nov. 11, 1859. Messrs. John Foster and Co. Pay to myself forty pounds.—(Signed) Joseph Green." The cheque was marked by a son of Cross, who was a clerk in the bank, with the word "gold," and the initials of his name, and the transaction entered in the bank books, as a loan to the defendant from the bank, the defendant having no account with the bank. Cross had previously had an account with the bank, but at the time in question, and for more than a year previously, he had kept no such account. There was some conflict of evidence at the trial, as to whether the true nature of the transaction was not that it was a loan from the bank.

The County Court judge directed the jury that the question for their consideration was, whether the 40l. was paid to the defendant as a loan from the bank, or was a payment from Cross on his own private account. The jury returned the following written verdict: "We are of opinion, that Green received the 40l. from Cross, believing it to be on account of payment of a larger sum of money owing from Cross to Green, and that he signed the cheque believing it to be a receipt for the 40l." The judge held that, upon this finding, the verdict must be for the defendant. The plaintiff afterwards moved for a new trial, or to enter the verdict for him, which the judge refused to grant, and the present appeal was from such refusal.

Gray, for the appellant. Upon the finding of the jury, the verdict ought to have been entered for the plaintiff, and [883] not for the defendant. The cashier of the bank had no authority to pay his private debt with the banker's money. When it is once established that he took a specific sum of the money belonging to the plaintiff, and without his authority gave it to the defendant, a case is made out entitling the plaintiff to recover back that money; and, if the particular coin could be identified, trover would lie for it in the same way as it would if the plaintiff's watch had been given by Cross to the defendant. *Orton v. Butler* (5 B. & Ald. 652) does not militate against this view. There the Court held that a declaration alleging that a sum of money had been received by the defendant to the plaintiff's use, and that the defendant had converted and disposed thereof to his own use, was bad. But that decision proceeded on the ground that the count was not referable to any known form of action; and it is not inconsistent with the judgment of the Court that trover will lie where the money is identified. Secondly, the defendant contributed by his laches in signing the cheque to the fraud effected by Cross in applying the bank money. The banker was innocent of any default or negligence; and the principle, that where a question arises between two persons as to who shall bear a loss resulting from the fraud of a third, the one who has been guilty of negligence shall suffer, applies in this case, and entitles the banker to recover back the money: *Young v. Grote* (4 Bing. 253). Thirdly, the cheque was given to the bank as a document which purported to be a security for money lent to the defendant; the money was in fact the banker's money; and the banker is in the same position, with relation to it, as the *bonâ fide* holder for value of a bill of exchange which has been obtained by a fraud committed on the maker.

J. E. Davis, for the respondent, was not called upon to argue.

[884] POLLOCK, C. B. We are all agreed that our judgment ought to be for the respondent. The jury have found that the manager of the plaintiff's bank obtained the signature of the defendant to the cheque, by a false representation that it was a receipt for the money he was about to pay him on account of a debt due from himself, and that the defendant, relying upon this representation, signed the document. I am of opinion, that the banker, whose manager has brought about this state of things, is not entitled to maintain an action for the recovery of the money, either as money received to his use, or in trover. He cannot say, that he is in the position, as regards the defendant, of an innocent sufferer by the fraud of a third party, since it was his own agent by whom the fraud was committed.

BRAMWELL, B. The law applicable to this case is not open to much doubt. If the defendant had taken a cheque signed by himself to the bank, and upon presenting it had received the money, he would unquestionably have been liable to the banker in respect of the money so received, whether he knew that he had signed a cheque or not, and though he may have been ignorant of the nature of the document. It is, I think, equally clear, that if he received payment from Cross, the cashier, of a debt due to him from Cross, and the latter paid him with the banker's money, that would not make him responsible to the banker for the return of the money, if he were innocent of all knowledge, that the money was other than his debtor's money. Suppose the facts had been, that Cross had taken the money from the till, and paid his debt with it outside the bank, it could not be contended that the money might be recovered back. But, admitting that the defendant saw Cross take the money out of the till, that makes no difference, if the defendant had reasonable ground for supposing and did suppose that Cross [885] had a right to do it; and, having regard to the position of Cross in the bank, there was nothing in his so doing calculated to excite any suspicion of dishonesty or fraud. I take, therefore, these two propositions to be true: one, that if the defendant had presented at the bank a cheque, signed by himself, to a clerk not connected with any fraud in relation to it, and had got the money, his ignorance of the nature of the document would not protect him against responsibility to the banker: the other, that payment by the cashier at the bank with money from the till, was not of itself such an act as to affect the defendant with knowledge that the cashier was paying his debt with the banker's money. Then the facts are, that the defendant having a debt against Cross, received from him payment in money which the defendant believed to be the money of Cross, and that the cheque was obtained from the defendant by a fraud committed by the agent of the plaintiff. Under these circumstances, I am of opinion the plaintiff can neither follow the money, nor recover against the defendant in respect of the cheque.

CHANNELL, B. I also think that our judgment ought to be for the respondent. We have the written finding of the jury, and to whatever interpretation it may be open, it is not competent to the appellant to contend that it is against evidence. The first point which has been raised by Mr. Gray is, whether the direction of the Judge, in leaving to the jury the question whether the 40l. was paid to the defendant as a loan from the bank, or was a payment from Cross on his private account, was correct. I think that was the proper question to leave, and that no objection can be raised on that ground. Then taking the direction as right, what was the effect of the finding? The jury say, "We are of opinion that Green received the 40l. from Cross believing it to be on account of payment of a larger [886] sum of money owing from Cross to Green, and that he signed the cheque believing it to be a receipt for the 40l." This negatives the supposition that the money was received as a loan from the bank, and affirms that it was in payment of Cross's debt.

Then is there any reason for ordering the judgment to be entered for the appellant on the ground that the finding shews a state of circumstances which entitles the plaintiff to recover the money? I was at first inclined to think that the case fell within the authority of *Young v. Grote*; and that it might be said that, however innocent the defendant may have been of any negligence (for being an illiterate man he merely signed a document which he was unable to read, upon the representation of the person from whom he was receiving payment that it was a receipt), yet he had enabled Cross to put the cheque into the banker's drawer, and by this means to conceal from him the misapplication of the money. But having regard to all the facts, and taking into consideration that Cross was the manager of the bank, and that he took advantage of the defendant's inability to read as a means to commit the fraud, I think the banker is not in the position of an entirely innocent third party; that *Young v. Grote*, therefore, does not apply, and that our judgment ought to be for the respondent.

WILDE, B. I am of the same opinion. The first point was, that there is no distinction between money and any other chattel in respect of the ability of the owner to follow it in the hands of a third person, where it has been taken dishonestly out of the owner's possession. There is no case supporting such a contention, and it is opposed to the characteristic peculiarity of money, which distinguishes it from other chattels, namely, that it is the highest degree of currency.

It was contended, secondly, that the plaintiff was entitled [887] to recover because the case was one in which a fraud had been committed by an intermediate person, by

which one of two innocent persons must suffer, and that one of these persons had by his negligence afforded the opportunity of committing the fraud, and therefore that the loss ought to fall upon him. No doubt can be entertained of the soundness of the principle upon which *Young v. Grote* proceeded; but the present case does not fall within it, for having regard to the position in life of the defendant, and his inability to read, there was no culpable negligence in his signing a document represented to be a receipt. Further, the intermediate person by whom the fraud was committed was the plaintiff's own agent, and I should doubt whether this fact would not counterbalance negligence on the part of the defendant, if such had been proved.

The third point urged by Mr. Gray was that, the defendant having signed the cheque, the banker is in the same position with relation to it, as the bona fide holder of a bill of exchange for which he has given value is in with relation to the bill; and that it is not competent to the defendant, as against him, to set up fraud. There is, however, this difference; the cheque has never, as would be the case with a bill, been passed into the hands of a third person. The plaintiff seeks to fix the defendant with liability in respect of one transaction, and upon facts which occurred at the same time, and by which his agent fraudulently carried out his design. The plaintiff's claim is in respect of that transaction, and that alone. He cannot at the same time adopt that transaction, and disavow the fraud of his agent, by means of which alone it was effected.

Appeal dismissed.(a)

[888] PHILPOTT v. ADAMS. Feb. 5, 1862.—A plea of nul tiel record to an action upon the judgment of a colonial Court is bad.

[S. C. 31 L. J. Ex. 421.]

The declaration alleged that the plaintiff, to wit, at the Supreme Court of the Colony of Victoria, and within the jurisdiction of the said Court, heretofore, to wit, on the 19th day of December, A.D. 1860, by the judgment of the said Court, recovered against the said defendant the sum of 787l. 15s. 5d., and also 6l. 13s. for his costs, making together the sum of 794l. 8s. 5d., whereof the defendant was convicted, as by the record and proceedings thereof remaining in the said Supreme Court of the said Colony of Victoria fully appears: and that the plaintiff had not obtained any execution or satisfaction of the said judgment.

Plea. That there is no such record in the said Court as in the declaration alleged. Demurrer and joinder therein.

G. Evans, for the plaintiff. The plea is bad. A plea of nul tiel record is not applicable to a declaration on a foreign judgment. In *Walker v. Witter* (1 Doug. 1), where the action was on a judgment of the Supreme Court of Jamaica and the defendant pleaded nul tiel record, the Court held that the plea was bad. Lord Mansfield there said: "The question was brought to a narrow point, for it was admitted on the part of the defendant that indebitatus assumpsit would have lain, and on the part of the plaintiffs, that the judgment was only prima facie evidence of the debt. That being so, the judgment was not a specialty, but the debt only a simple contract debt, for assumpsit will not lie on a specialty." And Buller, J., added, "As to the point that the judgment is not a record, and that the defendant must have judgment on [889] the plea of nul tiel record, there is no foundation for it, because it is stated to be a judgment of a Court in Jamaica. As such, it is to be tried by the country (as it might have been in this case on the nil debet,) and not by the Court. The prout patet per recordum in the declaration is absurd, and may be rejected, and the plea of nul tiel record is a mere nullity."

C. G. Merewether, for the defendant. A judgment of the Supreme Court of Victoria is the judgment of a Court which is created a Court of record by act of parliament, 9 Geo. 4, c. 83. It is not, therefore, a foreign Court, and the plea of nul tiel record applies. [Wilde, B. In *The Bank of Australasia v. Nias* (16 Q. B. 717), the judgment of the Court of Queen's Bench proceeded entirely on the ground that the judgment of the Supreme Court of New South Wales, upon which the action was brought, was the judgment of a foreign Court. Channell, B. In arguing that case, I endeavoured to draw a distinction between a foreign possession acquired by conquest, and a settlement of colonists, but Lord Campbell said that made no difference.] It is no objection to the plea that the issue must be proved by an examined copy, and

(a) Reported by W. Marshall, Esq.

not by the production of the record itself. In *Collins v. Mathew* (5 East, 473) debt was brought upon a judgment recovered in Ireland. The defendant pleaded nul tiel record, and concluded with a verification. The Court held that the plea ought to have concluded to the country, "for though the Irish judgment be a record, yet being only proveable by an examined copy on oath, the verity of the evidence could only be tried by a jury, and not by the Court, and, therefore, the conclusion should have been to the country." Secondly, the plea is an informal traverse of the existence of the judgment alleged to have been recovered, but it is not bad on [890] demurrer. If the word "judgment" were substituted for "record," the plea would be good, but the use of the one word instead of the other does not vitiate the plea. Thirdly, since the Common Law Procedure Act, the defendant is at liberty to traverse any material allegation in the declaration, notwithstanding it may be included in the general issue. The allegation with respect to the existence of a record of the judgment is material, because the plaintiff could not shew that there is a judgment without shewing that there is a record.

POLLOCK, C. B. The plaintiff is entitled to judgment. The declaration is upon a judgment recovered in a colonial Court, and the allegation traversed is immaterial and surplusage.

BRAMWELL, B. I am of the same opinion. The declaration would have been good without the traversed allegation, and the plea does not amount to a denial of the judgment having been recovered, but only to a denial of the existence of such evidence of it.

CHANNELL, B. It has been admitted that the allegation of a judgment having been recovered in the Supreme Court of Victoria, would be put in issue by a plea of never indebted. But the question arises, upon this demurrer, whether a traverse of there being a record of such judgment is a good plea. It is open to a defendant to traverse a particular fact, although it might have been included in the general issue, provided it be material. The question is, whether this is a traverse of a material fact. The declaration would have been good although it contained no reference to the record. The prout patet per recordum in the declaration is mere surplusage and cannot be traversed.

[891] WILDE, B. The traversed allegation is a mere statement of the mode in which the plaintiff intends to prove his judgment.

Judgment for the plaintiff.

POPHAM v. PICKBURN. Feb. 13, 1862.—If a report made by a medical officer of health to a vestry board, in pursuance of the Metropolis Local Management Act (18 & 19 Vict. c. 120), contains libellous matter, a newspaper proprietor is not privileged in publishing it, though without any comment.—*Quære*. Whether, after the publication of such a report by the vestry board, it is competent to others to republish it with or without reasonable comment.

[S. C. 31 L. J. Ex. 133; 8 Jur. (N. S.) 179; 10 W. R. 324; 5 L. T. 846. Applied, *Purcell v. Sowler*, 1877, 2 C. P. D. 222.]

Libel. The declaration stated, that the defendant falsely and maliciously printed and published of the plaintiff, in relation to his trade and business of a chemist and druggist, in a newspaper called the *Clerkenwell News*, the words following, that is to say: "I communicated some time since with the Registrar-General upon the giving of false medical certificates by Mr. Popham of Exmouth Street" (meaning the plaintiff). "The Registrar has requested the district Registrar to warn this person. I beg, however, to advise the vestry to communicate with the Secretary of State, so that a prosecution for forgery may be instituted. It is most important to the welfare of this district that this proceeding be put a decisive stop to." Whereby the plaintiff's credit and reputation were damaged, and the plaintiff was injured in his trade and business of a chemist and druggist, and lost the custom of divers customers.

Plea: not guilty. There were also pleas of justification on the ground that the alleged libellous matter was true. Issues thereon.

At the trial, before Wilde, B., at the Middlesex Sittings, in Trinity Term, 1861, it appeared that the plaintiff was a chemist and druggist, carrying on business in Exmouth Street, Clerkenwell; and that the defendant was the registered proprietor of a newspaper called the *Clerkenwell News*, which was published twice a week, at the

price of [892] one halfpenny, and had a large circulation in the district. The libel was published in the defendant's newspaper on the 27th February, 1861, in an article purporting to be a report of the proceedings of the parish vestry. The article was headed as follows :—

“CLERKENWELL VESTRY BOARD.

“The usual Board was held on Thursday week ; Mr. Commissioner Webb in the chair. The minutes of the previous meeting were read and confirmed.” Then followed an account of the business transacted, under different headings, such as “Financial Statement,” “Charge of the Imperial Gas Company,” “Metropolitan Board's Precept for its own Expenses,” &c. Under the head “Medical Officer's Report,” was the libel set out in the declaration, which formed a portion of the report of Dr. Griffith, the Medical Officer of Health to the Vestry Board, in pursuance of the Metropolis Local Management Act (18 & 19 Vict. c. 120). It was admitted that the defendant's publication was a correct report of the document read at the Vestry Board. The defendant gave evidence in support of the pleas of justification.

It was contended on behalf of the defendant, that he was privileged in publishing the report by the Metropolis Local Management Act. The learned Judge ruled that the publication was not privileged ; and a verdict was found for the plaintiff with 25*l.* damages, leave being reserved to the defendant to move to enter the verdict for him, if the Court should be of opinion that the publication was privileged.

Parry, Serjt., in the same term, obtained a rule nisi accordingly ; against which Montagu Chambers and Hance shewed cause in last Michaelmas Term (Nov. 14). First, the publication of the [893] libel is not privileged under the Metropolis Local Management Act. Although it is the duty of the Medical Officer of Health to make a report to the Vestry Board, the defendant had no right to give publicity to the libellous matter by publishing it in his newspaper. The 132nd section (a) of the Metropolis Local Management Act, requires every vestry and district Board to appoint a Medical Officer to inspect and report periodically on the sanitary condition of the parish. The 198th section (b) requires the vestry in [894] the month of June to send a copy of the reports to the Metropolitan Board of Works, and to deliver copies to any person on payment of 2*d.* each copy. That is a publication in pursuance of a duty, and does not justify the defendant in publishing the report in February for one halfpenny. [Pollock, C. B. The legislature has rendered it imperative on the vestry to publish the reports : then can it be a crime for any one to publish that which the legislature says shall be published ?] A publication of the libel at the time and in the manner authorized by the Act would be privileged, but the defendant has no

(a) Sect. 132. “Every vestry and district board shall from time to time appoint one or more legally qualified medical practitioner or practitioners of skill and experience to inspect and report periodically upon the sanitary condition of their parish or district, to ascertain the existence of diseases, more especially epidemics increasing the rate of mortality, and to point out the existence of any nuisance or other local causes which are likely to originate and maintain such diseases, and injuriously affect the health of the inhabitants, and to take cognizance of the fact of the existence of any contagious or epidemic diseases, and to point out the most efficacious mode of checking or preventing the spread of such diseases, and also to point out the most efficient mode for the ventilation of churches, chapels, schools, lodging houses, and other public edifices within the parish or district, and to perform any other duties of a like nature which may be required of him or them ; and such persons shall be called ‘Medical Officers of Health,’ and it shall be lawful for the vestry or board to pay to every such officer such salary as they think fit, and also to remove any such officer at the pleasure of such vestry or board.”

(b) *Annual Reports.*

Sect. 198. “Every such vestry as aforesaid and district board shall in the month of June in every year, cause to be printed the said account in abstract and summary statement for the preceding year, relating to such vestry or board, and also make or cause to be printed therewith a report of their proceedings in the execution of this Act, and of the works commenced and completed respectively in the preceding year by such vestry or board, and the works remaining in progress at the termination of

right to publish it at a different, or at any time. The plaintiff would have had an opportunity of contradicting or explaining the imputation contained in the report before its publication by the vestry, had it not been for the defendant's act. The plaintiff might have satisfied the Medical Officer of Health that he was mistaken, and he would then have made another report correcting the error. Secondly, the defendant is not justified on the ground that his publication was a correct report of the document read at the Vestry. The privilege is confined to a report of proceedings in Courts of Justice. A member of parliament is not privileged in publishing in a newspaper the [895] report of a speech delivered by him in the House of Commons, if it contains libellous matter, although the publication be a correct report of such speech, and he made it in consequence of an incorrect report having appeared in that and other newspapers: *Rex v. Creevey* (1 M. & Sel. 273), *Rex v. Lord Abingdon* (1 Esp. 226). There has been no alteration in the doctrine there laid down: *Lewis v. Levy* (E. B. & E. 537). It is impossible to contend that the Clerkenwell Vestry, as a public body, are entitled to any greater privilege than the House of Commons, or that it is more important to the public that the proceedings of the former should be published than those of the latter. The parliamentary privilege is clear, and applies to all other bodies in the State where freedom of speech is necessary: but there is no authority that any person who happens to be present at a debate may publish for his own benefit whatever is spoken, however injurious to an individual. *Davison v. Duncan* (7 E. & B. 229) has been supposed to have infringed this rule, but it has not. There Wightman, J., said: "Primâ facie it is actionable to publish a repetition of what is injurious to another unless justified by truth, or by its being a fair report of what has been said in a public judicial proceeding, not ex parte; or, it may be, in parliament." In *Hoare v. Silverlock* (9 C. B. 20), Maule, J., limited the privilege to "a fair account of proceedings in a Court of Justice, not being ex parte, but in the hearing of both parties." In *Lewis v. Levy* (E. B. & E. 537), which decided that a fair and correct report of proceedings before a magistrate was privileged, it was held that the privilege did not extend to a report which contained commentaries reflecting on the parties whose names appeared in it. According to the authority of *Cook v. Wildes* (5 E. & B. 328), if the action had been brought against [896] the Medical Officer, he would not have been protected by the statute, because he exceeded his duty in imputing forgery to the plaintiff.

Parry, Serjt., and Beasley, in support of the rule. The defendant was justified under the Metropolis Local Management Act in publishing this report. The Vestry is a public body, having public duties to perform; they are elected annually by the rate-payers, and as regards the parish, are in the same position as the Parliament with respect to the United Kingdom. The duties of the Medical Officer of Health are prescribed by the Act, and if he has good reason for believing that an unqualified medical practitioner has given a false certificate of the cause of death, he is bound to communicate that fact in his report to the Vestry. Such a communication, made bonâ fide and without malice, is privileged. Then, the Medical Officer being privileged in making the report, and the Vestry being not only privileged, but required by the legislature to publish it, on what ground can the defendant be liable? [Bramwell, B.

such year, and also of any proceedings taken by them or under their authority in the preceding year, in pursuance of any regulations of the General Board of Health for the time being in force or otherwise, for the removal of nuisances, or the improvement of the sanitary condition of their parish or district; and to every such report there shall be appended a copy of every report made to such vestry or board during the preceding year by the officer or officers of health for their parish or district; and every such vestry and board shall, in the said month of June, send a copy of every such account in abstract, statement, and report, together with a printed list of the names and addresses of the members of such vestry and board, and of their officers, to the Metropolitan Board of Works; and every vestry and district board shall permit inspection at their office of a copy of any such account in abstract, statement, and report by any rate-payer in their parish or district, without payment, at all reasonable times, and shall also permit the like inspection by the public generally, of such list of officers; and copies of such account in abstract, statement and report, and list of officers, shall be delivered to any person applying for the same, on payment of such reasonable sums, not exceeding twopence for each copy, as may be fixed by such vestry or board in this behalf."

Are the Vestry bound to publish a scurrilous and impertinent report: have they no discretion? The Act is in its terms imperative. The defendant has merely published in February and sold, at a cheaper rate, a report which the Vestry would have published in June. [Wilde, B. Though the defendant might be privileged in publishing the report after it was made public by the Vestry, it does not follow that he is justified in publishing it before.] The report was made public when it was read at the vestry meeting. Any one of the rate-payers was at liberty to inspect it before June, and if he had repeated the libellous matter in the presence of other persons, would he have been liable to an action? [Wilde, B. Is there any case in which the privilege contended for has been conceded except to the proceedings of [897] judicial tribunals?] In *Rex v. Wright* (8 T. R. 293), the Court of King's Bench refused to grant a criminal information against a bookseller for printing a report of the House of Commons, which reflected on the character of an individual. That decision proceeded on the ground that it was of advantage to the public, and even to the legislative bodies, that true accounts of proceedings in parliament should be generally circulated. The reason equally applies to the publication of the proceedings of a Vestry. *Davidson v. Duncan* (7 E. & B. 229) is distinguishable, for the "public meetings" there mentioned are large assemblies of the public, not the meetings of a Vestry constituted under the authority of an act of parliament. In *Delany v. Jones* (4 Esp. 191), Lord Ellenborough ruled that, though that which is spoken or written may be injurious to the character of the party, yet if done *bonâ fide*, as with a view of investigating a fact in which the party making it is interested, it is not libellous. It is for the interest of the public, that the medical report of a populous parish should be published.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILDE, B. In this case the plaintiff is entitled to judgment. The defendant has published that of the plaintiff which is undoubtedly a libel, and which is untrue. He seeks to protect himself on the ground that the publication is a correct report of a document read at a meeting of the Clerkenwell Vestry, which document must have been published and sold at a small price by the Vestry in a short time. But we are of opinion this furnishes no defence. Undoubtedly, the report of a trial in a Court of Justice in [898] which this document had been read would not make the publisher thereof liable to an action for libel, and reasonably, for such reports only extend that publicity which is so important a feature of the administration of the law in England, and thus enable to be witnesses of it not merely the few whom the Court can hold, but the thousands who can read the reports. But no case has decided that the reports of what takes place at the meeting of such a body as this Vestry are so privileged; indeed, the case cited in the argument is an authority that they are not.

Then is the publication justified by the statute? It is true that the document would have been accessible to the public in a short time, though not published by the defendant; but this cannot justify his anticipating the publication, and giving it a wider circulation, and possibly without an answer which the Vestry might have received in some subsequent report or otherwise, and which would then have been circulated with the libel. This defence, therefore, fails.

It was further contended, that this libel might be justified as a matter of public discussion on a subject of public interest. The answer is: This is not a discussion or comment. It is the statement of a fact. To charge a man incorrectly with a disgraceful act, is very different from commenting on a fact relating to him truly stated,—there, the writer may by his opinion, libel himself rather than the subject of his remarks.

It is to be further observed, that this decision does not determine or affect the question whether, after the statutory publication, it might or not be competent to others to republish these reports with or without reasonable comment.

Judgment for the plaintiff.

[899] WILLIAMSON v. BARTON. Feb. 13, 1862.—The plaintiff put up for sale by auction his farm produce. The defendant attended, and some lots of hay and corn were knocked down to him as the highest bidder, whereupon the auctioneer asked him his name, and having given it, the auctioneer, believing that he was buying for himself, wrote his name in a book as the purchaser, and sent in the account to him. The defendant, before and at the time of the auction, was foreman to a contractor, and had on previous occasions purchased stone of the plaintiff for him. The plaintiff was present at the auction but did not interfere.

The auctioneer did not know the defendant or the contractor, or their relation to each other. One of the conditions of sale required the highest bidder to find security for payment of the purchase money, and provided that in case of neglect or refusal, he might be treated as a ready money purchaser.—Held, that there was evidence from which the jury might infer that the defendant did not purchase the goods on his own behalf, but as agent only: Per Pollock, C. B.—That it was properly left to the jury to say whether the defendant authorized the auctioneer to write his name as purchaser. And that although the defendant entered into a binding contract, if the goods were delivered, not to him, but some other person, he was not liable: Per Bramwell, B.—That, even if the evidence warranted the jury in finding that the plaintiff actually knew that the defendant was purchasing as agent, the question would remain whether the defendant by his conduct made himself personally liable. That his conduct was that of a man buying for himself and not for another person; and that the jury ought to have been told that, if they believed the plaintiff's evidence, though they equally believed the defendant's, that the defendant had made himself a contracting party, and that, having done so, he was liable, though in fact he was only agent: Per Channell, B., and Wilde, B.—That a party who bids at an auction, and gives his name simply to the auctioneer, must be understood to be the contracting party and ought to be held liable as such; and if he is bidding only as agent, and wishes to protect himself from being treated as the contracting party, he ought to say so: Per Channell, B., and Wilde, B.

[S. C. 31 L. J. Ex. 170; 8 Jur. (N. S.) 341; 10 W. R. 321; 5 L. T. 800.]

Declaration for goods sold and delivered. Plea: never indebted.

At the trial, before Bramwell, B., at the London Sittings, after Trinity Term, 1861, it appeared that the plaintiff, who was a farmer in Pembrokeshire, being about to quit his farm, put up his farm produce for sale by auction. The auction took place on the 25th of September, 1857, when the defendant attended and bid for several lots of hay and corn, which were knocked down to him, as the highest bidder, for 150l. Thereupon, the auctioneer asked him his name in the usual way, and he replied "Barton," without saying whether he was purchasing for himself or any other person, and the auctioneer's clerk wrote it down as the name of the purchaser. The defendant had been, for some time previous to, and was at the time of the sale, foreman to one Smith, a government contractor, who was then executing certain [900] works in Pembroke Dockyard; and the defence to the present action was, that the defendant bought the hay and corn, not for himself, but for Smith. The plaintiff was present at the sale, but took no part whatever. He knew that the defendant was Smith's foreman, but he knew nothing as to whether he was on this occasion purchasing for himself or Smith. The defendant had, however, on previous occasions, purchased stone of the plaintiff for Smith. The auctioneer knew nothing either of Smith or the defendant, or of their relation to each other, and a few days after the sale sent in the account to the defendant. The hay and corn were, without any direction or interference of the defendant, fetched away in carts belonging to Smith, and were consumed by Smith's horses before his death, which occurred about ten days after the sale. The conditions of sale (so far as material) were as follows:—

1. That the highest of two or more bidders shall be the purchaser, and in case of a dispute between the bidders, the lot shall be put up again for sale if the auctioneer shall think proper so to do; otherwise he is to determine which of the parties is to be the purchaser.

2. That each lot shall be considered as delivered on being knocked down, and on the highest bidder complying with the conditions next hereafter mentioned.

3. That the highest bidder shall, on being declared such, name a person present, to be approved of by the auctioneer or his clerk, to join him or her as a partner for the lots sold, and that such person, on his or her consenting to become such partner, shall be considered jointly and severally answerable for the payment of the purchase-money with such highest bidder. And in case any such highest bidder shall neglect or refuse to procure the consent of any person or persons, to be approved of as aforesaid, the lot may be resold, and the first purchaser charged with any expences [901] and loss of such resale (if any), or he or she may be treated as a ready-money purchaser, and liable to be proceeded against for the recovery of the same, or the sale may be declared void, at the option of the auctioneer; but in case any such highest bidder shall pro-

cure the consent of any person or persons, to be approved of as aforesaid, the same shall be considered under the conditions equivalent to having signed the sale book.

3. (By this condition the money for purchases at the sale was payable on the 25th January, 1858.)

The learned Judge left it to the jury to say, whether the defendant authorized the auctioneer to sign his name as the purchaser of the goods, telling them that, if they were of that opinion, the defendant was liable for the price. If, however, they should think that, although the defendant entered into a binding contract, the evidence shewed that the goods were delivered, not to the defendant, but to some one else, he was not liable. The jury having found a verdict for the defendant,

Knowles, in last Michaelmas Term, obtained a rule nisi for a new trial on the ground of misdirection, in leaving to the jury the question whether the defendant had entered into the contract, the evidence shewing that he had : also on the ground that it was immaterial whether the defendant intended to act as agent or principal : also on the ground that it was immaterial whether the plaintiff knew that the defendant was bidding as agent or not : also on the ground that there was no evidence to support the learned Judge's charge touching the delivery, as there was no evidence of any contract other than that with Barton ; also on the ground that the verdict was against evidence.

Huddleston and Garth shewed cause in the same term (November 14). There was no misdirection. The real [902] question was whether the defendant purchased the goods on his own behalf or merely acted as the agent of Smith, and that was properly left to the jury. The plaintiff knew that the defendant was the agent of Smith. He had on previous occasions sold stone to Smith, and received payment for it, through the defendant. [Pollock, C. B. No doubt, the defendant might have been dismissed by Smith from his service shortly before the auction, but still, looking at all the circumstances, there was evidence from which the jury might infer that the defendant was acting for Smith, and that the plaintiff knew it.] The defendant did not authorize the auctioneer to sign his name as the purchaser of the goods. [Pollock, C. B. If a person buys goods in his own name, he is liable to pay for them although he in fact acts as agent for another. Wilde, B. The goods were knocked down to the defendant, and he was asked his name, he replied "Barton." Is not that evidence of an authority to the auctioneer to sign his name as purchaser?] It was not conclusive, and was properly submitted to the jury, who found for the defendant. [Pollock, C. B. The question is whether, the plaintiff being present, and well knowing that the defendant was the servant of Smith, it was necessary for the defendant to say, "I was bidding for Smith."]

Knowles and Milward, in support of the rule. There was *prima facie* a contract with the defendant. By the conditions of sale the highest bidder was to be the purchaser ; and the defendant was the highest bidder. At the time of the sale a complete contract was entered into between the plaintiff and defendant ; and that cannot be varied by shewing that the defendant was the agent of Smith. [Wilde, B. Suppose a person goes into a shop and orders some cloth to be sent to a particular place ; upon which the shopman asks him his name, and he gives [903] it ; *prima facie* he makes the contract on his own behalf ; but suppose he was foreman to a tailor, and the shopman knew that fact, might not the jury find that the order was given on behalf of the tailor?] There is a difference between buying in a shop and at an auction, for there the auctioneer is agent for both buyer and seller. Parol evidence is inadmissible to vary the terms of a contract after it has been reduced to writing by an auctioneer. The cases are collected in the note to *Thomson v. Davenport*, in Smith's *Lead. Cas.* vol. 2, p. 303, 4th ed., where it is said that "parol testimony never can be heard for the purpose of discharging the agent, but may always be so for that of charging the principal." The defendant authorized the auctioneer to sign his name as the contracting party ; and therefore if the plaintiff had known that the defendant was authorized by Smith to buy for him, although he might have shewn the agency for the purpose of suing Smith, the defendant is not at liberty to set it up for the purpose of discharging himself. [Wilde, B. If the contract was with the defendant, it is immaterial whether or no he was an agent, but in ascertaining whether he did contract, it is important to inquire whether he was agent.] The plaintiff might have objected to the admissibility of any evidence of agency for the purpose of varying the contract. [Pollock, C. B. I think not. I agree with my brother Wilde that, in investigating whether the defendant made the contract on his own behalf,

evidence of the relation between him and Smith is important.] The fact that the plaintiff knew the defendant was the foreman of Smith, does not alter the case. In *Magee v. Atkinson* (2 M. & W. 440), the contract was made by two brokers, each of whom must have known that the other was acting as agent, and it was held that, if the defendant entered into a written contract in his own name, he could [904] not afterwards set up that he was acting as broker merely; and that, although known to be a broker, if he signed the contract in his own name he was liable. In *Higgins v. Senior* (8 M. & W. 834), where the defendant had executed an agreement for the sale of goods, purporting on the face of it to be made and subscribed by him, it was held that it was not competent for the defendant to discharge himself by proving that the agreement was made by him as agent for a third person, and that the plaintiff knew the fact at the time the agreement was made and signed. So where the defendants, who were brokers, sold goods by auction, and gave an invoice describing the goods as bought of themselves, it was held that they could not, in an action for the nondelivery of the goods, defend themselves by evidence that they sold as agents, and had intimated that fact before and at the time of the sale; and that, the principals being indebted to them, the invoice had been made out in their names, according to a custom, to secure the payment of the purchase money through their hands: *Jones v. Littledale* (6 A. & E. 486). Again in *Humble v. Hunter* (12 Q. B. 310), where a charterparty was executed, not by the plaintiff, but by a third person, who in the contract described himself as owner of the ship, it was held that evidence was not admissible to shew that such person contracted merely as the plaintiff's agent. Secondly, the learned Judge having left two questions to the jury, and they having found a general verdict, it is impossible to say upon which the verdict proceeded. The jury were told, that although they were satisfied that the contract was made with the defendant, they ought nevertheless to consider whether there was evidence that the goods were delivered to him. But there was a binding contract with the defendant, and the delivery was under that contract. The [905] moment the contract was signed, the goods were at the risk of the defendant, and the property in them passed to him. Therefore it was a misdirection to tell the jury, that it was open to them to find a delivery to some one else. [Bramwell, B. The Court of Queen's Bench have lately decided that goods may be accepted, within the Statute of Frauds, before delivery. (a) Suppose the defendant had seen the goods, according to your argument there would have been an acceptance by him.]

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered.

WILDE, B. This was an action for the price of some farm produce said to have been sold to the defendant at a public auction.

It appeared, on the trial, that the goods were put up for sale by auction in the ordinary way, and that the defendant had attended and bid for them; they were knocked down to him; thereupon the auctioneer immediately asked him for his name in the usual way: he gave it, and the auctioneer wrote it down as the name of the buyer. The goods were afterwards delivered. The defence was, that the defendant bought only as agent for one Smith, and had not made himself liable. The further facts proved were, that the defendant was the foreman of Smith, who was a contractor for some public works in the neighbourhood; that, in truth, the goods were bought for Smith; that the master's carts were used in fetching them away, and that they were consumed by Smith's horses; that the plaintiff was present in the auction room, but took no part whatever; that the plaintiff knew the defendant to be Smith's [906] foreman, but knew nothing as to his agency on this occasion but what he might have surmised from the circumstance that he was in Smith's employment; that the auctioneer knew nothing of Smith, and knew nothing of the defendant or his position.

On these facts I am of opinion the defendant made himself liable. It is well settled that an agent is responsible, though known by the other party to be an agent, if, by the terms of the contract, he makes himself the contracting party: see *Higgins v. Senior* (8 M. & W. 834). And the late cases arising on charterparties have illustrated this principle forcibly: *Lennard v. Robinson* (5 E. & B. 125), *Parker v. Winlow* (7 E. & B. 942).

Supposing, then, it was competent to the jury, on the above evidence, to find

(a) *Cusack v. Robinson*, 1 B. & S. 299.

that the plaintiff actually knew that the defendant was buying for Smith, the question would still remain, whether the defendant, by what he did, made himself the contracting party.

It is clear to my mind that he did. He communicated to no one that he was acting as agent; he did nothing by word or act to indicate that he was not contracting himself, and for himself. There is not a single incident, however slight, in his conduct at the sale, to distinguish it from that of a man who was buying for himself. It was the ordinary conduct in all respects of a buyer at an auction.

There was nothing, therefore, on which the jury could properly be invited to find that he did not make himself a contracting party. It is not too much to ask or expect of a man who walks into an auction room and becomes a purchaser, that when he gives his own name he should protect himself from being taken as the contracting party.

It is said to be a hard case on the defendant. But it is dangerous and unwise to throw doubts, even in a hard case, [907] on the proper conclusions to be drawn from the ordinary events of an auction room. Sales by auction are far too common, and the effect of bidding and giving a name to the auctioneer as purchaser far too widely understood by the community, to admit of such doubts being sanctioned.

Without minutely adverting to the way in which the case was left to the jury, it is enough to say, that on these facts the Judge ought, in my opinion, to have told the jury, that if they believed the plaintiff's evidence, though they equally believed the defendant's evidence, the defendant had made himself a contracting party at the sale, and that, having done so, he was liable, though in fact he was only agent.

The jury having been left to find the contrary, the verdict ought, in my judgment, to be set aside, and a new trial granted.

BRAMWELL, B. I think this rule should be discharged.

No doubt a person who is acting for another, and known by him with whom he deals to be so acting, may and will be personally liable if he contracts as a principal, and that whether he contracts by word of mouth or in writing. The difference is, that if the contract is by word of mouth, it is not possible to say, from the agent using the words "I" and "me," that he means himself personally; whereas, if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is, that he binds himself personally, and he is taken to do so; and then the other party is bound to him. Therefore, in this case, had the defendant himself signed the conditions of sale as a purchaser, it may be conceded that he would have been liable; but the plaintiff would also have been bound to him. But he did not sign the conditions of sale himself; they were signed by the auctioneer's clerk and [908] unless the auctioneer's clerk had authority from him so to sign his name, the defendant is not bound by that signature. The question, therefore, was a proper one to leave to the jury, unless the admitted facts shewed that the auctioneer's clerk had such authority. If they did, such question ought not to have been left to them, and there was a miscarriage. Now, the admitted facts relied on by the plaintiff were, that the defendant attended the sale, that he bid, that he was asked his name, gave it, and it was written down; and I agree that in ordinary cases a man so acting gives authority to the auctioneer to sign his name as a purchaser; and if the case stopped there the defendant would be bound. But he may shew other facts which, taken in connexion with those first named, alter their effect. Suppose, for instance, the defendant had said before he bid, "All my biddings are as agent for Smith, and what you knock down to me you must put down to him;" surely the auctioneer would have had no authority afterwards to write his name down, not even though he forgot what had taken place, and asked his name, and was told. So, if the defendant had said the same to the plaintiff, "Your agent, the auctioneer, is selling for you; I am buying for Smith; what I bid for must be put down to him," the same result would follow. The defendant did not say so here in words, but to my mind there is evidence to go to the jury which they may hold equivalent to his having done so. The plaintiff knew the defendant was Smith's foreman; his answer on that point is a discreditable shuffle. He knew the defendant was buying for Smith; he himself was close to the auctioneer; the goods were delivered to Smith's carts, not upon any order of the defendant, nor after any communication with him, as appears on the evidence. If the defendant was bound to the plaintiff, so was the plaintiff to the defendant. Can it be said he was in any way? Suppose there had

been no writing (and there [909] having been a delivery, none was necessary), would not the proper question have been left to the jury? If not, what difference does the writing make? Suppose the defendant, on being asked his name, had said, "Barton, Smith's foreman." But if the defendant was concluded by the writing, and a party to the contract, surely he is discharged by the plaintiff delivering the goods to the principal without requiring payment. The conditions of sale were misunderstood by the plaintiff's counsel. The purchaser not having given security, and the seller not electing to put up the lot again, the transaction became a ready-money one: the stipulation that the goods should be considered delivered does not apply, and the seller had a lien for the purchase money. Yet he thinks fit to deliver the goods to the principal without requiring payment, and thereby, as I think, discharges the agent, if ever he was bound.

But it was said that the other question was improperly left to the jury. I think not. It was a right question, unless the matter was concluded by the evidence. If the goods were delivered to Smith, not upon the contract with Barton, the action for goods sold and delivered could not be maintained. Now, the evidence was that they were delivered to Smith's carts. How or why, it did not appear. It was for the plaintiff to make out that that was a delivery to Barton. There was some other loose and untrustworthy evidence of Barton's not denying his liability, which precluded my withdrawing the case from the jury; but still it was for them to say if they were satisfied that the plaintiff had proved that delivery; and they might well say they were not satisfied, not only because it was not shewn how the goods came to be delivered to Smith's carts, but also for the considerations I have adverted to relating to the first question.

I cannot help adding, it certainly will be strange if the [910] defendant is liable to this action. He did not think he was buying, nor making himself liable; nor did the plaintiff; nor did he think he was selling to the defendant. The auctioneer, who did not know the truth, may have thought so; yet the defendant is to be made liable to the plaintiff contrary to the belief and intention of both of them.

CHANNELL, B. I concur in the judgment of my brother Wilde, and in the reasons on which it is founded.

POLLOCK, C. B. In this case I am of opinion that the rule ought to be discharged. It is contended for the plaintiff that the defendant is liable, because he attended at an auction of the plaintiff's goods, conducted by the auctioneer as agent for the plaintiff, and, the lot being knocked down to him, he was asked what his name was, which he gave, and which the auctioneer wrote down as the name of the buyer, making a written contract. I think, if the plaintiff was present, and perfectly well knew that the defendant, from his position in life, could not be, and therefore was not, bidding for himself, and the defendant had no intention of bidding or buying for himself, but gave his name because he was asked what his name was, whatever may have been the impression or intention of the auctioneer, no contract was, in point of fact, made between the plaintiff and the defendant. The defendant did not mean to buy, and the plaintiff was aware of that. The plaintiff also did not mean to sell to the defendant, but to his principal only. I think there were circumstances from which the jury might infer that such was the real state of things, and if the jury had any evidence, I am not disposed to disturb their verdict.

The Court being equally divided in opinion the rule dropped.

[911] THOMAS CRONSHAW v. CHAPMAN. Feb. 4, 1862.—The defendant, having a County Court judgment against J. C., caused the following letter to be written and delivered to the high bailiff of the County Court:—"The plaintiff in this action has some reason to believe in the possibility of a third person claiming the goods, &c., at the address given on the back of the execution. He will, however, contest any claim that may be made, and he desires that the high bailiff at Liverpool should be so informed, that the officer who levies may not in any way be deterred from putting the warrant in force by reason of any party setting up a claim." The address on the back of the warrant was that of a house in the occupation of a brother of the judgment debtor; but the name of the judgment debtor was on the door, and he had a considerable quantity of property in the house. The bailiff entered the house in question and seized property of the

execution debtor and also of the plaintiff: Held, that the defendant was not responsible for the act of the bailiff in seizing the plaintiff's goods.

[S. C. 31 L. J. Ex. 277; 10 W. R. 323; 5 L. T. 54.]

Trespass for breaking and entering the plaintiff's dwelling-house, and seizing and carrying away his goods.

Pleas. Not guilty, and a justification under a warrant of execution issued on a judgment in a County Court.

At the trial, before Crompton, J., at the Liverpool Winter Assizes, 1861, it appeared that the defendant had recovered judgment in the County Court against Joseph Cronshaw, for a debt of 48l. The judgment debtor dealt in cigars, and had a quantity at a house, 175 Falkner Street, Liverpool, and his name was on the door. This house, as it turned out, was in the occupation of the plaintiff, Thomas Cronshaw, a brother of the judgment debtor. The defendant informed the high bailiff of the County Court, that the judgment debtor had goods in the house in question, and instructed the clerk of the registrar of the County Court to address to the high bailiff the following letter:—

“County Court Office, Preston, 1st August, 1862.

“*Chapman v. Cronshaw.*

“The plaintiff in this action has some reason to believe in the possibility of a third person claiming the goods, &c., at the address given on the back of the execution. He will, however, contest any claim that may be made, and he desires that the high bailiff at Liverpool should be so informed, that the officer who levies may not in any way be deterred from putting the warrant in force by reason of any party setting up a claim.”

[912] The bailiff accordingly levied on the goods in the house, 175 Falkner Street, and seized a quantity of cigars, the property of the judgment debtor, and also some articles of furniture, the property of the plaintiff, as found on the trial of an interpleader summons, which was taken out upon the plaintiff making a claim to the furniture.

The learned Judge left it to the jury to say, whether the defendant wrote the letter in question *bonâ fide*, and this question being answered in the affirmative, he directed a nonsuit to be entered, reserving leave to the plaintiff to move to enter the verdict for him, with 8l. 10s. damages.

A rule nisi having accordingly been obtained,

Edward James shewed cause. The defendant did nothing more than inform the bailiff that the judgment debtor had goods in the house in question, and require him to take them in execution. He did not order him to seize goods which were the property of a third person. It was for the bailiff to exercise his discretion in making the levy, and he might have done all which the defendant desired him to do without taking anything that did not belong to the judgment debtor. The case of *Childers v. Wooler* (2 El. & El. 287) is a direct authority for the defendant. There it was held that an execution creditor was not responsible, even where the information he gave the sheriff was erroneous, provided that in giving it he was actuated by an honest desire to assist the sheriff, and had reasonable ground for supposing the information was correct, for it left the sheriff to the exercise of his discretion in acting upon it. Here the jury have found that the defendant acted *bonâ fide*, and there were obviously reasonable grounds for his supposing the defendant had goods in the house.

[913] Littler, in support of the rule. The defendant did more in this case than the defendant in *Childers v. Wooler*. There the defendant merely informed the sheriff of the place where he supposed the judgment debtor to be; but, in the present case, the defendant not only told the bailiff where the goods were, but by telling him that he should contest any claim, and urging the bailiff to make the levy without being deterred by any claim that might be made, he required him, in effect, to seize all the goods on the premises, no matter whose property they might be.

POLLOCK, C. B. I do not so read the letter. The jury have found that the information was given *bonâ fide*; and the more natural construction of the document is, that the execution debtor had goods in the house, and that the bailiff should levy on them; not that he should seize goods the property of a third person although they might be in that house.

BRAMWELL, B., WILDE, B., and CHANNELL, B., concurred.
Rule discharged.(a)

CAVE v. MILLS. Feb. 27, 1862.—The plaintiff was surveyor to the trustees of certain turnpike roads. It was his duty to make all contracts, and pay the amounts due, for labour and materials required for the repair of the roads, he being permitted to draw on the treasurer to a certain amount. His expenditure was not strictly limited to that amount, and in the yearly accounts, which it was his duty to present to the trustees, a balance was generally claimed as due to him and was carried to the next year's account. He rendered accounts for the years 1856, 1857 and 1858, shewing certain balances due to himself. These accounts were audited, examined and allowed by the trustees at their general annual meeting and a statement, based on them, of the revenue and expenditure of the trust, was published as required by the 3 Geo. 4, c. 126, s. 78. The trustees, believing the accounts correct, paid off with monies in hand a portion of their mortgage debt. The plaintiff afterwards claimed a larger sum in respect of payments which had in fact been made by him, and which he ought to have brought into the accounts of the above years, but knowingly omitted. The plaintiff also rendered an account for the year 1859, which, on inquiry by the trustees, he stated did not include all the payments, and he subsequently rendered another account for that year in which he claimed a larger sum as due to him.—Held: First, that the plaintiff was estopped from recovering the sums omitted in the accounts for the years 1856, 1857 and 1858, since the trustees had acted upon the faith that those accounts were true: Per Pollock, C. B., Channell, B., and Wilde, B. Bramwell, B., dissentiente.—Secondly, that the plaintiff was entitled to recover the sums omitted in the account for 1859, since it was not accepted by the trustees as true: Per totam Curiam.

[S. C. 31 L. Ex. 265; 8 Jur. (N. S.) 363; 10 W. R. 471; 6 L. T. 650.]

This was an action against the trustees for carrying into execution the 53 Geo. 3, c. 133 (local and personal), who were sued in the name of their clerk, for money payable to [914] their surveyor for work and materials, &c. The cause was referred by a Judge's order to an arbitrator, who stated the following case for the opinion of this Court:—

The plaintiff, from the year 1855 to January 1860, was surveyor to the trustees of the Enstone, &c., turnpike roads, at the yearly salary of 40l. By verbal arrangement between the plaintiff and the trustees, it was the duty of the plaintiff to make all contracts and give orders for labour and materials required for the maintenance of the roads, on behalf of the trustees, and to pay the amounts due therefor, the plaintiff being for that purpose permitted by the trustees to "draw" on the treasurer from time to time. A certain monthly sum was fixed upon by the trustees at the commencement of each year as the limit of the amount of such "draw" in addition to the plaintiff's salary; but the paramount duty of the surveyor being to maintain the roads in efficient repair, the expenditure by the plaintiff was not strictly limited to that amount, and in the yearly accounts, which it was the practice and duty of the plaintiff to present to the trustees, a balance was generally claimed by him and duly allowed by the trustees, and carried on to the next year's account.

In this manner similar accounts were rendered and allowed for the years 1856, 1857 and 1858, these accounts being entitled "An Abstract of Receipts and Expenditure" and "Abstract of Surveyor's Expenditure," and representing balances in the above years in favour of the plaintiff of 75l. 2s. 11d., 81l. 9s. 5d. and 86l. 18s. 11d. respectively.

[915] The plaintiff presented these accounts at the general annual meeting of the trustees, held in the month of January, and these accounts were audited and examined by or on behalf of the trustees and compared with vouchers produced for the payments, and the accounts were duly allowed, and a minute of the fact of allowance was duly made.

In pursuance of the Act, 3 Geo. 4, c. 126, s. 78, the defendant, as clerk to the trustees, annually made out and transmitted to the clerk of the peace, after approval thereof by the trustees, a statement of the debts, revenues, and expenditure received or incurred on account of the trust. This statement, so far as respected the expenditure on the roads, was based upon the above mentioned accounts rendered by the plaintiff as surveyor, although not always strictly following them.

The following are copies of the plaintiff's account for 1858, and of the statement for the same year subsequently returned by the trustees to the clerk of the peace, and which statements were duly published as required by law.

Enstons, Heyford Bridge, Bicester, Weston on the Green, and Kirtlington Turnpike Roads.

Abstract of Surveyor's Expenditure for 1858.

EXPENDITURE.			RECEIPTS.		
	£	s. d.		£	s. d.
Balance from 1857. . . .	81	9 5	By Cash of Treasurer . .	412	0 0
Day Labour	172	14 1			
Materials dug and prepared .	141	16 6			
Damage done in obtaining Materials	6	16 1			
Carriage of Materials . . .	45	11 9			
Materials Purchased . . .	3	12 3			
Tradesmen's Bills	6	17 2			
Incidental Expenses . . .	0	1 8			
Surveyor's Salary	40	0 0	Balance due to Surveyor .	86	18 11
	£498	18 11		£498	18 11

[916] General Statement of the Income and Expenditure of the Enstons, Heyford Bridge, Bicester, Weston on the Green, and Kirtlington Turnpike Roads, between the 1st day of January and the 31st day of December, 1858, both inclusive :—

INCOME.			EXPENDITURE.		
	£	s. d.		£	s. d.
Balance in hand of Treasurer . . .	323	15 11	Monies paid on account of Surface repairs of Roads .	365	2 3
Sinking Funds in hands of Treasurer deducted from the above balance . . .	241	10 10	Damage done in obtaining Materials	6	16 1
			Tradesmen's Bills	10	6 7
Real balance	82	5 1	Salaries : Treasurer 5 5 0		
Revenue received from Tolls .	760	13 4	„ Surveyor 40 0 0		
£2 per Cent. overpaid to Bondholders for the year 1856, transferred to Sinking Fund	91	10 10	„ Clerk . 25 0 0		
Received from Magistrates' Clerk for Fines	3	7 6		70	5 0
			Law Charges	5	5 6
	£937	16 9	Improvements and Incidental Expenses	0	1 8
			One year's Interest to Bondholders to December 1857 .	137	6 2
			£2 per Cent. overpaid to Bondholders for the year 1856, transferred to Sinking Fund	91	10 10
			Balance in hands of Treasurer	251	2 8
				£937	16 9

Name.	Amount.	Rate of Interest.	Sinking Fund.	Amount.	State the Name and Place of Abode of Treasurer, Clerk and General Superintendent Surveyor below.
Bond for a Mortgage Debt.	£4577 0 0	£3 per Cent.	Sinking Fund in hands of Treasurer	£ s. d. 150 0 0	Treasurers. Messrs. Tubbs & Coleman, Bankers, Bicester.
			Do. do. £2 per Cent. overpaid for the year 1856	91 10 10	Clerk. Francis Burton Mills, Solicitor, Bicester.
				£241 10 10	Surveyor. Charles Cave, Surveyor, Banbury.

Examined and allowed at the General Annual Meeting of the Trustees of the Turnpike Roads, held at the King's Arms Inn in Bicester, in the county of Oxford, on the 26th day of January, 1859.

[917] At the General Annual Meeting of the Trustees in January, 1860, the plaintiff rendered the following Account for the year 1859:—

DR.		SURVEYOR'S EXPENDITURE, 1859.		CR.	
Balance due from 1858		£ s. d. 86 18 11	By cash of Treasurer	£ s. d. 481 4 0	
Day Labour	£ s. d. 185 10 11				
Materials dug and prepared	117 17 10				
Damages done in obtaining Materials	4 14 8				
Carriage of Materials	106 14 10				
Purchase of Materials	32 8 0		Balance due to Surveyor	129 15 5	
Tradesmen's Bills	15 16 3				
Repairs to Toll Houses	20 0 0				
Incidental Expences	0 18 0				
Surveyor's Salary	40 0 0				
		524 0 6			
		£610 19 5			£610 19 5

In answer to an inquiry by the trustees, the plaintiff then informed them that the above account did not include the whole of the payments made by him, and that there were other outstanding claims. The following minute was made in the trustees' book:—"The surveyor's account for the first year was examined, when there appeared to be a balance due to him of 129l. 15s. 5d."

The meeting was adjourned, and at the adjourned meeting the plaintiff rendered an account claiming 436l. 4s. as due to him, instead of the above mentioned balance of 129l. 15s. 5d.

In consequence of an intimation from the trustees the plaintiff resigned his situation as surveyor.

The following account for 1859 was subsequently returned to the clerk of the peace:—

[918] General Statement of the Income and Expenditure of the Enstons (&c.) Turnpike Roads, between 1st day of January and the 31st day of December 1859.

INCOME.			EXPENDITURE.		
Balance in hands of			Monies received on account of Surface	£	s. d.
Treasurer brought	£	s. d.	repairs of Roads	414	7 4
forward	251	2 8	Damages done in obtaining Materials	4	14 8
Balance received			Tradesmen's Bills	10	5 1
from Tolls	790	0 0		£	s. d.
			Salaries : Treasurer	5	5 0
			" Surveyor	40	0 0
			" Clerk	25	0 0
				70	5 0
			Law Charges	6	7 6
			Improvements and Incidental Ex-		
			pences	1	9 6
			One year's Interest to Bondholders to		
			December 1858, at £1 per Cent.	45	15 4
			Repairs of Toll Houses	20	0 0
			Claim made by Surveyor for extra		
			Labour extending over several		
			years, but refused payment by the		
			Trustees	436	4 0
			Balance in hands of Treasurer	31	14 3
				£1,041	2 8

In the general statement at the foot, it appears that the mortgage debt of the trust had been reduced by the sum of 228l. 17s., the amount of three bonds paid off during the year.

In the statement of the year 1860, sent to the clerk of the peace after the present action was commenced, the sum of 428l. 3s. 11d. is stated to be "retained in treasurer's hands to meet the claim of Mr. Cave, late surveyor, to be tried at the Oxon March Assizes, 1861."

The plaintiff, before the commencement of this action, had in fact made payments to the amount of 220l. in respect of labour and materials reasonably necessary for and done, and expended in, the repairs of the roads during the years 1856, 1857, 1858 and 1859, in excess of the amount included in his accounts as originally rendered to the trustees for the [919] above years; and there are besides still outstanding claims by third persons to a considerable amount in respect of work and materials for the roads done and supplied in the above years, under verbal orders and directions given by the plaintiff as surveyor, and which last mentioned outstanding claims are not within the present action or order of reference.

The above sum of 220l. consisted in part of balances paid by the plaintiff after he rendered his account for 1859, for monies due to labourers and others, for work and materials during the above years, and on account of which they had been paid monies by the plaintiff from time to time.

The whole amount ought to have been paid and brought into the accounts of the above years, but was knowingly omitted by the plaintiff, partly from negligence and partly to avoid complaint by the trustees, and to keep the apparent expenditure as low as possible, and in the expectation that the trust funds would in future years be better able to afford the outlay necessary for the maintenance of the roads and the payment of former arrears; and there was no actual fraud contemplated by the plaintiff.

Neither the defendant nor the trustees had any notice or knowledge or means of knowledge of these outstanding debts or claims, but on the contrary they believed, and the plaintiff intended they should believe, that the accounts rendered by him to them included all the debts and liabilities incurred by him in respect of the repairs of the said roads to the close of each year, and such accounts were acted upon by the trustees as above mentioned.

The pleadings and local acts of parliament are to be referred to, if necessary, as part of the case.

The question for the opinion of the Court is, whether the plaintiff is entitled at law to recover the whole or any part of the said sum of 220l.

[920] If the Court should be of opinion that the plaintiff is entitled to recover the said sum of 220l., then I (the arbitrator) find and award that the defendant, as such clerk as aforesaid, is indebted to the plaintiff in the sum of 268l. 6s. (being the said sum of 220l. added to the balance of the plaintiff's claim of 129l. 15s. 5d. in his last account, beyond the amount paid into Court), and judgment is to be entered for that sum.

If the Court should be of opinion that the plaintiff is entitled in law to recover the amount actually paid by him in respect of repairs for the year 1859 only, as distinguished from the previous years, then I find and award that the defendant, as such clerk, is indebted to the plaintiff in the sum of 103l. 6s. (being one-fourth of the said sum of 220l. added to the above mentioned balance, beyond the amount paid into Court), and judgment is to be entered for that sum.

But if the Court should be of opinion that the plaintiff is not entitled to recover any part of the said sum of 220l., then I find and award that the defendant, as such clerk, is indebted to the plaintiff in the sum of 48l. 6s. beyond the amount paid into Court, and judgment is to be entered for that sum.

Hayes, Serjt. (A. S. Hill with him), argued for the plaintiff. (a) By the 3 Geo. 4, c. 126, s. 78, the trustees of every turnpike road are required, at their general annual meeting in each year, to examine, audit and settle the accounts of their treasurers, clerks and surveyors; and when the accounts shall be settled and allowed by the trustees, they shall be signed by the chairman; and if any treasurer, clerk or surveyor, shall refuse or neglect to produce his accounts, he shall be dealt with according to the provisions with regard to officers refusing to account; and when the accounts shall [921] be audited, allowed and signed, the clerk to the trustees shall make out a statement of the debts, revenue, and expenditure received or incurred on account of the trust, which shall be submitted to the trustees, and when approved by the majority shall be signed by the chairman; and the clerk shall, within thirty days, transmit the same to the clerk of the peace of the county in which the road to which the statement relates shall lie. The 7th section requires the clerk of the peace to cause the statement to be produced to the Quarter Sessions, and to be registered. There is no estoppel. An estoppel must be mutual; here it would not be. When, indeed, a person wilfully makes a false statement, with the intention that another should act upon it, and he does so to his prejudice, the former is precluded from contesting its truth: *Picard v. Sears* (6 A. & E. 469), *Freeman v. Cooke* (2 Exch. 654). But here the trustees have not been prejudiced by the accounts rendered by the defendant. On the contrary, they have been benefited, for they have had a larger balance in hand, and have been enabled to pay off some bond debts. The authorities on this subject are collected in Smith's *Lead. Cas.* vol. 2, p. 334, 4th ed. *Skyring v. Greenwood* (4 B. & C. 281) is distinguishable. There, the paymasters of a military corps had given credit in account to an officer for increased pay, to which they knew he was not entitled, and for more than four years they allowed him to draw upon the faith that the money belonged to him; so that their conduct was equivalent to a voluntary payment with full knowledge of the facts. [Channell, B. In *Shaw v. Picton* (4 B. & C. 715), the agent of the grantor and grantee of an annuity delivered an account to the grantee, by which it appeared that the agent had received certain payments on account of the annuity, which had not in fact been received, and it was held that the agent was [922] bound by the account which he had delivered, unless he could shew that he had given credit for those payments by mistake.] That decision proceeded upon the same principle as *Skyring v. Greenwood* (4 B. & C. 281). [Wilde, B. At the bottom of the account for 1858, is: "Examined and allowed at the General Annual Meeting of the trustees," and it is signed by the chairman, as credited and settled. Then, can the surveyor, after that, claim items not included in it?] Unless a statement in an account that money has been received, which has not in fact been received, differs from the suppression of a claim, *Shaw v. Picton* is in point. [Channell, B., referred to *Lucas v. Oldham* (Moo. & R. 293).] Suppose a person has a claim for 500l.,

(a) In last Michaelmas Term, Nov. 18 and 22.

and omits to include it in an account delivered, can the debtor say, "I have laid out the money and made a profit of it, and therefore you are estopped from recovering it back?" [Channell, B. The arbitrator finds that the omission was designedly made.] In *Heane v. Rogers* (9 B. & C. 577, 586), Bayley, J., in delivering the judgment of the Court, said: "There is no doubt, but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think, that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons he is not bound." [Wilde, B. Suppose a servant is directed to make certain disbursements, and he does it in an extravagant manner, and then says that he has disbursed far less than he really has, can he after some years say, "I disbursed more, pay me the difference?"] There is no estoppel unless the [923] other party is prejudiced by the misrepresentation. With respect to the account for the year 1859, there is clearly no estoppel, for that account was not accepted by the trustees, and another was substituted by the plaintiff.

Mellish (Sawyer with him). The plaintiff from time to time delivered accounts to the trustees, in which he wilfully omitted large disbursements; and upon the faith of those accounts the trustees have dealt with the trust money in a way which they ought not and could not have done if true accounts had been rendered, for they have made public returns of a balance in hand, with which they have paid off debts. The arbitrator has found that no fraud was in fact contemplated by the plaintiff, but that means that there was no pecuniary dishonesty; for he has done that which, in point of law, is a fraud, for he has made a wilfully false statement with the intention to deceive. It resembles the case of directors of a joint stock Company publishing false accounts, in which case an action of deceit will lie. The case therefore falls within the principle of *Picard v. Sears* (6 A. & E. 469). [Wilde, B. The trustees are bound every year to examine, audit, and settle the accounts, which must be signed by the chairman as correct, but if a surveyor can at his own pleasure pass any accounts, the audit is wasted.] The expenses ought to be paid out of the receipts of the current year, but the effect of these accounts is to make them payable in a manner not contemplated by the statute. If a steward for the space of four or five years, rendered accounts in which disbursements were omitted, could he, upon its being discovered, recover the money? [Bramwell, B. Where a person has paid money with full knowledge of the facts, he cannot recover it back; that, how-[924]-ever, is the case of a person seeking to undo that which he has deliberately and intentionally done. But, suppose a butcher sent in his account week by week and was paid it, if, at the end of a twelvemonth, he sent in a supplementary bill, that would not be undoing anything which he had done, but the simple omission to bring some items into account. The case of an agent may be different, because there is a legal duty to render a correct account.] The position of the trustees has been altered by reason of the false account rendered by the plaintiff. After the accounts have been examined, audited and signed, the trustees are bound to print copies and transmit them to each of the trustees and to one of the Secretaries of State, who is to cause abstracts to be laid before Parliament: 3 Geo. 4, c. 126, ss. 78, 80; 3 & 4 Wm. 4, c. 80, ss. 1, 5. The market value of turnpike bonds is regulated by these accounts; the trustees of the roads are trustees for the shareholders; they are empowered to form a sinking fund, and when it amounts to 200l., they must apply it in discharge of the monies borrowed by paying the creditors willing to accept the lowest composition: 12 & 13 Vict. c. 87, s. 3; 13 & 14 Vict. c. 79, s. 4. The trustees are prejudiced, because the effect of publishing false accounts is to make the affairs of the trust appear in a better condition than they really are, and consequently the trustees would be obliged to purchase their bonds at a higher rate. The plaintiff may have intended to take upon himself the outstanding liabilities and not to charge the trustees; if so, these would be honest accounts; but if he intended, from some motive of his own, to suppress for a time those liabilities, and to charge the trustees with them in some future year, they would be dishonest accounts. As against him, it must be assumed that they are honest accounts. [Wilde, B. The maxim applies: "Allegans contraria non est audiendus;" Broom's Maxims, p. 160, 161, 3rd ed.] *Skyring v.* [925] *Greenwood*

(4 B. & C. 281), *Shaw v. Picton* (4 B. & C. 715), and *Freeman v. Cooke* (2 Exch. 654), are authorities in point.

Hayes, Serjt., replied.

Cur. adv. vult.

The learned Judges having differed in opinion, the following judgments were now delivered.

WILDE, B. The judgment which I am about to deliver, is that of the Lord Chief Baron, my brother Channell and myself.

This was a special case stated by an arbitrator for our opinion.

We consider that the question intended to be submitted to us by the arbitrator is, whether he ought, as arbitrator, to give effect to the evidence of the plaintiff in reference to the omitted items. He finds the evidence to be true, but leaving to us to determine whether the plaintiff is to be entitled to the benefit of it. It has been contended that he was not so entitled by reason of his own conduct as found and stated in the case by the arbitrator.

It was broadly laid down, in *Shaw v. Picton* (4 B. & C. 729), that "if an agent (employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not) renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can shew that that statement was made unintentionally and by mistake. If he cannot shew that, he is not at liberty afterwards to say that the money had not been received, and never will be received, and to claim reimbursement in respect of those sums for which he had previously given [926] credit," and the Court went on to say, that "when an agent has deliberately and intentionally communicated to a principal that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterwards to recover the money back again." In that case, his agent's intentional statement was, that certain monies properly stood to his principal's credit, whereas the present case involves only a statement equally intentional (but probably with a worse motive), that the expenses to which his principal was liable were restricted to certain sums by him stated.

The effect of the one statement was to swell the credit side of the account, that of the other to diminish the debit side.

In either case the balance would be equally affected, the principal equally deceived, and led to act upon the false statement to his prejudice.

The case of *Skyring v. Greenwood*, in the same book, proceeds upon a similar view of the law. The Court there treated a credit intentionally given by the agent, with full knowledge of the facts, as standing on the same footing with money voluntarily paid. And as the one could not be recovered back, so the other could not be set off.

And in like manner, in *Denby v. Moore* (1 B. & Ald. 123), the Court held that a tenant who had for some years paid the land tax, and knowing he was entitled to deduct it from his rent had not done so, could not recover it from his landlord.

Another general principle of law was invoked by the defendants in the present case.

And it was argued, that the plaintiff having made a statement false to his own knowledge, upon which the defendants acted, was bound by such statement.

The case finds that it was the "practice and duty" of [927] the plaintiff to render the accounts in question, and that the "defendants believed," as the plaintiff intended they should, "that the accounts were true," and contained all the items to which the plaintiff was entitled.

And further, that the defendants thereupon "allowed" the accounts as required by the statute, and, in further pursuance of the statute, transmitted to the clerk of the peace a statement of the debts, revenue and expenditure of the trust, based upon the accounts so rendered by the plaintiff.

It is also obvious that these false accounts were put forward by the plaintiff for fear his expenditure should be thought extravagant.

It is equally obvious that he had his own objects in avoiding a conclusion to that effect in the minds of the trustees, and it cannot be doubted that he anticipated dismissal, or some action on their part, if they knew the truth; which, however beneficial to the trust they administered, would be prejudicial to him.

He intended that the trustees, being kept in ignorance of the truth, should act differently from what they would have done had they known the truth. And it was

contended, upon this state of circumstances, that the trustees who settled, allowed, and adopted the accounts so rendered, "acted" upon them within the meaning of the word "acted" in that rule of law.

We are of opinion that both these principles apply to the present case. Indeed they are but variations of one and the same broad principle, that a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called "estoppel," or by any other name, it is one which [928] Courts of law have in modern times most usefully adopted. We are therefore of opinion that the arbitrator ought not to find for the plaintiff in respect of the sums kept out of the accounts for the years before 1859.

But they do not apply to the accounts for 1859; and for the sums really and properly expended by the plaintiff in that year we are of opinion that he ought to recover.

BRAMWELL, B. In this case, it will be convenient to state the facts, to shew how I appreciate them. The plaintiff was surveyor of a turnpike road, the trustees of which, sued in the name of their clerk, are the defendants. As such surveyor, it was his duty to find and pay for labour and materials for the repair of the road. He did so, and received from time to time payments on account for the defendants. It was also his duty to render an account to the trustees, of the payments he made and the sums he received. This is found as a fact, and indeed is shewn by his having done so; and it was not only necessary as a matter of account and means of settling between him and them, but also in order to enable them to make and render accounts as required by the statute. He accordingly rendered an account of the years 1856, 1857 and 1858, in which he stated various payments he had made, the amount of his salary, and, on the other side, gave credit for cash received, shewing certain balances due to himself. These accounts were received by the defendants in the belief that they were correct, and treated as such in the returns they were obliged by statute to make, that is to say, they stated they had laid out the sums he mentioned for labour and materials. In point of fact, he had laid out more. He afterwards rendered another account for the year 1859, but, on being challenged as to its correctness, he acknowledged it was not correct, and stated he had laid out more, and claimed payment thereof, and of the items omitted in former years. This [929] second account was not received by the defendants in the belief it was correct, nor treated as such in their returns; as they mentioned therein the sum named in the account, and also the additional sum claimed, adding they had refused payment of it.

This action was brought to recover the omitted items. It was referred to arbitration, and the arbitrator has found, that it was the plaintiff's paramount duty to keep the roads in efficient repair; that, though a certain monthly sum was fixed as the limit, the plaintiff might draw on the treasurer, the plaintiff was not strictly limited to that amount for his outlay, and that he had in fact, in excess of the sums mentioned in the accounts, made payments to the amount of 220*l.* in respect of labour and materials reasonably necessary for, and done and expended in the repair of the roads during the years 1856, 1857, 1858 and 1859. I take it, therefore, that the arbitrator finds that had the plaintiff rendered just accounts, he would have been entitled to receive that amount from the trustees; that is to say, that at one time he had a cause of action against them for money paid to that amount. Now, these accounts were untrue; they directly, indeed, asserted nothing untrue, but they meant that the amounts mentioned in them had been, and alone had been, expended and incurred in the respective years, and I think it makes no difference, that part of the sums he claimed were in fact paid after the account for 1859 was rendered, because I take it that the accounts mean that the monies mentioned in them are all that have been paid or are payable.

The arbitrator further finds that the whole amount ought to have been brought into the accounts of the above years, but was knowingly omitted by the plaintiff partly through negligence, partly to avoid complaints from the trustees, and in expectation of their being in better funds in future years; and the arbitrator adds, "there was no actual fraud, in fact, [930] contemplated by the plaintiff." If this means, as I understand, that he did not intend to put more money in his pocket than was due to him, or that he did not think he was committing a fraud, I am content so to take

it. But if it means that no fraud was committed, then, with sincere respect for the arbitrator, I dissent. Without laying down any more sweeping proposition, I think it may be safely said, that where, as here, there is a duty to tell the truth, and no duty or obligation the other way (which it might be said, would be when one sought to buy poison to murder another), and an untruth is told to the knowledge of the teller, for his own purposes, and the statement is accepted as true, a fraud is committed. If fraud, then, makes any difference, I think it exists. The questions are, can the plaintiff recover for the years 1856, 1857, 1858 and 1859, or if not, for the last or for none?

Now, if the defendants have any right, as against the plaintiff in consequence of these incorrect accounts, it must be in respect of some duty from him to them. For the question here is not whether he shall be punished, but what are his duties and their rights. Now, his duty was the duty of every one who undertakes anything, viz., to bring honesty and reasonable skill and care to its performance. Having undertaken then to render accounts, he was bound to render them honestly, and with reasonable skill and care, not with absolute accuracy, but with no defect arising from fraud or negligence. The duty of care was as great as the duty of honesty, and negligence as much a breach of duty as fraud in the rendering of the accounts. The trustees, therefore, ought to have the same right against the plaintiff if the incorrectness of the accounts had proceeded from carelessness as from fraud. If *Skyring v. Greenwood* proves anything, it proves that. If one can suppose such a case as that there were certain items that ought not to be charged, but he thought they ought, and fraudulently suppressed them, they would have no right [931] against him. This shews that fraud of itself gives no right—it is inaccuracy, and that gives them rights whether it proceeds from fraud or negligence. But can it be said that any negligence in the accounts, however gross, would cause the plaintiff to lose his debt, and forfeit his cause of action once existing, or estop him from shewing the truth? It is to be remembered that these accounts are but statements. Would an inaccurate verbal statement of the amount due, the inaccuracy proceeding from fraud or negligence, and there being a duty to be honest and careful, have this effect? It seems to me that it would not. It is not for me to give reasons for this; it is for those who assert that the plaintiff has lost his right of action to give reasons why it should be so. It is not to punish him, as I have said. Besides, even for punishment such a law as the defendants allege would be unreasonable, because, the punishment would not depend on the gravity of the offence, but on the importance of the subject-matter of it. Thus, the most dishonest suppression of a farthing in the account would be followed by the loss of a farthing only; the most venial suppression of 1000l. would be followed by the loss of that amount. Nor is it necessary so to decide such a case to do justice to the defendants. If, by the falsity of the account, they have sustained damage, they may maintain an action and recover a sum equal to that damage, and not, as here, make a gain by the transaction. Again, the maxim "*Allegans suam turpitudinem non est audiendus*" cannot apply. The plaintiff does not allege his turpitude, it is the defendants who do. The plaintiff alleges he paid this money,—he did so. The defendants say, you have rendered an incorrect account, and done so fraudulently; he admits the former statement, and denies the latter. How can he then be said to set it up as his cause of action, which is what the maxim means? Nor does the other maxim, "*Allegans contraria non est audiendus*" apply. The plaintiff does not allege "*contraria*," [932] which I take it, means at the same time doing in fact what is popularly called "blow hot and cold."

Nor is the case within the rule, that if a man makes a statement with intent another shall act on it, and the other does act on it, the first shall never, against the second, be permitted to deny it, for here there is no evidence the account has been acted on. It was said, I believe by myself, that this account was acted on as much as an account can be, that is to say, it was accepted as true, but if so, it seems to me that such a case cannot be within the rule. On examination of that rule it will be found that it supposes a case where, if the plaintiff could deny his former statement and recover, the defendant would lose precisely what the plaintiff would gain, which would not be the result in such cases as this. That is to say, if a horse is bought on a representation by A. it does not belong to him, and afterwards A. sues the buyer for the horse, if he recovered, the buyer would lose precisely what A.

recovered, and the damage done by the falsity would be to the amount of that recovery ; that is not so here.

Nor do I think those cases apply in which it has been held that money, voluntarily paid with the knowledge of the facts, cannot be recovered back. There an act has been done which it is sought to undo, then as much is to be taken out of the defendant's pocket as is to be put into the plaintiff's. The various authorities cited, with the exception of *Skyring v. Greenwood*, are instances of the application of those rules to which I have addressed myself. In *Shaw v. Picton* the money had been paid over, and that is relied on in the judgment. That case, however, requires notice. As I have said, if it proves anything it shews that the plaintiff could not recover, whether the inaccuracy of his accounts proceeded from fraud or negligence. It is undoubtedly an authority very much in favour of the defendant's argument, but it is distinguishable. Part of the money in [933] that case sought to be set off (which is the same as recovered) by the defendants, had actually been paid, and though the residue had not been specifically paid, the account had continued ; and if the presumption is good, that the first payment out is against the first payment in, the balance also had been paid out. I am aware that the reasons given are not based on this, but the fact is not lost sight of ; and even if it had been, it would only shew the case was the common one of a right judgment with wrong reasons. If I thought it in point, I should acquiesce, but I do not, and certainly think it ought not to be extended. It seems to me, that this reasoning also furnishes an answer to a question, put, I believe, also by myself : "Suppose if the account had shewn a balance against the plaintiff and he had paid it over, could he have recovered it back ?" First, in the case supposed, an act would have been done ; secondly, it is not clear that the plaintiff would be seeking to recover back money by demanding payment of items brought forward anew. Another way of putting this difficulty has occurred to me, viz., "Suppose the plaintiff had wrongly charged his side of the account and over estimated his receipts, and paid over a balance ?" The case is not very probable, but here also an act would be done, viz., the money paid over.

In the result then, I think the burthen on the defendants ; that they have brought forward neither principle nor authority to justify us in holding that the plaintiff has lost a cause of action he once had ; that the tenor of the authorities is the other way—I mean those which hold that the statement must be acted on, or the position of the one party changed in order to bind the other (see *Sanderson v. Collman*) (4 Man. & G. 209) ; and the principle also applies by which a bare promise to give a chattel or do anything would not bind, while the gift itself and the act when done would. It seems to me also a great mischief would be introduced if a man might say, "I [934] owed you money and have not paid you, but you said, carelessly, I had, so now I will not pay."

I think, therefore, the plaintiff entitled to recover for all the years, but as to the year 1859, I think it clear on the defendants' own reasoning, as to that year the account was not accepted as true ; the fraud then was not committed, only attempted ; the inaccuracy was corrected ; the defendants never could have maintained any action for breach of duty as to the accounts rendered for 1859. It seems to me that the plaintiff is entitled to judgment for his whole claim, clearly for the year 1859.

Judgment accordingly.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

ATKINSON v. DENBY. Feb. 10, 1862.—The plaintiff, being in embarrassed circumstances, offered his creditors a composition of 5s. in the pound. The defendant, a creditor, refused to accept it unless the plaintiff paid him 50l., and gave him a bill of exchange for 103l. The other creditors would not accept the composition if the defendant did not. The plaintiff paid the defendant the 50l. and gave him the bill of exchange, and the defendant then executed the composition deed. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plaintiff might recover back the 50l. in an action for money had and received.

[S. C. 31 L. J. Ex. 362; 8 Jur. (N. S.) 1012; 10 W. R. 389; 7 L. T. 93. Applied, *Re Lenzberg's Policy*, 1877, 7 Ch. D. 654. Referred to, *Latter v. Braddell*, 1881, 50 L. J. C. P. 169.]

This was an appeal by the defendant against the decision of the Court of Exchequer in making absolute a rule to enter the verdict for the plaintiff for the sum of 50l. The pleadings and facts fully appear in the report of the case in the Court below: 6 H. & N. 778.

Thrupp (Mathew with him) now argued for the defendant.(a)¹ This is the case of a voluntary payment of money, with full knowledge of the circumstances, and therefore it cannot be recovered back. There are various cases where, under similar circumstances, bills of exchange have been [935] given, and payment having been enforced by third parties, the debtor has been allowed to recover back the amount, because the payment was under coercion; but this is an attempt to recover back money voluntarily paid. *Smith v. Bromley* (2 Doug. 695, note) and *Smith v. Cuff* (6 M. & Sel. 160) are relied upon by the plaintiff; but, in *Higgins v. Pitt* (4 Exch. 312, 325), Parke, B., after expressing a doubt whether, notwithstanding the dictum of Lord Ellenborough and Bayley, J., in *Smith v. Cuff*, a debtor who pays money down can be considered as oppressed, said "if he voluntarily pays afterwards it is clear that he cannot recover it back." *Wilson v. Ray* (10 A. & E. 82) was decided on that ground, and there is no distinction in principle between that case and the present. [Cockburn, C. J. The plaintiff was obliged to pay the money in order to obtain the assent of all the creditors. Crompton, J. The distinction is where the parties are in the same position, and where the creditor takes advantage of the debtor.] In *Smith v. Bromley* (2 Doug. 695, 697) Lord Mansfield said, that where the act was a violation of the general laws of public policy, the party paying the money could not recover it back. [Crompton, J. Here the act is not merely against public policy, it is a fraud upon the other creditors.] If the plaintiff recovers back this money he will be taking advantage of his own fraud. The true test is, whether the payment was voluntary or under coercion: *Gibson v. Bruce* (5 Man. & G. 399), *Glynn v. Thomas* (11 Exch. 870). The plaintiff was not compelled to pay the money for he might have become bankrupt, but he chose to pay it in order to obtain the advantage of a composition deed. The two parties are in *pari delicto*, and therefore the rule applies, "*potior est conditio defendentis*." In *Viner v. Hawkins* (9 Exch. 266) [936] the money was paid by an insolvent debtor in order to obtain his discharge from custody under a writ of *ca. sa.*, and it was held that he could not recover it back.

Cleasby appeared for the plaintiff, but was not called upon to argue.

COCKBURN, C. J. We are all of opinion that *Smith v. Bromley* and *Smith v. Cuff* govern the present case. It is true that the latter relates to the giving promissory notes, not money; but, in point of principle, I can see no difference between giving a promissory note or money, as regards the act being voluntary. Where the one person can dictate, and the other has no alternative but to submit, it is coercion, and, in the language of Lord Ellenborough, "one holds the rod and the other bows to it."(a)² Where a debtor offers his creditors a composition, whereby they are all to receive the same proportionate amount in respect of their debts, it is contrary to the policy of the law to allow him to purchase the consent of one creditor by payment of his debt in full. It is said that both parties are in *pari delicto*. It is true that both are in *delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit. We are all of opinion that the cases I have mentioned apply, and that it would be mischievous if we were to hold that they did not.

Judgment affirmed.

(a)¹ Before Cockburn, C. J., Wightman, J., Crompton, J., Byles, J., and Keating, J.

(a)² *Smith v. Cuff*, 6 M. & Sel. 165.

[937] IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

CLARKE, *Appellant* v. HOLMES, *Respondent*. Feb. 11, 1862.—The plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service, the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. Held in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the defendant was liable for the injury.

[S. C. 31 L. Ex. 356; 8 Jur. (N. S.) 992; 10 W. R. 405. Not applied, *Smith v. Howard*, 1870, 22 L. T. 132. Applied, *Britton v. Great Western Cotton Company*, 1872, L. R. 7 Ex. 136. Adopted, *Webbin v. Ballard*, 1886, 17 Q. B. D. 124. Observed upon, *Thomas v. Quatermaine*, 1887, 18 Q. B. D. 690.]

This was an appeal from the decision of the Court of Exchequer in discharging a rule to enter a nonsuit or grant a new trial. The pleadings and facts fully appear in the report of the case, 6 H. & N. 349.

T. Jones argued for the defendant (the appellant) in last Hilary Vacation (*b*) (Feb. 4 and 5). Both upon principle and authority the plaintiff is not entitled to recover; for he voluntarily undertook a dangerous service, with full knowledge of the danger, and in consideration of wages adequate to the risk. Negligence does not affect the question, because danger is the essence of the vocation. [Cockburn, C. J. The plaintiff complained of the dangerous state of the machinery, and was told that it should be rectified. Wightman, J. The defendant was under a statutory obligation to fence the machinery, and in consequence of his not doing so the accident happened.] The omission to fence was not the proximate cause of the mischief. The Factory Acts, 7 & 8 Vict. c. 15, and 19 & 20 Vict. c. 38, were not passed [938] for the benefit of adults, but for the benefit of women and children. Their object is to protect those who are unable to take care of themselves; not persons who voluntarily expose themselves to danger. The 7 & 8 Vict. c. 15, s. 21, only makes it unlawful not to fence machinery near which children or young persons are liable to pass or be employed. The question is whether a person, who for adequate wages accepts a dangerous employment, with full knowledge of the danger, can afterwards sue his employer for injury sustained in the course of that employment. [Keating, J., referred to *Mellors v. Shaw* (1 B. & S. 437).] The finding of the jury only amounts to this, that the plaintiff performed a dangerous occupation carelessly. [Cockburn, C. J. The danger arose from the machinery not being fenced. There is always more or less danger in descending or ascending a mine, but it is the duty of the mine owner to take all reasonable precautions against accident: *Paterson v. Wallace* (1 Macqueen, 748), *Bartonshill Coal Company v. Reid* (3 Macqueen, 266).] There was no accession of danger beyond that originally accepted. [Cockburn, C. J. The reason why no action will lie, under ordinary circumstances, is because the servant knows that he has undertaken a dangerous service; here, there was extraordinary danger, and was only submitted to on a promise by the master that it should be remedied.] *Priestly v. Fowler* (3 M. & W. 1) shews, that wherever a servant accepts a dangerous occupation, he must bear the risk. [Cockburn, C. J. That is, whatever is fairly within the scope of the occupation, including the negligence of fellow-servants; here it is the negligence of the master. Crompton, J. It cannot be made part of the contract, that the master shall not be liable for his own negligence.] The question is, what was the actual bargain between the plaintiff and defendant. [Bytes, J. While the machinery was fenced, was not this the contract of the plain-[939]-tiff: "I will work with fenced machinery;" after the fencing was broken, was not the contract: "I will continue to work, if you will restore the fencing?"] Negligence is only a form of voluntary contribution. The ground upon which negligence is an answer proceeds

(*b*) Before Cockburn, C. J., Wightman, J., Williams, J., Crompton, J., Willes, J., Bytes, J., and Keating, J.

from the maxim, "volenti non fit injuria." A master is not liable for injury to his servant whilst using dangerous machinery, simply because the master knew it was unsafe, if the servant had the same means of knowledge: *Williams v. Clough* (3 H. & N. 258). In *Roberts v. Smith* (2 H. & N. 213) it was assumed that mere knowledge on the part of the master that the scaffold was unsafe, would not render him liable, and the new trial was granted on the ground that there was evidence of the personal interference and negligence of the master. The plaintiff might have refused to continue in the defendant's service unless the machinery was fenced, but, rather than give up his employment, he was willing to incur the risk. In *Senior v. Ward* (1 E. & E. 385) there was habitual negligence on the part of the master, but the proximate cause of the injury was the pitman's refusal to test the rope; here the proximate cause was the act of the plaintiff in putting his arm on the machine. [Cockburn, C. J. He could not perform his duty without doing it.] Where the relation between the parties does not create the duty the breach of which is complained of, an express allegation of duty will not avail: *Seymour v. Maddox* (16 Q. B. 326). [Cockburn, C. J. If in that case the plaintiff had said to the defendant that it was dangerous to pass from the dressing-room to the stage without the floor being sufficiently lighted and the hole fenced, and the defendant had promised that it should be done, that would have been a parallel case to this.] In *Assop v. Yates* (2 H. & N. 768) it was held that the defendant was not [940] liable on two grounds: first, because, after having complained of the hoarding and knowing all the circumstances, he voluntarily continued at work; secondly, because the part which the defendant took in causing the injury was too remote to give a cause of action to the plaintiff. In *Skipp v. The Eastern Counties Railway Company* (9 Exch. 223) it was the duty of the plaintiff to attach the luggage vans to the locomotive engine. The Company's staff for the performance of this work was not sufficient, but the plaintiff continued to work without making any complaint, and it was held that the Company were not liable for injury done to him. Although the defendant was guilty of a breach of duty, the plaintiff cannot recover, if he wilfully, and contrary to the command of the defendant, committed the act which was the direct cause of the injury: *Caswell v. Worth* (5 E. & B. 849). In *Cowley v. The Mayor, &c., of Sunderland* (6 H. & N. 565), the defendants had undertaken a statutory duty, which bound them to exercise ordinary care and diligence in providing machines reasonably safe for use. He also referred to *Coe v. Platt* (6 Exch. 752) and *Paterson v. Wallace* (1 Macqueen, 748).

Bliss (Aspland with him), for the plaintiff (the respondent). The argument for the defendant is, in substance, that the plaintiff, knowing the danger, voluntarily incurred it; and that he was the proximate cause of the injury. But, at the time the plaintiff entered into the service of the defendant, the machinery was properly fenced, and therefore, the contract was, on the one hand, that the plaintiff should serve the defendant, and, on the other, that the defendant should keep the machinery properly fenced. There was no evidence that the plaintiff was a weekly servant. [Cockburn, C. J. [941] If so, at the commencement of each week he would enter into a new contract, knowing that the machinery was unfenced.] The plaintiff complained of the dangerous state of the machinery, and was promised that the fencing should be restored. *Senior v. Ward* (1 E. & E. 385) is an authority that a complaint to a manager is a complaint to the master. The injury was caused by the negligence of the defendant in leaving dangerous machinery unfenced. The plaintiff having continued in the service upon the faith of the promise that the machinery should be fenced, had a right to expect, every time he went to work, that he should find it fenced. The questions are: First, was there a statutory duty imposed on the defendant to keep the machinery fenced? secondly, has there been a breach of that duty? thirdly, is the defendant responsible for that breach of duty? fourthly, has the plaintiff been injured in consequence of the defendant's breach of duty, without having contributed to the injury by his own negligence? The obligation to fence imposed by the 7 & 8 Vict. c. 15, s. 21, is not confined to factories in which children and young persons are employed: *Coe v. Platt* (6 Exch. 752). The 19 & 20 Vict. c. 38 has not altered the law in that respect, but has merely defined the machinery to which the 7 & 8 Vict. c. 15 applies. There has clearly been a breach of the duty to fence; then is the defendant responsible for that breach of duty? In *Priestly v. Fowler* (3 M. & W. 1), and *Dynen v. Leach* (26 L. J. Exch. 221), the plaintiffs entered into a contract by which they took upon themselves the risk of the service. Here the

contract was, not that the plaintiff should take upon himself the risk, but that the defendant should keep the machinery fenced, or be responsible for the consequences of his neglect. It is no answer, that the plaintiff voluntarily undertook a dangerous employment, because there was nothing in the contract to [942] modify the duty or responsibility of the defendant. In an action for damage occasioned by the defendant's negligence, it is a material question whether or not the plaintiff might have escaped the injury by ordinary care on his part: *Clayards v. Delhick* (12 Q. B. 439). Here the jury have found that there was no negligence on the part of the plaintiff *Couch v. Steel* (3 E. & B. 402) shews that a master is liable for the breach of a statutory duty. Knowledge is only material as an ingredient of negligence. *Thompson v. The North Eastern Railway Company* (30 L. J. Q. B. 67), *Roberts v. Smith* (2 H. & N. 213), *Mellors v. Shaw* (1 B. & S. 437) and *Ashworth v. Stanway* (30 L. J. Q. B. 183) are authorities in favour of the plaintiff. The cases in which it has been held that a master is not responsible for injury done to a servant by a fellow-servant, are founded on the nature of the contract, viz., that the servant shall undertake the ordinary risks of the service, including that of his fellow-servants. In *Williams v. Clough* (3 H. & N. 258), if the defendant had known of the defect in the ladder, he would have been liable. *Senior v. Ward* (1 E. & E. 385) proceeded on the ground that the pitman was guilty of negligence. In *Seymour v. Maddox* (16 Q. B. 326), the plaintiff knew that it was dangerous to cross the stage for want of proper lights, but made no complaint, therefore, either the defendant was released from his duty, or it was modified, by express contract; or the plaintiff was guilty of negligence.

J. Jones replied.

Car. adv. vult.

The following judgments were now delivered.

COCKBURN, C. J. In this case I am of opinion that the [943] decision of the Court of Exchequer should be upheld, though not precisely on the grounds on which that decision appears to have proceeded.

I think the question whether any liability in the defendant arises under the statutes 7 & 8 Vict. c. 15, and 19 & 20 Vict. c. 38, is open to considerable doubt, owing to the plaintiff being an adult.

It appears to me, however, unnecessary to decide this question, being clearly of opinion that, independently of any statutory duty or obligation, there was negligence in the defendant in not fencing the machinery on which the plaintiff was employed. And although the declaration in this action is based on the alleged statutory duty of the defendant to fence the machinery, the leave to move was reserved on the question of negligence, and there is full power to amend the pleadings; and we can therefore so mould the declaration as to make it applicable to the grounds on which we think the case should be decided.

I consider the doctrine laid down by the House of Lords, in the case of *The Bartonshill Coal Company v. Reid*, as the law of Scotland with reference to the duty of a master, as applicable to the law of England also, namely, that where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur. No doubt, when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting [944] parties contemplated as incidental to the employment. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract, shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept.

In the present case, at the time the plaintiff entered on the employment, the machinery was properly fenced; on its ceasing to be so, the manager of the works, on the remonstrance of the plaintiff, promised in the presence of the defendant, the master, that the defect should be made good. It must be taken, therefore, that at the time the contract between the plaintiff and defendant was entered into, it was

contemplated by the parties that the machinery should be fenced. It follows that, through the negligence of the master in omitting to keep the machinery fenced, the servant has been exposed to danger to which he ought not to have been subjected; and, the injury of which the plaintiff complains having thus arisen, the defendant is justly and properly liable.

It was, indeed, strongly urged upon us, on the part of the defendant, that, as the plaintiff, upon becoming aware that the machinery was no longer properly fenced, instead of refusing to go on, as he might have done, continued to perform his service with a knowledge of the increased risk to which he was exposed, he must be taken to have voluntarily incurred the danger, and is, therefore, in the same position as if he had originally accepted the service as one to be performed on unfenced machinery. I am, however, of opinion, that there is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one, who, on a [945] temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied. In the latter case it seems to me, that the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation.

No doubt, a defect thus arising in machinery, may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that a party complaining had materially contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff who has materially contributed to his own injury, by his own negligence, cannot recover, although he may shew negligence in the opposite party. But, the question whether the injury of which a plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff has had any share in bringing it about, is one wholly for the jury. In the present case, the jury have determined this question in favour of the plaintiff, and we are bound by their decision. It is, indeed, put to us that, notwithstanding this finding of the jury, the knowledge of the plaintiff that the machinery was unfenced, is, in point of law, sufficient to prevent the plaintiff from recovering. But I am of opinion that it is only a fact in the case, to be taken into consideration by the jury, with all the other facts and circumstances, in determining the question whether the plaintiff has himself helped to bring about the accident in respect of which he seeks to charge the defendant. In this sense, and in this sense only, such knowledge might afford an answer to the action. It does not do so in point of law. And, in the present case, on the finding of the jury, it does not do so in point of fact. I am, therefore, of opinion that the Court of Exchequer were right in refusing to disturb the verdict for the plaintiff.

[946] WIGHTMAN, J. I concur in the judgment of the Lord Chief Justice, but not in the reasons on which it is founded.

CROMPTON, J., said: I have arrived at the same conclusion. It seems to me that the only question reserved to us is whether the mere knowledge of the plaintiff, when he did the act, of the dangerous state of the machinery, is a bar to his recovery, notwithstanding the negligence of the defendant. I think it must be taken to have been found by the jury that there was negligence on the part of the defendant for which he is responsible. It is not necessary to consider whether the opinion expressed by Parke, B., in *Coe v. Platt* (6 Exch. 757), is correct, that though the principal object of the 7 & 8 Vict. c. 15, was the protection of women and children, yet that any person might complain, who had sustained an injury from machinery which ought to have been fenced, because it must be assumed, upon the finding of the jury, that there was a cause of action arising from the negligence or default of the defendant; and the question is whether the mere knowledge of the plaintiff of the dangerous nature of the service precludes his right of action. I found my judgment on two propositions, viz., that there is no defence under the principle of law laid down in *Priestly v. Fowler* (3 M. & W. 1), and the plaintiff has not contributed to his injury by his own negligence. Where a party enters upon a service, he must be supposed to have contemplated dangers arising within the scope of his employment, including the negligence of his fellow servants, and therefore for ordinary risks he cannot expect to be indemnified. Here we need not consider what personal knowledge the plaintiff had of the danger, because there was a neglect of duty on the part of the defendant in not

keeping the machinery fenced, for which he is responsible. It is said that mere knowledge is a defence; I cannot think so. The party [947] cannot recover if he has contributed to the accident; and I agree with the observation of my lord, that knowledge is only a part of negligence, and it is still a question whether there was negligence or not. I am confirmed in that view by what Lord Campbell said in *Senior v. Ward* (1 E. & E. 385). Upon these grounds I am of opinion that the judgment of the Court below ought to be affirmed.

WILLES, J. I agree with the opinion of my brother Wightman.

BYLES, J. I am of opinion that the judgment of the Court of Exchequer must be affirmed.

This is a case of very great importance, and I am anxious that its decision should repose on what seems to me the true ground.

I do not rest the right of the plaintiff to recover on the statutable obligation incumbent on the master to fence the machinery, nor yet on the personal knowledge of the master that the machinery was improperly left unfenced, though I do not presume to intimate any disagreement with the Court of Exchequer.

But I think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition.

The case of *Priestly v. Fowler* introduced a new chapter into the law, but that case has since been recognised by all the Courts, including the Court of error and the House of Lords. So that the doctrine there laid down, with all the consequences fairly deducible from it, are part of the law of the land. But the principles laid down in *Priestly v. Fowler*, and all the examples there given of their application, relate to the conveniences and casualties of ordinary or domestic [948] life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery.

It is, in most cases, impossible that a workman can judge of the condition of a complex and dangerous machine, wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both. The master again is a volunteer, the workman ordinarily has no choice. To hold that the master is responsible to his workman for no absence of care, however flagrant, seems to me in the highest degree both unjust and inconvenient.

On the other hand, to hold that the master warrants the safety and proper condition of the machine, is equally unjust to the master, for no degree of care can insure perfect safety; and it is equally inconvenient to the public, for who would employ such machines if he were an insurer?

It seems to me that the true rule lies midway between these extremes, and I therefore agree in the conclusion arrived at by the Lord Chief Justice. The master is neither, on the one hand, at liberty to neglect all care, nor, on the other, is he to insure safety, but he is to use due and reasonable care. The degree and nature of that care are to be estimated on a consideration of the facts of each particular case. I do not say that the degree of care is, in all cases, the same as the master must observe towards strangers.

This rule seems to me the only rule consistent with justice and public convenience. But I do not rest it on those considerations alone. It reposes on very high authority. Lord Cranworth, in delivering the judgment of the House of Lords in *The Bartonshill Coal Company v. Reid* (3 Macqueen, 266), [949] states that, in the case of dangerous machinery, the master is bound to exercise due care. It is true that this was a Scotch case, but in that very case the law of Scotland and the law of England were held to be the same in this branch of the law of master and servant.

It may be true, that some of the cases cited at the bar are not quite consistent with this rule, particularly those which seem to make the personal misconduct or personal knowledge of the master a necessary ingredient in his responsibility. But we are a Court of error, at liberty to decide on principle, and fortified by higher authority. Why may not the master be guilty of negligence by his manager, or agent, whose employment may be so distinct from that of the injured servant, that they cannot with propriety be deemed fellow servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable.

It is said that the verdict exempting the servant from the charge of negligence is inconsistent with the fact that he knew the machinery to be unfenced. But knowledge is only an ingredient in negligence. It may be, that the knowledge of the servant induced him to use extraordinary care, which care was yet insufficient to preserve him from accident. Besides, a servant knowing the facts may be utterly ignorant of the risks.

Lastly, the original contract of the servant was to work with fenced machinery, and it was his master, and not he, that violated the condition; and in so doing exercised a species of compulsion over the servant.

For these reasons I think the plaintiff below is entitled to our judgment.

Judgment for the plaintiff below.

[950] IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

THE GREAT NORTHERN RAILWAY COMPANY, *Appellants v.* BEHRENS, *Respondent.*

Feb. 5, 1862.—Where a carrier receives goods of the description mentioned in the 11 Geo. 4 & 1 Wm. 4, c. 68, and the person delivering the same has declared their value and nature, he is not bound to tender, but the carrier must demand, the increased charge mentioned in the notice affixed in his office, warehouse or receiving house, whether the goods are there delivered, or to a servant sent to fetch them; and if no such demand is made, the carrier is liable for the loss of or injury to the goods, although the increased charge has not been paid. So Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer).

[S. C. 31 L. J. Ex. 299; 8 Jur. (N. S.) 567; 10 W. R. 389; 8 L. T. 328. Distinguished, *Robinson v. London and South Western Railway*, 1865, 19 C. B. (N. S.) 51.]

This was an appeal against the decision of the Court of Exchequer, in discharging a rule to enter the verdict for the defendant, pursuant to leave reserved at the trial. The pleadings and facts fully appear in the report of the case, 6 H. & N. 366.

C. Pollock argued for the appellants (the defendants below) in last Michaelmas Vacation (*a*) (December 2). The Company are not liable for the damage done to the picture. The statement in the receipt was not a declaration of value, nor was it accompanied with payment of, or an engagement to pay the increased charge, as required by the 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1. The Company have not waived the performance of any condition precedent. The effect of the statute is, that on the one hand, the carrier, as a condition precedent to the protection of the statute, must affix in his office a notice of the increased rate of charge; on the other hand, the con-[951]-signor of the goods must declare their nature and value, and pay, or engage to pay, the increased rate of charge. The jury having found that there was no such engagement by the plaintiff, the question is, whether it was the duty of the defendants to insist on payment or an engagement to pay the increased rate. There is nothing in the Act to lead to such an inference. The 1st section prescribes what is to be done by the consignor, and its requisites must be complied with, before any liability can attach to the carrier: *Hart v. Baxendale* (6 Exch. 769). That case is no authority that, upon the consignor declaring the value and nature of the goods, it is the duty of the carman to demand the increased rate of charge. *Prima facie* the carrier is protected by having affixed the notice in his office. [Wightman, J. What do you say the consignor ought to have done?] He ought to have said, "I am ready to pay the increased rate of charge." [Wightman, J. How is he to know the amount?] The 2nd section says, that all persons shall be bound by the notice without further proof that it came to their knowledge.

Keane, for the respondent (the plaintiff below). The Company ought to have demanded the increased rate of charge. The 1st section of the 11 Geo. 4 & 1 Wm. 4, c. 68, uses, with reference to it, the word "accepted"; the 2nd section uses the words

(*a*) Before Wightman, J., Williams, J., Willes, J., Byles, J., Keating, J., and Blackburn, J.

"demand and receive;" the 3rd uses the word "accepted"; but the word "accepted" in the 1st and 3rd sections is expounded by the 2nd, and means accepted after demand. It is the duty of the consignor to take the first step, and declare the value and nature of the goods, whether they are delivered at the office or elsewhere; the carrier must then demand the increased charge, and, if he omits to do so, he loses the protection of the statute. In *Hart v. Bazendale* (6 Exch. 769), Maule, J., said: "The meaning of the statute is, that when the value of the parcel has been [952] declared, the carrier may demand an increased rate, in conformity with the notice affixed in his office. The notice is not in restriction of the carrier's liability, but a mere notice of tariff. If there is no tariff, the carrier has no right to charge the increased rate. But if a notice is affixed and an increased rate demanded, the owner of the goods may refuse to pay it, and require the carrier to carry the goods on the terms of not being responsible for their loss." Suppose the consignor is a foreigner, or unable to read, how is he to know what is the increased rate of charge? The 2nd section merely says, that it shall be lawful for the carrier "to demand and receive an increased rate of charge;" it does not require the consignor to tender it. [Blackburn, J. When the consignor makes the declaration of value, ought he not to state that he is ready and willing to pay the increased charge?] The consignor must make the declaration, whether a notice is affixed in the carrier's office or not. The affixing the notice entitles the carrier to demand the increased rate of charge. The concluding part of the 1st section must be read in connection with the 2nd. The 2nd section contemplates a delivery, not only at the office in which the notice is affixed, but elsewhere, and consequently if the goods are delivered and their value and nature declared elsewhere, the carrier must demand the increased rate of charge, for the consignor cannot know it. Again, the 3rd section supposes a demand made and receipt given, when no notice has been affixed; and if it is the duty of the consignor to tender the increased rate of charge, he must do so in all cases; but how can he tender when no notice has been affixed? It is sufficient if the consignor is ready to pay the increased rate of charge when it is demanded: *Pickford v. The Grand Junction Railway Company* (8 M. & W. 372). The statute relieves the carrier from liability, not by reason of his having affixed a notice in his office, but [953] provided he demands the increased rate of charge notified in it, and the consignor refuses to pay it.

C. Pollock, in reply, referred to *Batson v. Donovan* (4 B. & Ald. 21), and *Owen v. Burnett* (2 C. & M. 353).

Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN, J. This case was argued on the 2nd of December, and stood over in consequence of some doubt entertained by some members of the Court. Upon consideration, however, of the facts and of the statute 1 Wm. 4, c. 68, ss. 1, 2, 3, we are of opinion that the judgment of the Court of Exchequer was correct, and that the respondent is entitled to our judgment.

We think that the respondent having declared the value of the picture to the carman, who was the agent of the appellants, and who received the same to be carried by them, was entitled, upon the loss of it by the appellants, to recover its value, though he did not pay or offer to pay any increased rate in proportion to the value, no such payment having been required either at the time of delivery to the carman, or at any other time before the loss.

The case of *Hart v. Bazendale*, 6 Exch. 769, decides that, in such a case as the present, the person delivering the goods to the carrier must, in the first instance, declare their value, in order to fix the carrier with responsibility, and the carrier may then require him to pay an increased rate of charge according to a tariff put up in the office; but there is nothing in the statute which protects him from liability, if, after the value is declared to be such as would entitle him to demand an increased rate of charge, he chooses to accept the [954] goods to be carried without making any demand of such increased rate, or requiring it to be either paid or promised. The carrier is not bound to accept such goods for carriage without payment of such increased rate, if required; but if he choose to do so, and the value is declared, he will not be protected by the Act.

We agree, therefore, in opinion with the Court of Exchequer, and the judgment will be affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

MILLER AND OTHERS v. TETHERINGTON. Feb. 11, 1862.—A custom that underwriters are not liable, under the ordinary form of policy, for general average in respect of the jettison of goods stowed on deck, is a valid custom and does not contradict the terms of the policy: so Held in the Exchequer Chamber (affirming the judgment of the Court of Exchequer).

[S. C. 31 L. J. Ex. 363; 8 Jur. (N. S.) 1039; 10 W. R. 356; 6 L. T. 231.]

This was a proceeding in error on the judgment of the Court of Exchequer for the plaintiffs on the demurrers to the pleas and replications. The pleadings fully appear in the report of the case in the Court below, 6 H. & N. 278.

Broun now argued for the plaintiffs.(a) The argument was in substance the same as in the Court below. In addition to the authorities there cited, *Da Costa v. Edmunds* (4 Camp. 142) was relied on.

Mellish (with whom was Honyman) appeared for the defendant, but was not called upon to argue.

[955] COCKBURN, C. J. We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. The policy is in general terms, which, it is admitted, embraces the case of general average. But then the pleas allege a custom at Liverpool, according to which, where a policy of insurance is in general terms, the underwriter is not liable for general average or contribution in respect of the jettison of goods which instead of being stowed below deck are stowed on deck. The question is whether such a custom can be imported into the policy, so as to limit the liability of the underwriters. The Court below held that the policy must be read as incorporating the custom. I think that the reasons given by the Court of Exchequer are so clear and satisfactory that it is unnecessary to say more than that we concur in the judgment of that Court, and upon the grounds there stated.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

BIGGE AND OTHERS v. PARKINSON. Feb. 10, 1862.—The plaintiffs having entered into an agreement with the East India Company for the conveyance of troops to Bombay, the defendant undertook to supply the plaintiffs with troop stores, “guaranteed to pass survey of the East India Company’s officers”: Held, in the Exchequer Chamber, that this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended.

[S. C. 31 L. J. Ex. 301; 8 Jur. (N. S.) 1014; 10 W. R. 349; 7 L. T. 92. Referred to, *Jones v. Just*, 1868, L. R. 3 Q. B. 203; *Mody v. Gregson*, 1868, L. R. 4 Ex. 53. Not applied, *Readhead v. Midland Railway*, 1869, L. R. 4 Q. B. 386. Applied, *Bear v. Walker*, 1877, 46 L. J. C. P. 679; 37 L. T. 278; 25 W. R. 880. Distinguished, *McClelland v. Stewart*, 1883, 12 L. R. Ir. 125. Referred to, *Wallis v. Russell*, [1902] 2 Ir. R. 594, 617.]

Error on a bill of exceptions. The declaration stated that the plaintiffs were about to dispatch a certain vessel, called the “Queen Victoria,” with certain troops and [956] marine boys and passengers on board thereof, on a certain voyage, to wit, from London to Bombay, as the defendant well knew; and thereupon the plaintiffs, at the request of the defendant, ordered of the defendant, who then carried on the business of a provision merchant, and agreed to buy of him divers provisions and stores for the use of and to be used and consumed by the said troops and marine boys and

(a) Before Cockburn, C. J., Wightman, J., Crompton, J., Willes, J., Byles, J., and Keating, J.

passengers on the said voyage, at certain prices then agreed upon between the plaintiffs and defendant. And the defendant agreed to supply the same in the way of his business for the purpose aforesaid, and then promised the plaintiffs that the said provisions and stores should be, and be shipped, in a condition reasonably fit and proper for the said purpose of being so used and consumed as aforesaid. Breach: that although the defendant supplied provisions and stores for the purpose aforesaid, and the plaintiffs paid for the same at the prices aforesaid, the said provisions and stores were not reasonably fit and proper for the said purpose, nor supplied in a reasonably fit and proper condition, but were unsound and unwholesome, and wholly unfit and improper, and in a wholly unfit and improper condition for the said purpose, &c.

Plea: Non-assumpsit. Issue thereon.

The cause was tried before Pollock, C. B., at the London Sittings after Michaelmas Term, 1860, when the following facts appeared. The plaintiffs were owners of a ship called the "Queen Victoria," and were about to charter her to the directors of the East India Company for the conveyance of troops from London to Bombay for the East India Company, and for the supply of those troops with provisions and stores during the voyage. The plaintiffs advertised for tenders for the supply of provisions and stores, and entered into an agreement with the East India Company for the conveyance and supply of troops. The defendant afterwards wrote and sent to the ship's husband of the "Queen [957] Victoria," acting as agent for the plaintiffs, the following letter:—

"Sir,—I hereby undertake to supply your ship, the 'Queen Victoria' to Bombay, with troop stores, viz., dietary, mess utensils, coals, berth water and water casks, at 6l. 15s. 6d. per head, guaranteed to pass survey of the Honourable East India Company's officers, and also to guarantee the quantities as per invoice, to be on board on Sept. 13.—Yours obediently,
"J. H. PARKINSON."

The plaintiffs afterwards saw the defendant and accepted this tender; and accordingly ordered of him, and he thereupon supplied to the plaintiffs, troop stores for the supply of 234 soldiers on their voyage on board the vessel "Queen Victoria," from London to Bombay; which provisions and stores passed the survey of the Honourable East India Company's officers. In reference to these provisions and stores the defendant sent an invoice to the master of the vessel, stating the particulars of the provisions and stores so purchased, as being provisions and stores for 234 men, at 6l. 15s. 6d. per head, amounting to 1585l. 7s., which the plaintiffs paid the defendant. The provisions and stores proved unsound and unwholesome.

The Lord Chief Baron directed the jury that, there being an express guarantee, no implied promise of the defendant could be imported into the contract, and there was no evidence to support the agreement in the declaration; whereupon the jury found a verdict for the defendant.

The plaintiffs' counsel having tendered a bill of exceptions to the above directions, the case was now argued by

Cleasby, for the plaintiffs.(a) There was evidence for the [958] jury of the contract alleged in the declaration, viz., that the provisions and stores should be reasonably fit for the purpose of being used by the troops. Where goods are to be supplied for a particular purpose, the law implies that they shall be fit for that purpose. There is nothing in the tender of the defendant, which formed the basis of the contract, to prevent that implication of law. The defendant contends that because there is an express guarantee that the provisions and stores shall be such as will pass survey of the East India Company's officers, no implied warranty can be imported; but the contract is, that they shall pass the survey of the officers and be reasonably fit for the purpose for which they were required.

The Court then called on

The Attorney General (with whom was T. J. Clark), for the defendant. First, even if there had been no express stipulation, the law would not have implied the one alleged in the declaration. In the absence of fraud, the maxim "caveat emptor" applies. [Crompton, J. This is not a contract for the purchase of a specific article, but for commodities to be supplied; then must not the seller supply something

(a) Before Cockburn, C. J., Wightman, J., Crompton, J., Keating, J., and Byles, J.

reasonably fit for the purpose? *Laing v. Fidgeon* (6 Taunt. 108).] The plaintiffs had an opportunity of inspecting the provisions and forming their own judgment upon them. There was no peculiar knowledge on the part of the defendant respecting the goods. An implied warranty only arises where the article is not in esse but has to be manufactured, or where there is greater knowledge on the part of the seller than the buyer, and the buyer, relying on the seller, does not exercise his judgment. The defendant was not [959] the manufacturer. [Cockburn, C. J. He is nevertheless responsible, and must resort to his remedy against the manufacturer. Where a person undertakes to supply provisions, and they are supplied in cases hermetically sealed, but turn out to be putrid, it is no answer to say that he has been deceived by the person from whom he got them.] On a sale of meat, where buyer and seller have the same means of ascertaining its condition, there is no implied warranty that it is fit for human food: *Emmerton v. Matthews* (ante, p. 586). The rule is thus stated in Chitty on Contracts, p. 399, 6th ed.:—"If a man purchase goods of a tradesman without in any way relying upon the skill and judgment of the vendor, the latter is not responsible for their turning out contrary to his expectation; but that if a tradesman be informed at the time the order is given of the purpose for which the article is wanted, and the buyer relies on the seller's judgment, the latter impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is required." [Cockburn, C. J. There is no difference in this respect between goods to be manufactured and provisions to be supplied.] There is nothing to shew that the plaintiffs relied on the judgment of the defendant. In *Jones v. Bright* (5 Bing. 533) the defendant was the manufacturer, and knew the purpose for which the article was wanted; and at the time the order was given the buyer had no opportunity of inspecting it. [Cockburn, C. J. Can it make any difference that the seller is not the manufacturer? Suppose he says, "I do not manufacture but I will sell you the article you wish." In *Gardiner v. Gray* (4 Camp. 144), Lord Ellenborough said, that "where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply." Suppose a person, on the negotiation for the purchase of a [960] horse, told the seller that he wanted it for hunting, would there be an implied warranty that it was fit for that purpose? [Cockburn, C. J. If a person engages another to supply him with a certain number of horses for a particular purpose, as for instance a cavalry regiment, and relies on the judgment of the seller, would he not be bound to provide horses reasonably fit for that purpose? If the buyer was to select the horses, the case might be different. So here, when the defendant undertook to supply provisions for the troops, he impliedly undertook that they should be fit for consumption.] The mere fact that the seller has been informed by the buyer of the purpose for which he wants the article, will not raise an implied warranty that it is fit for that purpose. Secondly, there being an express guarantee that the commodities shall pass survey of the officers of the East India Company, no other warranty can be implied. The parties agreed upon a particular mode by which the quality of the provisions was to be tested; and when approved, all responsibility on the part of the seller was at an end. The Court will not extend an express warranty by implication: *Dickson v. Zizivia* (10 C. B. 602). In *Budd v. Farrmanner* (8 Bing. 48, 52), Tindal, C. J., said: "Where there is an express warranty as to any single point, the law does not beyond that raise an implied warranty that the commodity sold shall also be merchantable."

Cleasby, at the request of the Court, replied upon the second point only. He argued that there was an implied warranty that the provisions should be reasonably fit for the voyage, in addition to the stipulation that they should pass survey of the East India Company's officers.

COCKBURN, C. J. We are all of opinion that the ruling of the Lord Chief Baron cannot be upheld, and that there [961] must be a trial de novo. There are two questions: First, whether upon a contract to supply provisions there is an implied warranty that they shall be reasonably fit for the purpose for which they are intended. Upon that point not a doubt can be entertained. The principle of law is correctly stated in the passage cited from Chitty on Contracts (page 399, 6th ed.). Where a buyer buys a specific article, the maxim "caveat emptor" applies; but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose; and I see no

reason why the same warranty should not be comprehended in a contract for the sale of provisions.

Then comes the question, whether by the particular terms of this contract an implied warranty is excluded by the express warranty. I accede to the proposition, that where both parties have agreed to abide by the arbitrament of a third person, as to whether goods to be supplied are fit for the purpose for which they were ordered, and that person decides that the goods are such as ought to be accepted under the contract, the parties are concluded by his decision. Here, if the provisions were to be supplied to the satisfaction of the East India Company's officers; so that they were to be the sole judges of whether they were fit for the purpose intended, the parties would have been concluded by their determination. But as I read this contract, in addition to the implied condition that the provisions supplied shall be fit for the purpose intended, there is superadded an express condition, not qualifying the former but inserted for the benefit of the buyer, who undertook to supply provisions for the use of the East India Company, who were sending out troops. It was, I think, inserted to protect the buyer and guard against any dispute: so that, if the provisions did not at once pass survey, others should be shipped in their place. The seller having supplied provisions unfit for consumption, it is said that he has performed his contract because he has succeeded in getting the provisions passed by the officers of the Company. If so, the guarantee as to quantity, if that had passed survey, would be subject to a similar argument.

Trial de novo awarded.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

BARROW v. TOTAL. Feb. 4, 1862.—A testator devised as follows:—"I give and devise unto my wife all that my messuage or dwelling-house, where I now live during the term of her natural life; and immediately after the death of my said wife, I give and devise unto my grandson, T. C., son of the late R. C., all that my estate where I now live, and all that other estate thereto belonging, called the W. Estate, for his own use during his natural life, with remainder to the eldest son of the body of the said E. C., lawfully begotten, severally and successively in tail male of the name of C. And for want of such lawful issue of that name either by my said grandson, T. C., or my son, J. C., then I give and devise the said estate where I now live and the W. estate amongst my daughters and their children, share and share alike, to hold unto them, his, her or their heirs for ever, as tenants in common." T. C. suffered a recovery and died without issue. In ejectment the plaintiff claimed as grandson of a daughter of the testator, the defendant claiming under a conveyance in fee by T. C. subsequent to the recovery. In the year 1823, the Court of Exchequer held that T. C., the grandson, could make a good title in fee to a purchaser. About the same period the Court of King's Bench, on a case from Chancery, certified that T. C. was tenant in tail, and that certificate was confirmed by the Lord Chancellor. Held, in the Exchequer Chamber, that, under these circumstances, the construction put upon the will, however doubtful, could only be overruled by the House of Lords.

[S. C. 8 Jur. (N. S.) 991; 10 W. R. 357; 6 L. T. 472: affirmed nomine *Parker v. Tootal*, 1865, 11 H. L. Cas. 143; 11 E. R. 1286 (with note).]

This was a writ of error on the judgment of the Court of Exchequer for the defendant (a) on a special case stated for the opinion of that Court.

The action was ejectment to recover a messuage and hereditaments known as the Weaste, situate in Pendleton, [963] in the county of Lancaster. The writ issued on 14th of August, 1855, and the cause came on for trial before Hill, J., at the Liverpool

(a) The plaintiff's counsel having stated that a construction had been put on the will by Lord Eldon, C., the Court of King's Bench and the Court of Exchequer, which was against the plaintiff, the Court gave judgment for the plaintiff without argument in order that the point might be decided by a Court of error.

Summer Assizes, 1859, when a verdict was found for the defendant, subject to a special case (in substance) as follows:—Thomas Chorlton was, at the time of making his will and at his death, seised in fee of an estate called the Weaste, which comprises the premises for which this action is brought, which bears date the 5th of September, 1799, and was on that day duly executed, published, attested, and subscribed according to the law then in force for passing real estate. He devised as follows:—

“I give and devise all my real and personal estate unto my executors and trustees hereafter mentioned; in trust, nevertheless, to pay debts and legacies during the term of ten years, and after my decease to be disposed of after the following manner and form: Also I give and devise unto my wife, Catharine Chorlton, all that my messuage or dwelling-house, garden and premises thereto belonging, where I now live, together with my household furniture and everything now usually held therewith, during the term of her natural life; and, immediately after the death or decease of my said wife, I give and devise unto my grandson, Thomas Chorlton, son of the late Richard Chorlton, all that my estate where I now live, and all that other estate and premises thereto belonging, situate in Pendleton aforesaid, called or known by the name of Weaste Estate, now in the tenure or holding of Thomas Walker, his assigns or under tenants, for his own use during his natural life, with remainder to the first son of the body of the said Thomas Chorlton, lawfully begotten, severally and successively in tail male, of the name of Chorlton. And for want of such lawful issue of that name, either by my said grandson, Thomas Chorlton, or my son, James Chorlton, then I give and devise the said estate, where I now live, and the [964] Weaste Estate amongst my daughters and their children, share and share alike, to hold unto them, his, her, or their heirs for ever, as tenants in common, but not as joint tenants. And I also give and devise unto my son, James Chorlton, all that my estate, and premises thereto belonging, situate in Monton, in the parish aforesaid, now in the tenure, holding, or possession of William Stott, his assigns and under tenants. And also I give and devise unto my son, James Chorlton, all that my estate, and premises thereto belonging, situate in Ellenbrook, in the parish aforesaid, now in the tenure, holding, or possession of the late William Harrison, his assigns or under tenants. But if it shall happen that the sums of money, which I hereafter give unto the following persons, at the end of ten years as aforesaid, which my executors and trustees shall have in their hands, together with interest arising from my whole estate, real and personal, shall be too little, then I authorize my said executors and trustees to sell and dispose in the best way and manner they can the estate at Ellenbrook aforesaid, to make up the said sums of five hundred pounds each, and the remainder of the purchase money to be given to my said son, James Chorlton, or his heirs. Also I give and bequeath to my daughter, Martha Blinkhorn, the sum of five hundred pounds of lawful money of Great Britain, during the term of her natural life; and immediately after the death or decease, to be divided amongst her child or children, share and share alike; and the interest arising from the said sum of five hundred pounds during the said term of ten years shall be aiding to pay off the late James Blinkhorn's debts, and if any overplus shall happen when the said debts are paid, I give the same to be divided amongst my daughters or their children, share and share alike. And I give and bequeath to my daughter, Sarah Stevenson, the sum of five hundred pounds of law-[965]-ful money as aforesaid, during the term of her natural life; and immediately after her death or decease, to be divided amongst her child or children, share and share alike. Also I give and bequeath to my daughter, Elizabeth Turner, five hundred pounds of lawful money as aforesaid. Also I give and bequeath unto my daughter Ann Barrow's children, five hundred pounds of lawful money as aforesaid, to be divided amongst them share and share alike. Also I give and bequeath unto my grandson, Robert Scholes, son of my late daughter Catherine, five hundred pounds of lawful money as aforesaid, and no more on any account whatever. Also I give and bequeath unto my daughter, Mary Chadwick, the sum of five hundred pounds of lawful money as aforesaid. And as to the rest, residue and remainder (if any) of my goods, chattels and effects whatsoever, after payment of my just debts as aforesaid, I give and bequeath unto and amongst the aforesaid legatees, share and share alike.” (The will then concluded with the appointment of executors.)

The testator died in December, 1799. His widow died in March, 1801. Richard Chorlton, the eldest son of the testator, died in 1794. Thomas Chorlton, the grandson of the testator, who was the only son of Richard Chorlton who survived his father,

survived the testator, and was the heir-at-law, and died in October, 1838, without having had any child. James Chorlton, the second and only other son of the testator, died in 1804, having had only one son, who was born in October, 1799, and died in October, 1825, having had no child.

The plaintiff was grandson of Ann Barrow, a daughter of the testator, who died in 1796.

Thomas Chorlton, the grandson and heir-at-law of the testator, suffered a recovery with double voucher of the Waste Estate, at the Lancaster Summer Assizes, 1810.

The defendant claims title under a conveyance in fee [966] made by Thomas Chorlton, the grandson, subsequent to the recovery.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover the said premises, or any share or interest therein, or any part thereof. If the Court shall be of opinion that the plaintiff is so entitled, the verdict and judgment are to be entered for him for such share or interest. If the Court shall be of opinion that the plaintiff is not entitled to recover, the verdict already entered is to stand.

Manisty (Aspland with him) argued for the plaintiff. The case involves two questions: First, whether Thomas Chorlton, the grandson of the testator, took an estate for life or in tail: secondly, whether the remainders to the testator's daughters and their children were vested or contingent. Though the will is informally drawn, the intention of the testator may be collected from the whole instrument. There is a devise to Thomas Chorlton for life, with an express remainder to his first son, and a remainder by implication to his other sons successively in tail male, and for want of lawful issue, that is of such issue, of that name by his grandson Thomas Chorlton, or his son John Chorlton, the estate is to go over to his daughters and their children. There are decisions on the construction of this will which are adverse to that contended for. In *Chorlton v. Craven*,^(a) the Court of King's Bench, on a case sent from the Court of Chancery, certified that Thomas Chorlton was tenant in tail, and that certificate was confirmed by Lord Eldon. Again, in the year 1823, the question came before the Court of Exchequer on exceptions to title by a purchaser, when Richards, C. B., was of opinion that Thomas Chorlton took such an estate as enabled him to [967] make a good title to the fee, by the means which he had adopted for that purpose: *Rushton v. Craven* (12 Price, 599). However, it is observed in Jarman on Wills, vol. 2, p. 385, 3rd ed., that "the absence of all information as to the precise grounds of that decision greatly detracts from its value as a general authority." [Cockburn, C. J. In *Robinson v. Robinson* (1 Burr. 38), the devise was to Z. for life, and no longer, provided he took the testator's name, and after his decease to such son as he should have lawfully begotten taking that name, and in default of such issue to W. in fee; and it was held that "son" was to be taken as nomen collectivum, and, in order to effectuate the manifest general intention of the testator, Z. must by necessary implication take an estate in tail male.] That decision is reviewed in Jarman on Wills, vol. 2, p. 432, 3rd ed., where it is said: "that the word 'son,' in the devise in that case, appears to have been regarded as a word of limitation, and consequently the first taker was properly held to be tenant in tail, without imposing on the subsequent words, 'in default of such issue,' the office of conferring that estate, to which, indeed, upon every sound principle of construction, they appear to be inadequate." Here there is no reason for enlarging the life estate into an estate tail by implication. The rule is thus stated in Jarman on Wills, vol. 2, p. 430, 3rd ed.: "With regard to real estate also it is clear that the words 'in default of such issue,' following an express devise to any particular generation of issue, as children, sons, or daughters, will be construed to refer to the issue before described; that is, as meaning in default of 'such' children, sons, &c. And in cases of this class this rule prevails, whether the objects of such preceding devise take estates of inheritance or only estates for life." No estate raised by implication in a will can destroy an express estate; as where the devise was to A. for life, remainder to his first son, and so to every other son in tail [968] male, and for want of issue male of A., remainder over; and that was held no estate tail in A. by implication: *Bamfield v. Popham* (1 P. Wms. 54). That case was followed by *Blackburn v. Edgley* (1 P. Wms. 599). All the authorities were reviewed in *Baker v. Tucker* (3 H. L. Cas. 106). There the devise was in trust for the testator's reputed son for his life, and

(a) Not reported, but mentioned by Mr. Preston in his argument in *Mellish v. Mellish*, 2 B. & C. 524.

after his decease for and to his first and every other son successively in tail male, and in default of such issue to his daughter or daughters, as tenants in common in fee, and in default of issue of the reputed son, to and for the testator's right heirs: and it was held that the reputed son took only an estate for life, and that no remainder in tail to him could be implied after the limitation to the daughters. An estate for life may be enlarged into an estate tail by implication in order to effectuate the manifest intention of the testator, but never to defeat it: *Foster v. Hayes* (4 E. & B. 717). He argued, secondly, that the daughters of the testator and their children, took vested remainders. On this point he cited *Wild's case* (6 Rep. 16 b.).

Cleasby (with whom was Lewin) appeared for the defendant, but was not called upon to argue.

COCKBURN, C. J. Without saying that the case is free from doubt, or what view we might have taken if the question had been *res integra*, after the decisions of three Courts, upon the authority of which purchasers have been compelled to take the property, and considering that the matter has remained undisturbed for above thirty years, we think that no tribunal but the highest Court in the realm ought to disturb those decisions. We must, therefore, leave the plaintiff, if he desires it, to appeal to the House of Lords.

Judgment for the defendant.

[969] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

THE BIRMINGHAM CANAL NAVIGATION COMPANY *v.* THE EARL OF DUDLEY.

Feb. 5, 1862.—The Dudley Canal Act, 16 Geo. 3, provides that no owner of mines shall carry on any work for getting such mines under any tunnel, or within twenty yards of the same, without the consent of the Company; and that no owner of any mines shall, without such consent, carry on any work for getting coal or mineral within twelve yards of the canal, "except as hereinafter mentioned." Then follows a clause which provides that the owner of mines may without such consent, get coal and minerals beyond the prescribed limits. Then follows a clause which provides that the Company may enter upon lands and mines for discovering the distance of the canal from the working parts of such mines, and that if any mine shall be worked contrary to the Act, they may use all necessary means for making the canal safe. By a subsequent clause it is provided, that when the owner of any mine lying under the canal or within the limited distance, shall be desirous of working the same, he shall give the Company three months' notice of his intention, and upon the receipt of such notice it shall be lawful for the Company to inspect such mines in order to determine what minerals may be gotten without prejudice to the canal; and if upon inspection the Company shall refuse to permit the owners of such mines to work them, then the Company shall within three months pay to the owners the value thereof. Another clause provides, that nothing in the Act contained shall defeat the right of any owner of land through which the canal shall be made, to the mines under the land used for the canal, and that it shall be lawful for such owner to work such mines, provided that no injury be done to the navigation.—Held, in the Exchequer Chamber, that the prohibition against working any mine within twenty yards of a tunnel without the consent of the Company, was not absolute, but subject to the same exception as working within twelve yards of the canal, and therefore if the Company refused to permit the owner of a mine to work it within twenty yards of a tunnel, they were bound to pay him the value thereof.

[S. C. 9 Jur. (N. S.) 24. Applied, *Midland Railway v. Checkley*, 1867, L. R. 4 Eq. 28.]

This was a proceeding in error on the judgment of the Court of Exchequer (*a*) for the defendant in error (the plaintiff below) on a special case stated by consent of the parties and order of a Judge for the opinion of that Court.

(*a*) The Court, by consent of counsel, gave judgment for the plaintiff without hearing any argument, in order that the question might be determined by a Court of error.

The special case (so far as material) was as follows :—

By a local Act, 16 Geo. 3, c. lxvi., called "The Dudley Canal Act," certain persons and their successors were incorporated by the name of the Company of Proprietors of the Dudley [970] Canal Navigation, and powers and authorities were given to them for making and maintaining the canal therein mentioned and carrying the purposes of the Act into execution, including powers to purchase lands.

The question in this case is as to the liability of the Company to purchase or pay compensation for certain minerals belonging to the plaintiff, and left unworked by him under the circumstances hereinafter mentioned, under and within twenty yards of a certain tunnel upon the canal hereinafter called "The Dudley Extension Canal."

Section 58. "That all coals, glasshouse pot-clay, limestone, ironstone and other minerals which shall be found and dug up in making, carrying on and completing the said canal or any other works hereby authorized to be made, carried on and completed, shall be laid upon the surface of the lands in some convenient place near the said works at the expense of the said Company of Proprietors, their successors and assigns; and it shall and may be lawful to and for the persons respectively in whose land or ground the said coals, glasshouse pot-clay, limestone, ironstone, and other minerals shall be found and dug up to take, carry away and dispose of the same to and for his and their own use and benefit; and that it shall and may be lawful to and for the said owners or proprietors of any such mines, glasshouse pot-clay, limestone, ironstone and other minerals which shall or may be discovered or cut in any tunnel or aqueduct, which shall be made by virtue of this Act, to make a sough or soughs, drain or drains, to water or drain the remaining part of such mines or minerals, and to discharge the water arising and flowing from the same into such tunnel or aqueduct, provided that such settling places be made at convenient distances in such soughs or drains as shall be approved and directed by the said Company of Proprietors, their successors or assigns, or their principal engineer for the time being; and the same shall be cleansed [971] as often as shall be necessary at the expense of the person or persons to whom the same shall belong, in order to prevent the mud and earth from being conveyed into such tunnel or aqueduct: Provided that such parts of the said soughs or drains as shall be under or within the distance of ten yards from such tunnel or aqueduct on either side thereof shall not exceed four feet in breadth, and that the same shall be performed under the direction and inspection of the said Company of Proprietors, their successors or assigns, or their principal engineer for the time being, and that no owner or proprietor of any mines or minerals, their workmen or servants, or other person whatsoever shall open or carry on any work for digging, getting or discovering such mines or minerals under any tunnel or within twenty yards of the same without the consent of the said Company of Proprietors, their successors and assigns; and that no water shall be taken or drawn off lower than the level of the water in the said canal by any works to be made, carried on or erected for getting such coals, glasshouse pot-clay, limestone, ironstone or minerals within twenty yards of any such tunnel or aqueduct, unless such water shall be returned into the said canal through such tunnel or aqueduct; and that no owner or proprietor of any mines or minerals, their workmen or servants or other person whatsoever, shall on any account whatever open, dig, sink or carry on any work for the getting of coal, limestone, ironstone, or minerals within the distance of twelve yards from the said intended canal or any reservoir or reservoirs to be made by the said Company of Proprietors, their successors or assigns as aforesaid; nor shall any coals or other minerals be got under any part of the said canal or the towing paths thereunto belonging, or under any such reservoir or reservoirs as aforesaid, or within or under any land or ground lying within the distance of twelve yards of [972] either side of the said canal or any such reservoir or reservoirs or other works on any account whatsoever, except as hereinafter mentioned, without the consent of the said Company of Proprietors, their successors and assigns, in writing under their common seal for that purpose first had and obtained."

Section 59. "Provided, nevertheless, that when any mine of coal, ironstone or other mineral which shall be worked agreeable to the directions of this Act, or any vein thereof, shall extend beyond the limits hereinbefore allowed for working the same, it shall and may be lawful for the owner of any such mine, without any such consent as aforesaid, from time to time to make sufficient and necessary gateways, headways or tunnels, and also sufficient and necessary air and water gutters on each

side of such gateways, headways or tunnels, under the said canal and towing paths, and also under any ground where such owners are restrained from working as aforesaid, to dig, make and get such coal, ironstone or other minerals beyond such limits, so as such gateways do not exceed six feet in height nor six feet in breadth, and so as such headways or tunnels do not exceed six feet in height nor four feet in breadth, and so as such air and water gutters on the sides of such gateways headways or tunnels do not exceed eighteen inches in height nor eighteen inches in breadth, and so as the same are not made nearer together than nine feet, anything herein contained to the contrary hereof in anywise notwithstanding."

Section 60. "And for the better discovering persons who shall or may open, dig, sink or carry on any work for the getting of coal or other minerals contrary to the directions of this Act, be it further enacted: That it shall and may be lawful to and for the said Company of Proprietors, their successors and assigns, by themselves, their agents [973] and servants from time to time and at all times hereafter to enter upon any lands or grounds through or near which the said intended canal and other works hereby authorized to be made shall be or pass wherein any coal or other mines shall or may be dug or opened, and likewise to enter into such coal or other mines, and there to view, search, measure, lath and use all other means for the discovering the distance of the said intended canal, towing paths, reservoir or reservoirs and other works from the working parts of such mines respectively. That in case it shall appear that any mine hath been worked or got contrary to the directions of this Act, it shall and may be lawful to and for the said Company of Proprietors, their successors and assigns, and to and for their agents, servants and workmen at the expense, costs and charges of the owners or proprietors of all such mines respectively, to enter into and upon all such mines, and from time to time to use all necessary and reasonable ways and means for repairing, supporting, sustaining, securing and making safe the said canal, towing paths, reservoir or reservoirs, and other works; and such expenses, costs and charges shall be recovered by the said Company of Proprietors, their successors and assigns in such and the same manner as the rates or duties hereinbefore granted are to be recovered, and shall be paid into the hands of the treasurer or receiver for the time being to the said Company of Proprietors to be applied for the purposes of this Act."

Section 62. "Provided always, and be it further enacted, That when and so often as the owner or proprietor of any coal mine, limestone or other minerals lying under the said canal, towing paths, reservoir or reservoirs, and other works, or within the distance hereinbefore limited, shall be desirous of working the same, then and in every such case such [974] owner or proprietor shall give notice in writing under his, her, or their hand or hands of such his, her, or their intention to the clerk for the time being of the said Company of Proprietors, at least three calendar months before he, she, or they shall begin to work such mines lying under the said canal, towing paths, reservoirs, and other works, or within the distance aforesaid; and upon the receipt of such notice it shall and may be lawful for the said Company of Proprietors, their successors and assigns, to inspect or cause such mines to be inspected in order to determine what coal or other minerals may be come at and be actually gotten without prejudice or damage to the said canal, towing paths, reservoirs and other works: and if the said Company of Proprietors, their successors or assigns shall fail or neglect to inspect, or cause such mines to be inspected, within the space of thirty days after the receipt of such notice, then it shall and may be lawful for the owners or proprietors of such mines, and they are hereby respectively authorized to work and get such part of the said mines as lie under the said canal, towing paths, reservoir or reservoirs, and other works, or within the distance aforesaid; and if upon such inspection as aforesaid the said Company of Proprietors, their successors or assigns, shall refuse to permit the owners or proprietors of the said mines to work such part of the said mines as lie under the said canal, towing paths, reservoir or reservoirs, and other works, or within the distance aforesaid or any part thereof, as they might from time to time have come at and actually gotten, or in any other manner obstruct or prevent them from getting the same, that then the said Company of Proprietors, their successors and assigns shall, within three calendar months after such refusal or obstruction as aforesaid, pay or cause to be paid to the owners, proprietors, or [975] workers of such mines respectively such price or prices for the same in proportion to their several interests therein as the next adjoining mines of equal quality shall have been really and bonâ fide sold for or be estimated or valued at," &c.

Section 79. "Provided always and be it further enacted by the authority aforesaid, that nothing herein contained shall extend or be construed to extend, to defeat, prejudice or affect the right of any lord or lords of any manor or manors, common or waste grounds, or of any owner or owners of any lands or grounds in, upon, or through which the said canal, towing paths, wharfs, quays, reservoirs, trenches, sluices, passages, watercourses or conveniences aforesaid, or any of them, shall be made, to the mines, minerals, or quarries lying or being within or under the lands or grounds to be set out or made use of for such canal, towing paths, wharfs, quays, reservoirs or other conveniences aforesaid, or any of them, but all such mines, minerals, and quarries are hereby reserved to such lord or lords of such manor or manors, or of such common or waste grounds, and to such owner or owners of such lands or grounds respectively, their heirs or assigns; and that it shall and may be lawful to and for the lord or lords of such manor or manors, common or waste grounds, or such owner or owners of such lands or grounds respectively (subject to the conditions and restrictions herein contained), to work all such mines and quarries, and to take and carry away all such coals, ironstone, and minerals as shall be gotten therein to his and their own use, provided that in working such mines and quarries no injury be done to the said navigation, anything herein contained to the contrary notwithstanding."

(The case then set out the 3rd and 21st sections of "The Dudley Canal Extension Act," 25 Geo. 3, c. lxxxvii.)

In pursuance of the powers and authorities given to them [976] by the Dudley Canal and Dudley Canal Extension Acts, and immediately after the passing of the Dudley Canal Extension Act, the Dudley Canal Company formed the tunnel referred to in the last mentioned Act, which tunnel is called the Dudley Tunnel.

By "The Birmingham and Dudley Canals Consolidation Act, 1846," the said Company of Proprietors of the Dudley Canal Navigation was incorporated into and united with the Company of Proprietors of the Birmingham Canal Navigations, the defendants in this cause, and for the purposes of this case it is admitted that by the effect of the provisions of the Act, the defendants, in respect of the question arising in this case, are in the same position, in respect of rights and liabilities, as the Dudley Canal Company would have been had the question arisen with it before it was incorporated with the defendants' Company.

In the year 1860 the plaintiff was the owner and proprietor of coal, limestone, and other minerals lying under the said Dudley Tunnel, and within the distance of twenty yards on each side of it, and was desirous of working the same; and on the 27th October, 1860, he gave the defendants and their clerk notice in writing of such his intention.

Within thirty days from the service of this notice, viz., on the 20th November, 1860, the defendants served upon the plaintiff a notice in writing that they refused to permit him to work the mines. The plaintiff thereupon abstained from working the mines.

The plaintiff, thereupon and after the expiration of three calendar months from the receipt of the said notice of the 20th November, 1860, claimed to be paid by the defendants for the said mines, strata, and minerals a price or prices to be calculated in accordance with the provisions of the Dudley Canal Act, and the defendants denied their liability to pay for the said mines, strata and minerals. There is, [977] however, no question or dispute as to the amount to which the plaintiff is entitled (if to anything), both parties having agreed that the amount was 5500l.

If the plaintiff is entitled to recover, judgment is to be entered for him for 5500l. and costs: if the plaintiff is not so entitled judgment for the defendants is to be entered with costs.

It is admitted, for the purposes of this case, that the plaintiff might have come at and actually gotten all the coal, limestone, and other minerals mentioned in the notice given by him, and it is also admitted that by the working and getting the same, although they might be worked in a skilful manner and according to the ordinary mode of mining in the district, injury would have been done to the said Dudley Tunnel and Navigations.

The question for the opinion of the Court is, whether upon the true construction of the Dudley Canal Act and the Dudley Canal Extension Act, and under the circumstances aforesaid, the defendants are or are not liable to pay to the plaintiff any price

or compensation in respect of the mines, strata, and minerals under and within twenty yards of the said tunnel.

Lush (H. Lloyd with him) now argued for the plaintiffs in error (the defendants below).^(a) Upon the true construction of the Dudley Canal Act (16 Geo. 3), the owners of mines are absolutely prohibited from working them under or within twenty yards of any tunnel without the consent of the Company. That Act was under consideration in the case of *The Dudley Canal Navigation Company v. Grazebrook* (1 B. & Adol. 59), where it was held that the lessee of a mine was entitled to work it under the reservoir of the Company. [978] There, however, the difficulty arose under the 79th section of the Act, which reserves to the owners of mines the right to work them under reservoirs, provided no injury be done to the navigation. That decision was recognised as law by this Court, in the case of *The Stourbridge Canal Company v. The Earl of Dudley* (30 L. J. Q. B. 108). This case depends upon the distinction between working under tunnels and the open parts of the canal; in the latter case it is allowed, in the former prohibited. The earlier sections of the Act speak of the canal as a whole. The 58th section treats the canal as divided into two parts, and deals separately with that part which runs through a tunnel and the open part. The earlier part of that section is an enabling clause; it gives to the owners of the soil all minerals dug up in making the canal, and it enables them to drain the remaining part of the minerals. Then follows the prohibitory part of the clause, which provides that no drain under or within ten yards from a tunnel shall exceed four feet in breadth, and that no mine owner shall work his mines under any tunnel, or within twenty yards of the same, without the consent of the Company. Then follows the prohibition with respect to the open part of the canal; that no minerals shall be got under any part of the canal within twelve yards of either side of it, "except as hereinafter mentioned," without the consent of the Company. As respects the tunnels the prohibition is absolute: as respects the open parts of the canal the prohibition is subject to exception. Other clauses are interposed before the section containing the exception referred to in the 58th section. The 59th section relates to working mines beyond the limits allowed, and the 60th points out the mode of discovering persons who work their mines contrary to the directions of the Act. The 62nd section, which contains the exception mentioned in the 58th, uses language similar to that used in the latter part of that section. If the exception contained in the 62nd section had been tacked on to the end of the 58th section, there would have been no difficulty. The 79th section has been inserted *pro majore cautela*: it merely reserves to the owners of the soil the mines under the land used for the canal. In the case of *The Birmingham Canal Company v. Swindell*,^(a) the Court were of opinion that the words "except as hereinafter mentioned," in the 58th section, did not overrule the whole clause, but were confined to the latter part of it. In other respects that judgment cannot be sustained. It mainly rests on the 59th and 60th sections. But in those sections the canal is spoken of as a whole. It was not necessary to distinguish between the open and the tunnel part. The object of the 60th section was to enable the Company to ascertain whether works which were being carried on were within the prescribed distance. The 59th section is not a qualification or exception of the 58th, but only enables the owners of mines to work them beyond the prescribed limits without the consent of the Company. The true construction of the Act is to read the 62nd section as immediately following the 58th. He also referred to the 21st section of the Dudley Extension Act, 25 Geo. 3, c. lxxxvii.

Sir Fitzroy Kelly (Gray with him), for the defendant in error (the plaintiff below). The general effect of the Dudley Canal Act is, that a mine owner is prohibited from working his mine within twenty yards of a tunnel or twelve yards of the open canal without the consent of the Company, subject to this qualification, that if the mine owner is [980] desirous of working within the prescribed distance, he must give the Company three months' notice of his intention to do so; and then the Company must, within thirty days, cause the mine to be inspected, and if upon such inspection they

(a)¹ Before Cockburn, C. J., Wightman, J., Crompton, J., Willes, J., Byles, J., and Keating, J.

(a)² Before Wood, V. C., assisted by Crowder, J. The judgments (post, p. 980, note) were delivered on the 22nd of February, 1856, but there does not appear to be any report of the case.

shall refuse to allow the owner to work the mine within such distance, the Company must, within three months, pay the owner the value thereof. There is no foundation for any distinction between working under one part of the canal or another, and no reason for making compensation in the one case and not in the other. He was then stopped by the Court.

Lush replied.

COCKBURN, C. J. We all agree that the construction put upon the Act by Vice-Chancellor Wood and Mr. Justice Crowder, in the case of *The Birmingham Canal Company v. Swindell*, (a) is correct; and therefore the judgment of the Court below must be affirmed.

Judgment affirmed.

(a) The judgments delivered in that case were as follows:—

CROWDER, J. This was a Bill filed by the plaintiffs for an injunction to restrain the defendants, who are the proprietors of certain coal mines lying under a tunnel through which the canal passes, known as the Dudley Tunnel, from opening or carrying on any work for digging, getting, or discovering any mines or minerals under such tunnel, or within twenty yards of the same, without the consent of the plaintiffs.

The question is, whether the defendants are entitled to carry on such works under the provisions of three Local Acts, namely, "The Dudley Canal Act," 16 Geo. 3, "The Dudley Canal Extension Act," 25 Geo. 3, and "The Birmingham and Dudley Canals Consolidation Act," 1846. It was agreed, however, in the course of the argument that the question turned entirely upon the true construction of the Dudley Canal Act, 16 Geo. 3, and this Court is called upon to put an interpretation upon the prohibitory clause in the 58th section of that Act, which forbids the working of minerals within twenty yards of any tunnel on the line of the canal. Is this an absolute prohibition to [981] work within that space without the plaintiffs' consent, or is it qualified by the 62nd section of the same Act? If it be absolute the decree must be for an injunction; if qualified by the 62nd section, it is admitted that the defendants have done all that is required to enable them legally to work their mines, and that they are entitled to have the Bill dismissed.

The argument for the plaintiffs turned mainly on the grammatical construction of the 58th and 62nd sections, which it was contended shewed that the Legislature, in fixing the distance of twenty yards from a tunnel in the one case, and twelve yards from the canal in the other, by the use and collocation of the words in those sections, prohibits working within twenty yards of a tunnel absolutely, but only prohibits working within twelve yards of the open canal, subject to the qualifying terms of the 62nd section, which are referred to by the words near the end of the 58th section, "except as hereinafter excepted."

No sufficient reason was adduced in the course of the argument, nor indeed can any be assigned, why the Legislature should have enacted an absolute prohibition in the one case and a qualified prohibition in the other; for although it was argued that from the greater support required for a tunnel than for the sides of a canal, a longer restriction from working was justly imposed as to the former, there is no conceivable reason why the owner of the minerals should be deprived of his property without compensation any more in the one case than in the other. And the whole of the provisions in the 62nd section seem studiously framed to protect equally the Canal Company from danger to their canal, and the owner of the minerals from the loss of his property. Looking also at the important provisions of the 60th section, it is difficult to suppose that the Legislature could have intended to confine their operation to works within twelve yards of the canal, and exclude them from works within twenty yards of a tunnel.

The 60th section begins with a short preamble in these words:—"For the better discovering persons who shall or may open, dig, sink, and carry on any work for the getting of coal or other minerals, contrary to the directions of this Act," apparently contemplating all illegal working. Now the working within twenty yards of a tunnel without consent is certainly as contrary to the directions of the Act as working within twelve yards of the canal without consent, and the mischief is even greater on account of the additional support required to the sides of a tunnel. The section then goes on to enact that the Canal Company shall have power to enter on any lands where the works are being carried on, with a view to measure and [982] discover the distance

of the "canal, towing paths, reservoir or reservoirs, and other works from the working parts of such mines respectively," with power also, if necessary, to enter into the mines, and "use all necessary and reasonable ways and means for repairing, supporting, &c., and making safe the canal, towing paths, reservoir, or reservoirs, and other works."

The plaintiffs' counsel were obliged to admit, that according to their construction of the Act, this section would not apply to workings within twenty yards of a tunnel, although no reason for their exclusion from its provisions could be suggested. Indeed, according to the argument for the plaintiffs, that the prohibition was made absolute because of the importance attached to the security of the tunnel, the provisions of the 60th section would seem more especially required against the working so prohibited. For, without the aid of this section the Canal Company has no power whatever to take the necessary precautions for security against the working of minerals within any part of the forbidden ground.

But the plaintiffs' counsel argued against the applicability of the 60th section to the first prohibition; first, because the word "distance" is in the singular number, as it is in the 62nd section; and also because the provisions refer to the "canal, towing paths, reservoir or reservoirs, and other works," not mentioning by name "tunnels," which is the same enumeration as in the 62nd section. It seems to follow, therefore, that the plaintiffs' construction of the language of the 58th section, which would confine the provisions of the 62nd section to workings within twelve yards of the canal, and where there was no tunnel, would equally confine the provisions of the 60th section to the same prohibited workings.

But the main ground on which it was contended, on behalf of the plaintiffs, that the first prohibition to work within twenty yards of a tunnel could not receive a qualification from the 62nd section, was that the second prohibition to work within twelve yards of the "canal, reservoir or other works," concludes with the words "except as hereinafter mentioned," which it was said do not override the earlier branch of the section containing the first prohibition. And then it was argued that as the exception must have reference to the 62nd section, such section could not affect the first unqualified prohibition. As regards the exceptive words, I am of opinion that they are confined by the true grammatical construction of the 58th section to the second prohibition, as contended for by the plaintiffs' counsel. But the inference drawn from that conclusion is, I think, erroneous. For although by confining the words "except as hereinafter mentioned" to the second prohibition, it is clearly established that one or more of [983] the subsequent sections must qualify the second prohibition, it by no means follows that the same sections do not also qualify the first.

Suppose no exceptive words had been introduced into the 58th section, so that both prohibitions would have appeared equally absolute in that section, it could hardly have been contended that the 60th and 62nd sections did not qualify and regulate both prohibitions, for "distance" in the singular number might reasonably refer to the twelve and twenty yards respectively, although perhaps the more accurate expression would be "distances" in the plural number, and the general words "canal, towing paths, reservoirs, and other works" are clearly comprehensive enough to include tunnels on the line of the canal. Indeed it was pointed out in the argument for the defendants, that the words "canal and other works," at the end of the 3rd section of the Extension Act, 25 Geo. 3, do clearly include tunnels. It cannot be doubted, I think, that such a construction would effectuate the manifest intention of the Legislature by affording due protection both to the canal and the property of the landowner through which it passes.

The principal argument then for the plaintiff seems to be founded on the words "except as hereinafter mentioned," in their juxtaposition with the second prohibitory clause in the 58th section. It is contended not only that they apply exclusively to the second prohibition, with which they are grammatically connected, and so incorporated with the subsequent qualifying sections, but that they inferentially prevent those subsequent sections from having any qualifying operation on the first prohibition, although the language of those sections may be ample enough to comprehend it. This argument is, I think, erroneous, and is met by a serious difficulty in the outset, for the 58th section as well as the 62nd is referred to by the exceptive words; as both these sections qualify the prohibition to dig without consent. And yet it is admitted on behalf of the plaintiffs that the 59th section does qualify the first as well as the

second prohibition, although it is said the 62nd section does not. The 59th section enables owners of minerals "beyond the limits hereinbefore allowed," without any consent, to make headways, gateways, or tunnels, &c., of specific dimensions, and under any ground where they are restrained from working, to get coal. It is true the plaintiffs' counsel felt bound to admit the applicability of that section to both prohibitions, because of the word "limits" in the plural number, and the reasons urged why the 62nd section did not qualify the first as well as the second prohibition, were, first, that in that section the word "distance" in the singular number could only apply to one of the prohibitions, and secondly, that the words "canal, towing paths, reservoirs, and other works" are substantially [984] the same as those in the second prohibition in the 58th section, and must therefore apply exclusively to that prohibition.

Still the fact that the first prohibition is qualified by the 59th section, proves conclusively that the exceptive words which refer to that section as qualifying the second prohibition, do not exclude its qualifying effect upon the first prohibition, the language of the 59th section being large enough to include it. It follows, therefore, that the exceptive words, in so far as they refer to the 59th section, are mere surplusage, and I can see no reason for giving them any other effect in so far as they refer to the 62nd section; for it appears to me, that the language of the 62nd section is extensive enough to embrace and qualify the first prohibition. And I do not think it at all inconsistent with the exclusive applicability of the exceptive words to the second prohibition, that the 59th, 60th, and 62nd sections should equally relate to and qualify both prohibitions. I entertain no doubt that the enumeration in the 62nd section of "canal, towing paths, reservoirs, and other works" includes tunnels, and that the word "distance" in that section means the distance of twenty yards from a tunnel or twelve yards from the rest of the canal, as the case may be.

I think, therefore, the true construction of the Act is, that the twenty yards distance from the tunnel is to be calculated precisely in the same way as the twelve yards distance from the other parts of the canal, that is, laterally and down to the centre of the earth; and that in respect of the working within twenty yards of the tunnel and twelve yards of the rest of the canal without consent, the same protection is afforded, on the one hand to the Canal Company and on the other to the owner of minerals within the prohibited distance, by the 60th and 62nd sections. By this construction, simply treating the exceptive words in the 58th section as surplusage, and without doing any violence to the language of the Act, all its provisions will be reconciled to each other and to reason and justice, and the manifest intention of the Legislature will be effectuated.

For these reasons, I am of opinion that the Bill should be dismissed.

I will merely add that I have taken the numbers of the sections, as designated in the case, which has been referred to, of *The Dudley Canal Navigation Company v. Grazebrook* (1 B. & Adol. 59).

WOOD, V. C., said,—Concurring as I do in the view his Lordship has formed of this case, I have very little to add.

[985] It is extremely difficult to find any reason, why the exception with reference to a tunnel should be in terms absolute, while as to the rest of the canal it is qualified, unless that in making a tunnel some benefit is conferred on the landowner in respect of the drainage, or otherwise, of his mines, and, in order to shew that, we were referred to the 25 Geo. 3, by which, when a very large and extensive portion of the works was connected by a tunnel, it does appear that the Legislature were of opinion that certain benefits might be rendered to the landowner in the course of that operation, from this circumstance, that the Canal Company are allowed to take the minerals at a certain price, and if the landowner wished to retain them he might do so on paying an increased price, shewing therefore that the Canal Company did not pay the full value for the minerals, and shewing, as it was said, that some benefit was given to the landowner by a tunnel which was not given in an open cutting. By straining the argument it was sought to extend to the 16 Geo. 3, the construction contended for; and owing solely to the circumstance of the 25 Geo. 3 having recognized that right in a work of a different character in point of extent and otherwise, it was conceived that some benefit must be rendered to the landowners by a tunnel. But beyond that, I think there is no ground whatever for supposing the singular anomaly which would exist of providing that, in all cases of open cutting, the minerals should be

paid for by the Company in manner provided by the 62nd section, whereas in those portions of the canal which appear not to have been of considerable importance in point of amount or extent, namely, where a tunnel existed, that there should be made this difference in the position of the landowner. But further, as pointed out by Mr. Justice Crowder, the argument with reference to the 60th section seems to carry the construction here contended for to an extreme limit of, I may say, unreasonableness, because it can scarcely be supposed, under any conceivable view of the case, that the Legislature should have been anxious and careful to protect the Canal Company from any improper workings in the neighbourhood and vicinity of other parts of the canal, where the parties were allowed to come within twelve yards, and yet should not have taken any precautions whatever to secure the Company against any improper workings at that part which seems the most important part to be preserved, namely, the portion consisting of tunnels.

There is one construction which seems to me to simplify the whole of the clauses. Instead of reading, as it is contended we ought to do, the words "canal, towing paths, reservoir or reser[986]-voirs and other works," as exclusive of tunnels, on account, as it is suggested, of there being in the 58th section the word "tunnel" in the first part where the limit of twenty yards is affixed, and afterwards the words "canal, or any reservoir or reservoirs, or other works," being adopted, the simple and most reasonable construction in every point of view is, to take in the 62nd section at the end of the 58th, and to construe the word "canal" to mean what it really is, the canal in its whole extent, whether passing through a tunnel or not. If there had been a different collocation of the two parts of the 58th section, I think hardly any doubt could have been suggested. If the latter part of that section had been first, and the provision had been that no owner or proprietor of any mines shall work within twelve yards of any part of the intended canal, that is to say, "except as hereinafter mentioned," and the section had then gone on to say, "and with regard to a tunnel they shall not work within twenty yards without consent," it would have been plain what the intention of the Legislature was, that the open parts of the canal should be protected by not working within twelve yards of it; and as regards a tunnel, which is a more important part with reference to the character of the work, and requires more care and protection, the workings shall not come within twenty yards; and then, the sole argument being thrown back upon the exception reserved in the one case and not in the other, would, I think, have been at once met by the arguments adduced by the learned Judge whose assistance I have had, for it would have been plain that, as there is no necessity for an exception in any prohibitory clause, if there be a subsequent clause clearly and manifestly overriding the whole of the particular enactment, there being no need of the exception in the 58th section, the subsequent clauses, which come by way of proviso, necessarily override the whole of the 58th clause, and are applicable as well to the one which contains the exception as to the other which does not. The exception has been inserted unnecessarily in any case, because it is admitted to be wholly unnecessary with reference to the 59th clause; and notwithstanding that in the case of a tunnel the direction that it is not to be worked without consent is without any exceptive clause whatever, yet a section which follows with sufficient words for that purpose overrides the whole of it. So I apprehend if the 62nd section contains a proviso in terms large and general enough to override the whole of the 58th section, it will not be limited in its effect, because, in a particular clause of that section, there happens to be these exceptive words introduced, which in themselves, with regard to any subsequent section, are mere surplusage.

The whole contest is in truth reduced to this—unless the 62nd [987] clause, where it uses the words "canal, towing paths, reservoir or reservoirs, and other works," can be construed as exceptive of tunnel, which is clearly and indisputably part of the canal, and unless the 58th clause has introduced a species of interpretation clause by the manner in which the two descriptions of works are designated, it is impossible to escape from the overriding of the 58th section by the 62nd section. I think there is nothing in the circumstance of a tunnel having been specially provided for to take it out of the meaning of the word "canal," in which it would otherwise be included, and therefore, as has been observed by Mr. Justice Crowder, we reconcile all the clauses of the Act, certainly in respect of the manifest intention of the Legislature and justice of the case.

[987] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

THE GREAT WESTERN RAILWAY COMPANY v. BLAKE. Feb. 10, 1862.—The plaintiff purchased a ticket at the Paddington Station of the Great Western Railway Company, and paid one fare for his conveyance from thence to Milford in Pembrokeshire. The line of the Great Western Railway Company terminates a short distance beyond Gloucester, and the line from thence to Milford belongs to the South Wales Railway Company. By arrangement between the two Companies the lines are worked, and the fares paid by the passengers apportioned, between them. The plaintiff was conveyed in the same carriage which he entered at Paddington towards Milford, and after the train had passed on to the line of the South Wales Railway Company it came into collision with a locomotive engine left on that line by the servants of the South Wales Railway Company. There was no negligence on the part of the driver of the train. Held, in the Exchequer Chamber, that the Great Western Railway Company were responsible to the plaintiff, since, under the circumstances, there was an implied contract on their part that they would use reasonable care to maintain the whole line from Paddington to Milford in a condition fit for traffic.

[S. C. 31 L. J. Ex. 346. Applied, *John v. Bacon*, 1870, L. R. 5 C. P. 441. Referred to, *Foulkes v. Metropolitan District Railway*, 1880, 5 C. P. D. 168. Followed, *Buxton v. North Eastern Railway*, 1868, L. R. 3 Q. B. 549; *Thomas v. Rhymney Railway*, 1871, L. R. 6 Q. B. 266. Distinguished, *Wright v. Midland Railway*, 1873, L. R. 8 Ex. 137.]

Error on a bill of exceptions. The declaration stated, that the plaintiff, at the request of the defendants, became and was a passenger in a carriage, being one of a train of railway carriages, to be by the defendants safely and securely [988] carried and conveyed on certain railways on a journey from one place to another distant place, to wit, from London to Milford, for hire and reward to the defendants in that behalf: Yet the plaintiff saith, that by and through the negligence, carelessness, default, and improper conduct of the defendants, the carriage in which the plaintiff was carried and conveyed during the said journey, whilst the plaintiff was such passenger as aforesaid, was suddenly checked by and received a sudden and violent concussion from the train of carriages, of which the said carriage formed one, coming into contact and collision with, and running and striking with great force and violence against and upon a locomotive engine; and thereby the plaintiff was greatly and permanently injured in his body, &c.

Pleas. First: not guilty. Secondly: that the plaintiff did not become, nor was he a passenger to be by the defendants safely or securely carried or conveyed on the said journey in the declaration mentioned, as alleged. Issues thereon.

The cause was tried before Martin, B., at the London Sittings after Trinity Term, 1860, when the following facts appeared:—The defendants were common carriers of passengers for hire, and have a station at Paddington in London, and contract with passengers by one contract, and for one entire fare, to carry and convey them from Paddington to Milford, in Pembrokeshire. On the evening of the 30th of December, 1859, the plaintiff purchased the usual ticket from the defendants and paid his fare, and became a passenger to be conveyed by the defendants from Paddington to Milford by the mail train. The contract between the plaintiff and defendants was the ordinary one which the law implied. The line of railway belonging to the defendants terminates at Grange Court, a short distance [989] beyond Gloucester, and the line from thence to Milford belongs to the South Wales Railway Company. There is an arrangement between the two Companies under which the lines are worked, and the fares paid by the passengers apportioned, between them. The plaintiff was conveyed in the same carriage which he entered at Paddington past Grange Court and onwards towards Milford. After the train had passed on to the South Wales line, it came into collision with a locomotive engine left on that line by the servants of the South Wales Railway Company, and the plaintiff was seriously injured by the concussion. There was no negligence on the part of the driver of the train.

The learned Judge told the jury, that the circumstance that the engine was left upon the line by the servants of the South Wales Railway Company, and not by the servants of the defendants, did not relieve the defendants from their legal liability, but that they were by law responsible for such negligent and improper act: whereupon the jury found a verdict for the plaintiff.

The defendants' counsel having tendered a bill of exception to the above ruling, and proceedings in error having been taken thereon, the case was now argued by

Bovill (with whom was Digby)(a) for the plaintiffs in error (the defendants below). The injury was caused by the negligence of the South Wales Railway Company, not of the Great Western Railway Company. [Cockburn, C. J. The contract was with the Great Western Railway Company to carry the whole distance from Paddington to Milford. Formerly, if a person booked a place in a stage coach for a particular distance, though the coach proprietor made [990] a sub-contract with another person to horse the coach for some part of the way, he was liable for negligence on that part. So here there is a contract to carry the plaintiff to a given place, and a sub-contract to carry on the line of another Company.] The Great Western Railway Company merely run their carriages over the South Wales line. The servants on that line are the servants of the South Wales Company, over whom the Great Western Railway Company have no control. [Cockburn, C. J. It was part of their contract, that they would take reasonable care to keep the railway in a secure state throughout the whole distance, and they have failed to discharge that duty. It is now settled that where a person sends goods by a railway Company, who use for a portion of the distance the line of another Company, if the goods are lost, the remedy is against the Company with whom the contract was made.] There is no undertaking by the Great Western Railway Company that the line of railway they use shall be in a safe condition. In the case of goods, the liability depends upon whether the Company are common carriers throughout the whole distance, and if so they are insurers, except as to the act of God and the Queen's enemies. The 8 & 9 Vict. c. 20, s. 87, enables one Company to contract with another for passing over their railway; and by the 89th section the Company is not to be liable to a greater extent than common carriers. Coach proprietors are not liable for injury arising from accident, where there is no negligence in the driver: *Aston v. Heaven* (2 Esp. 533), *Crofts v. Waterhouse* (3 Bing. 319). An undertaking "safely and securely" to carry, only creates a duty to use an ordinary degree of care: *Ross v. Hill* (2 C. B. 877). The plaintiff below must establish that the arrangement under which the [991] Great Western Railway Company used the line of the South Wales Company, made the servants of the latter, who caused the injury, the servants of the former. But the mere bargain did not transfer the liability for negligence from one Company to the other. [Cockburn, C. J. What is there in a contract by a passenger with a railway Company to make their liability less over one portion of the line over which they carry than another?] The Great Western Railway Company have merely permission to use the line of the South Wales Railway, and by giving tickets to passengers to travel over that line, they undertake that they will use ordinary care, not that they will be responsible for the acts of servants over whom they have no control. [Crompton, J. Their contract is, "I will carry you by myself and my sub-contractor."] He also referred to *Latch v. The Rimmer Railway Company* (27 L. J. Exch. 155).

Parry, Serjt. (with whom was Archibald), appeared for the defendant in error (the plaintiff below), but was not called upon to argue.

COCKBURN, C. J. I am of opinion that the direction of the learned Judge was right, and that the judgment of the Court below ought to be affirmed. It has been settled that where a railway Company enters into a contract for the conveyance of goods to a distance extending, not merely over their own line, but over the whole or some portion of any other line of railway with which it is connected, the Company so contracting is liable not only for the loss of the goods upon their own line, but also in respect of the loss of the goods upon the line not their own. I think that position obtains in the case of passengers. If a railway Company [992] chooses to contract to carry passengers not only over their own line, but also over the line of another Company, either in whole or in part, the Company so contracting incurs all the

(a) Before Cockburn, C. J., Wightman, J., Crompton, J., Keating, J., Byles, J., and Mellor, J.

liability which would attach to them if they had contracted solely to carry over their own line. Here there was a contract between the Great Western Railway Company and the South Wales Railway Company, by which the former are enabled to carry passengers not only over their own line, but also over the South Wales line. Under these circumstances, the Great Western Railway Company became responsible for the safety of every passenger throughout the distance for which they gave him a ticket, just as if they had conveyed him on their own line.

This brings us to the simple question how far the Company are bound to use reasonable care for the safety of passengers as well on their own line as on the passage over another line. Looking at the construction of railways, and the powers which railway Companies enjoy, there is no doubt it is part of the contract that they shall use reasonable care to maintain their railway in proper condition for the conveyance of passengers. This is not like the case of a stage-coach proprietor, because the road is not in his hands, and he has no means of securing its proper condition. When the contract is entered into, the road would be in a certain condition, without anything being required to be done on the part of the coach proprietor to keep it in a safe condition. Railway Companies ought at least to use due and reasonable care to keep the line over which they contract to carry passengers in a safe condition. There is no doubt that is the obligation which attaches to a railway Company who undertake to convey passengers through the whole distance on their line; and if by arrangement with another Company they convey passengers over the whole or part of another line, the same obligation attaches, and [993] they make the other Company their agent, and on their part they undertake that the other Company shall keep their line in a proper condition.

It is unnecessary to say whether the plaintiff below would have had a right of action against the South Wales Railway Company; at all events, he has against the Great Western Railway Company. It would be inconsistent with public convenience and safety to put any other construction on such a contract than that the Great Western Railway Company should be primarily liable to the plaintiff below, and should take their remedy against the South Wales Company, whose servants, by their negligence, have caused the accident; whilst to hold that the Great Western Railway Company is liable, is not only consistent with public convenience, but also the true construction of the contract.

WIGHTMAN, J. I concur in opinion, though not without some hesitation.

CROMPTON, J. I am of the same opinion. When the Great Western Railway Company gave a ticket to the plaintiff to travel from Paddington to Milford, they took upon themselves all the responsibilities by which a railway Company is bound with reference to the carriage of passengers the whole distance. I say the carriage of passengers, because Mr. Bovill has distinguished between passengers and goods as regards the extent of liability. When railways were first established, some Companies would only undertake to convey passengers part of the way on a long journey on their own line; others conveyed passengers beyond their own line, but refused to be responsible for what might occur on a line not their own; others made an arrangement with other Companies by which, for one fare [994] for the whole distance, they undertook to convey passengers to particular places on the line of another Company. Here the Great Western Railway Company, having made arrangements with the South Wales Company for the carriage of passengers to Milford, and for dividing the fares between them, one of the responsibilities which they took upon themselves was that the line should be safe and secure the whole distance. Whether, under these circumstances, a passenger would have a remedy against the South Wales Railway Company may be doubtful, because there is no privity between them; but the Great Western Railway Company has a remedy against the South Wales Railway Company.

BYLES, J. I am of the same opinion. The express finding, that, by arrangement between the two Companies, the fares are apportioned between them, involves this proposition, that when the Great Western train comes upon the South Wales line, as the profits are divided between the Great Western and South Wales Companies, for the purpose of this action the South Wales line became the Great Western line, and the Great Western Company were bound to take due care with respect to the machinery, that is, the engines, carriages and line. It is sufficient to rest there; but, if necessary, I should go further, and say that, without the arrangement as to profits,

the Great Western Company, by their contract with the plaintiff below, were as much bound to take care of the machinery as if the whole line was their own. Possibly the South Wales Railway Company might have been liable to the plaintiff below; yet here is a contract from which results a duty on the part of the Great Western Railway Company to take due care that the machinery from Paddington to Milford is safe and secure.

[995] KEATING, J. I concur in opinion that the ruling of the learned Judge was correct.

MELLOR, J. I am of the same opinion. The effect of the arrangement between the two Companies was to make the line of the Great Western Company one line from Paddington to Milford. I do not say how it would be if the Great Western Company had run over the line of the South Wales Company on payment of tolls. I do not dissent from what my brother Byles has said on that point; but I express no opinion upon it, as it is not necessary for the decision of this case.

Judgment affirmed.

MEMORANDUM.

In this vacation the following gentlemen were appointed her Majesty's counsel:—William Matthewson Hindmarch, of Gray's Inn, Esquire; George Boden, of the Inner Temple, Esquire; and Thomas Weatherley Phipson, of Lincoln's Inn, Esquire.

The EXCHEQUER REPORTS. REPORTS of
 CASES ARGUED and DETERMINED in the
 COURTS of EXCHEQUER and EXCHEQUER
 CHAMBER. Easter Term, 25 VICT., to
 Hilary Vacation, 26 VICT., both inclusive. By
 EDWIN TYRRELL HURLSTONE, of the Inner
 Temple, and FRANCIS JOSEPH COLTMAN, of
 the Inner Temple, Esquires, Barristers-at-Law.
 Vol. I. London, 1863.

[1] EXCHEQUER REPORTS. EASTER TERM, 25 VICT.

JONES *v.* JONES AND OTHERS. April 29, 1862.—A declaration in trespass alleged that the defendant broke and entered the plaintiff's dwelling-house and land, which dwelling-house was then actually inhabited by the plaintiff and his family, and in which he then was; and whilst the plaintiff was therein pulled down and destroyed the dwelling-house and the fixtures therein, and assaulted the plaintiff then being therein, and ejected and expelled him and his family therefrom; and seized, converted and destroyed the materials of the house. The defendant pleaded, as to breaking and entering, pulling down and destroying the dwelling-house and fixtures thereon, and seizing the materials, that he was entitled to common of pasture over the said land, and because the house was wrongfully erected on the land, so that without pulling down the same the defendant could not use or enjoy the common of pasture in so ample and beneficial manner as he otherwise would and ought to have done, he necessarily and unavoidably committed the trespasses in the introductory part of the plea mentioned in removing the house, doing no unnecessary damage, &c.—Held, that the plea was bad, since the defendant was not justified in pulling down the house when the plaintiff and his family were in it.

[S. C. 31 L. J. Ex. 506; 8 Jur. (N. S.) 1132.]

Declaration. For that the defendants broke and entered the dwelling-house and land of the plaintiff, situate in the parish of Llandewy Brefi, in the county of Cardigan, and bounded on all sides thereof by certain common or waste lands called "Llandewy Brefi Mountain or Waste;" which said dwelling-house was then actually inhabited by the plaintiff and his family, and in which he then was; and then, and whilst the plaintiff was therein, pulled down and destroyed the said dwelling-house and the fixtures therein, and assaulted the plaintiff then being therein; and then by so pulling down the said dwelling-house endangered the lives and hurt and injured the persons of the plaintiff and his family, and ejected and expelled them therefrom, and kept them so expelled for a long space of time; and also then seized and took away, and wrongfully converted to their own use, and destroyed the materials of the said house.

[2] And by means of the premises the plaintiff was deprived of the use and possession

of his said house and land, and was put to great expense in procuring another house and land, and was and is otherwise injured.

Third plea. As to breaking and entering the dwelling-house and land, and pulling down and destroying the dwelling-house and fixtures therein, and seizing and taking the materials of the said house: that the defendant, John Jones, at the time of the alleged trespasses, was possessed of land, the occupiers whereof for thirty years before this suit enjoyed, as of right and without interruption, common of pasture over the said land, for all their cattle, levant and couchant upon the said land of the defendant, John Jones, at all times of the year, as to the said land appertaining: that the alleged trespass to the said land was in use by the defendant, John Jones, of the said right of common; and because the said house had been wrongfully erected and then was wrongfully in and upon the said land, so that without pulling down the same the defendant, John Jones could not use or enjoy his said common of pasture in and throughout the said land in so ample and beneficial manner as he otherwise would, might, and ought to have done, the defendant, John Jones, in his own right, and the other defendants as his servants and by his command, necessarily and unavoidably committed the alleged trespasses in the introductory part of this plea mentioned in removing the said house, doing no unnecessary damage to the plaintiff on the occasion aforesaid, which are the alleged trespasses in the introductory part of this plea mentioned.

Demurrer (a) and joinder therein.

[3] Dowdeswell, in support of the demurrer. The plea affords no answer to the declaration. *Perry v. Fitzhove* (8 Q. B. 757) is an express authority that the defendants were not justified in pulling down the house when the plaintiff and his family were in it. It is true that mere matter of aggravation need not be pleaded to, but the allegation that the plaintiff and his family were in the house is a substantial part of the complaint in the declaration. If a landlord distrains a horse upon which his tenant is riding, or the tools which he is using, that is illegal because it tends to a breach of the peace, and the landlord cannot justify the act by confining his plea to so much of the declaration as charges the distress. In like manner a sheriff cannot by pleading a writ of fi. fa., justify a trespass in breaking open an outer door. *Davies v. Williams* (16 Q. B. 546) is distinguishable, because there the occupier had a previous notice and request to remove the building, but persisted in remaining with his family in it. Moreover the plea does not attempt to justify the assault. He also argued, that the plea was bad because it did not allege a seisin in fee with a prescription in a que estate, but merely alleged a right of common in the occupiers of land for a period of thirty years. On this point he referred to *Davies v. Williams* (16 Q. B. 546) and *Mellor v. Spateman* (1 Wms. Saund. 343, 346).

Hannen, contra. There is no doubt as to the right of a commoner to abate a nuisance on the common. *Perry v. Fitzhove* (8 Q. B. 757) is distinguishable; or if not, is inconsistent with subsequent decisions. There the defendant attempted to justify the expulsion of the plaintiff and his family from his house, in the exercise of a right of common. Here the [4] justification is carefully limited. The allegation that the plaintiff and his family were in the house is mere matter of aggravation. The defendants need only justify so much as the plaintiff must necessarily prove to maintain his action. If the defendants had merely pleaded not guilty, the plaintiff would not have been bound to prove that he and his family were in the house at the time it was pulled down. In *Harvey v. Bridges* (1 Exch. 261) Lord Denman observed, "that in the case of *Perry v. Fitzhove* great pains were taken to distinguish the case of a peculiar and articulate justification of all the acts charged to have been committed, from a case like that of *Taylor v. Cole* (3 T. R. 292), where it was evident from the plea that there were no acts of violence, but the words used in the declaration were only those of the ordinary language of law stating a trespass committed with so much force as

(a) The plaintiff also replied, "that before and at the time of committing the trespasses in the introductory part of the said plea mentioned, and intended to be thereby justified, he, the plaintiff, was in the actual possession of the said dwelling-house, and actually and personally present in the same, and inhabiting therein; and that the defendants with force and arms, and in a violent manner and against the peace, broke and entered the said dwelling-house, and committed the said several trespasses." The defendant joined issue on the replication.

was necessary to change the possession." [Bramwell, B. Assuming that *Perry v. Fitzhove* decided that a person has no right, in the abatement of a nuisance, to pull down a house while persons are in it, it is said that this declaration charges the pulling down the house while the plaintiff and his family were in it, and therefore the defendants ought to plead to that charge. But how are they to do it? Are they to begin the plea by saying that the plaintiff and his family were not in the house, and then justify as to the rest of the charge. That would be a novelty in pleading. Then does it not follow that the plaintiff, if he relies on the fact of his being in the house, should state it by way of replication.] That is the proper mode of pleading so as to raise the real question between the parties. If *Perry v. Fitzhove* is not distinguishable from this case, it is inconsistent with subsequent decisions. In *Burling v. Read* (11 Q. B. 904) the declaration charged the defendant with pulling down the plaintiff's workshop [5] whilst he was inhabiting it and present in it: the defendant pleaded that the workshop was his, and not the plaintiff's; and it was held immaterial whether the plaintiff was or was not inhabiting and present at the time of the alleged trespass. Lord Campbell there said: "It would be giving a most dangerous extension to the doctrine in *Perry v. Fitzhove* (assuming the decision there to be correct) if we were to hold that the owner of a house could not exercise the right of pulling it down, because a trespasser was in it." *Davison v. Wilson* (11 Q. B. 890) is an authority to the same effect. The plaintiff must contend that there is a difference between the right to abate a nuisance on a common and on a person's own soil. [Wilde, B. *Burling v. Read* and *Perry v. Fitzhove* shew a clear distinction between a man pulling down his own house and pulling down an inhabited house to abate a nuisance on a common.] It is only necessary to give notice before abating a nuisance, where there is no right to enter upon the land.

Dowdswell, in reply. In *Burling v. Read* and *Davison v. Wilson* the house which the defendant pulled down was his own. The act of the defendant in pulling down an inhabited house on a common would be attended with risk of a breach of the peace. [Pollock, C. B. The argument that an act is unlawful because it may lead to a breach of the peace is very vague. What has a stronger tendency to a breach of the peace than the common "molliter manus imposuit," where one man comes into actual collision with another? In the assertion of a right, a person is not bound to send for a policeman or to bring an action of ejectment, and why should not the same doctrine apply to a tenement erected on a common? Wilde, B. The doctrine of abatement of nuisance is an exception to the general law of [6] England, that a man has no right to take the law into his own hands.] The fact that the plaintiff and his family occupied the house at the time the defendant pulled it down, is a substantial part of the declaration, and not mere matter of aggravation.

Cur. adv. vult.

The judgment of the Court was now delivered by

CHANNELL, B. The question in this case arises on a demurrer to the third plea, to which the plaintiff has replied as well as demurred. The decision of the question is of no importance to the parties except as regards the matter of costs. The plea was impeached principally on the authority of *Perry v. Fitzhove* (8 Q. B. 757), which it was contended by the plaintiff was precisely in point. One member of the Court is of opinion that that case may be distinguished from the present, and that the principle intended to be laid down may be gathered from the explanation of that case by Lord Denman, C. J., when delivering the judgment of the Court of Exchequer Chamber in *Harvey v. Bridges* (1 Exch. 261). The majority of the Court are, however, of opinion that *Perry v. Fitzhove* is not distinguishable from the present case. We decline to express any opinion as to whether, if this question had come before us for the first time, we should have concurred in the judgment pronounced by the Court of Queen's Bench in *Perry v. Fitzhove*; but, seeing that the question is of no importance except as regards costs, we think it better, as the Court is not unanimous, to abide by that decision and leave the defendant, if dissatisfied with it, to take the case to a Court of error. Our judgment will therefore be for the plaintiff.

Judgment for the plaintiff.

[7] *HUMPHREYS v. WELLING*. April 17, 1862.—The defendant having petitioned the Court for the relief of insolvent debtors, his discharge was opposed by the plaintiff. An agreement was entered into between them, that the defendant should give the plaintiff a promissory note as a security for his debt, and that the plaintiff in consideration thereof should not oppose the making of a final order for protection. This arrangement was sanctioned by the Commissioner of the Court, who adjourned the final hearing to allow of its being effected. The promissory note was accordingly given, the opposition withdrawn, and the final order for protection made. Held, that the agreement was illegal as against the policy of the law, and that the promissory note given in pursuance of it was therefore void.

[S. C. 32 L. J. Ex. 33; 6 L. T. 250.]

The declaration was on a promissory note made by the defendant for payment to the plaintiff of 16l.

Plea. That, before the making of the said note and before the filing by the defendant of the petition hereinafter mentioned, the defendant was indebted to divers persons in divers sums of money, and among others to the plaintiff in a certain sum of money, to wit, 11l. 18s., together with costs, which the plaintiff had recovered against the defendant, and afterwards and before the commencement of this suit a petition for the protection of the defendant from process was duly, and according to the form of the statutes in that case made and provided, presented by the defendant to the Court for Relief of Insolvent Debtors in England, and a final order for protection and distribution was duly made in the matter of the said petition by a Commissioner of the said Court duly authorized in that behalf, and the said debt was inserted, with all the necessary particulars, in the schedule of the defendant's debts annexed to the said petition, according to the provisions of the said statutes: that the said note was made and given by the defendant to the plaintiff, after the filing of the said petition and before the making of the said final order, as and for a new security for the payment to the plaintiff of the said debt from which the defendant was discharged as aforesaid, of and in pursuance of a certain unlawful agreement between the defendant and the plaintiff, that the plaintiff would forbear to oppose the making of the said final order. [8] And the plaintiff at all times aforesaid had power and right to oppose the making of the said final order; and the plaintiff, in pursuance of the said agreement and in consideration of having received the said note as aforesaid, did not oppose the making of the said final order of adjudication; and that save as aforesaid there never was any consideration for the defendant's making and giving the said note to the plaintiff, or for the plaintiff's receiving and holding the same.

Replication. That before the making of the said final order in that plea mentioned the matter of the said petition was postponed by the said Commissioner of the said Court, in order to enable and for the express purpose of enabling the defendant to come to some arrangement with the plaintiff in respect of the said debt due from the defendant to the plaintiff, in the said plea mentioned, and with an intimation that no such final order would be made in the matter of the said petition unless such an arrangement were so made: and that, during such adjournment, an arrangement was accordingly made by and between the plaintiff and the defendant in respect of the said debt, whereby it was arranged that the defendant should make and deliver the said note to the plaintiff for and on account of the said debt, and that accordingly the said note was made and delivered by the defendant to the plaintiff for and on account of the said debt in pursuance of such arrangement. And that such arrangement was made with the privity, consent and allowance of the said Court in the said plea mentioned; and that, in fact, the said Commissioner would not make the said final order until such arrangement with the plaintiff, in respect of the said debt, had in fact been made; and so the plaintiff in fact says, that the said arrangement (being the said agreement in the said plea mentioned) was no fraud upon the said creditors [9] of the defendant, or the said Court making the said final order, or upon the laws applicable to the said petition.

Demurrer and joinder therein.

Addison argued for the defendant (Feb. 5). The plea states that the note was given upon the illegal consideration that the plaintiff should withdraw his opposition

to the defendant's discharge under the Insolvent Debtors' Acts. That is a good answer. But the effect of the illegality of that transaction is not obviated by the matter alleged in the replication, namely, that the arrangement was sanctioned by the Commissioner. The addition of that incident makes the transaction even worse than it appears on the plea. The policy of the law is that there should be a full disclosure of the affairs of an insolvent. In *Nerot v. Wallace* (3 T. R. 17) it was held that a promise made by the friend of a bankrupt when he was on his last examination, that, in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, was void, as being against the policy of the bankrupt laws. He was then stopped by the Court.

Hance, for the plaintiff. The arrangement under which the note was given does not contravene the provisions of any statute. It is said, however, that it is against the general policy of the law that such a transaction should be allowed. That may be so where the security is given by the debtor in secret, and in fraud of the other creditors; but here, as alleged by the replication, it was done with the sanction of the Commissioner who, in open Court, adjourned the hearing avowedly for the purpose of the arrangement. [10] By section 91 of the 1 & 2 Vict. c. 110, a creditor is prevented from suing on any security given for a debt from which the insolvent has obtained his discharge; but no similar provision is contained in the 5 & 6 Vict. c. 116, or the 7 & 8 Vict. c. 96, under which the petition in this case was presented. It may, therefore, be inferred that it was not the intention of the legislature that actions upon new securities should be prohibited. The defendant has had the full benefit of the contract, for he obtained his discharge through it; and he now seeks to take advantage of his own fraud.

Addison, in reply. The case of *Nerot v. Wallace* shews that the sanction of the Commissioner to the giving the new security does not prevent the withdrawal of the opposition being an illegal consideration. [Channell, B. In *Taylor v. Wilson* (5 Exch. 251), it was held that a security given by a bankrupt to a creditor, in consideration of his forbearing to oppose the bankrupt's last examination, was not void under the 12 & 13 Vict. c. 106, s. 202, which makes void securities for debts given in consideration of the creditor's forbearing to oppose the allowance of the bankrupt's certificate.] In *Murray v. Reeves* (8 B. & C. 421), an agreement that a creditor should be appointed sole assignee of an insolvent debtor's estate, and should receive 100l. out of it within three weeks from his appointment, in consideration of his withdrawing his opposition to the insolvent's discharge, was held void. Lord Tenterden, C. J., said: "It is obvious that a measure of this kind takes from the Commissioners that superintendence, controul and power of imprisonment for a time, which the legislature intended to vest in them; and, consequently, deprives the other creditors of the benefit of that full disclosure, voluntarily and freely to be made, which they are entitled to have. Such bargaining, whatever may have been [11] intended or effected in the particular case, may, in many cases, give protection to fraudulent concealment, to the great prejudice of creditors, and is, therefore, in our opinion, contrary to the policy of this part of the law, and consequently, void."

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. We are all of opinion that the plea is good, and that the replication affords no answer to it; and, therefore, our judgment ought to be for the defendant. The action is brought on a promissory note; there is a plea that the note was given in consideration of the plaintiff withdrawing his opposition to the defendant's obtaining a final order for protection. It is unnecessary to cite the authorities which decide that the plea is good. There is a replication to the plea, stating that the agreement was made, and the note given, with the sanction of the Insolvent Court. We are all inclined to think that the Court had no authority to sanction such an arrangement; and we are of opinion that it was illegal, notwithstanding such sanction, and that no action can be maintained upon the note.

Judgment for the defendant.(a)

[12] *THE ATTORNEY GENERAL v. KENT AND OTHERS.* May 9, 1862.—In the year 1818, S., a Portuguese, came to England as agent of a wine Company, in which capacity he was employed until the year 1833. He continued to reside in England, and in the year 1857 was appointed attaché to the Portuguese Embassy, which office he held until his death in 1860. There was no evidence of his having visited Portugal, or communicated with any person there, after he came to England. In a will in his handwriting he stated that as he was a Portuguese subject, and an attaché, his property was not liable to legacy duty.—Held: First, that S. acquired an English domicile. Secondly, that his appointment as attaché did not revive his domicile of origin, and consequently his personal property was liable to legacy duty.

[S. C. 31 L. J. Ex. 391; 10 W. R. 722; 6 L. T. 864.]

Information in equity by the Attorney General (so far as material) as follows:—

1. The object of this information is to obtain from the defendants, who are the executors of the will of Alexander Teixeira Sampayo, Baron de Sampayo, late of Barnes, in the county of Surrey, deceased, payment of the legacy duty which has become due to her Majesty in respect of the testator's personal estate, and the question for the decision of the Court is whether the testator was at the time of his death domiciled in England.

2. The testator died at Barnes, in the county of Surrey, on the 11th day of May, 1860. The Attorney General is ignorant as to the place of his birth, but it is alleged by the defendants that he was born in the kingdom of Portugal or in some dependency thereof.

3. In the year 1819, the testator came to England, and had his fixed and permanent abode in this country down to the time of his death in 1860, as before stated, and during all or most part of that period, he was engaged in mercantile pursuits, by means of which he amassed a considerable fortune.

4. The testator on the 3rd day of December, 1859, made his last will and testament in writing of that date, and duly executed the same in the manner and with the formalities required by the English law, and he therein described himself as "Alexander Teixeira, Sampayo Baron de Sampayo, [13] a Portuguese subject, and an Attaché to the Legation of His most Faithful Majesty the King of Portugal, now residing at Barnes, in the county of Surrey." And he appointed the above named defendants executors of his will.

5. After the testator's death, that is to say, on the 2nd day of June, 1860, the above named defendants duly proved his will in her Majesty's Court of Probate.

6. Application has been made to the defendants for payment of legacy duty in respect of the testator's personal estate, but they refuse to pay the same, on the ground, as they allege, that the testator was not at the time of his death domiciled in England; and they allege that, in the year 1857, the then King of Portugal made the testator an attaché of the Portuguese Embassy in this country, and conferred on him the rank of Baron, and that such appointment was notified to and recognized by the Foreign Office in this country, and that on the ground of such appointment the testator claimed and obtained exemption from the payment of assessed and other taxes; and they insist that, under these circumstances, the testator was at the time of his death a Portuguese subject, and domiciled in Portugal.

7. The Attorney General insists that the testator, by residing and engaging in trade in this country or otherwise, had acquired an English domicile previously to the year 1857, when, as the defendants allege, he was made attaché to the Portuguese Embassy here, and that the English domicile which he so acquired was not thereby lost, but continued to be the testator's domicile at the time of his death, and that therefore his personal estate is subject to legacy duty, and that the defendants, as executors of his will, are liable to pay the same.

Prayer. That it may be declared that the testator, Alexander Teixeira Sampayo, Baron de Sampayo, de-[14]-ceased, was domiciled in England at the time of his death, and that legacy duty is payable to her Majesty in respect of his personal estate, and that the defendants are accountable for the same, &c.

The answer of the defendants was as follows:—

1. The testator died at Barnes, in the county of Surrey, on the 11th day of May,

1860. The testator was born, as we are informed and believe, at Angra in the island of Terceira, one of the Western Islands or Azores, then and still part of the dominions of the King of Portugal, in the year 1795, and was the son of Portuguese parents, who had always, up to the time of his birth as aforesaid, been resident in the said island of Terceira.

2. The testator, as we are informed and believe, came to England in or about the year 1818 (having, however, previously visited England), in the capacity of a commissioner or agent, to manage in London the affairs and business of an incorporated Portuguese association called the "Oporto Wine Company," in which the then King of Portugal was largely interested, and which was established under the authority of the Portuguese Government for the purpose of extending the sale of Portuguese wines in England, and continued to reside in London, in such capacity of Commissioner or agent of the said Company, until the year 1833, when the said Company ceased to exist. From the year 1828 to the year 1833 the testator also held, jointly with his late brother Francisco Teixeira, Baron de Sampayo, the office of financial agent and representative of the Portuguese Government in London. The testator resided at Barnes aforesaid from the year 1833 until the time of his death. But we say that the testator was not, except as aforesaid, engaged in mercantile pursuits, and that he did not acquire thereby any considerable fortune, as alleged in the information.

[15] 3. The testator made his last will and testament in writing on the 3rd day of December, 1859, and executed the same in the manner and with the formalities required by the English law, and therein described himself as in the fourth paragraph of the said information mentioned, and thereby appointed us executors of his said will. The said will would be valid according to the law of Portugal, being made according to the law of the country in which the testator actually was at the time of making his will, although he was, as we insist, at that time and at the time of his death, domiciled in Portugal. The testator had previously thereto signed several testamentary papers in his own handwriting, in one of which, bearing date the 3rd day of December, 1857, and which, but for the execution of the said will of the 3rd day of December, 1859, would have been the last will and testament of the testator, the said testator stated as follows:—"As I am a foreigner who always intended to return to my country, and besides being an attaché of the Legation of His most Faithful Majesty the King of Portugal, in London, my property is not subject to legacy duty." The said will of 3rd December, 1859, was prepared by the defendant, Francis Thomas Bircham, who was the testator's solicitor, and who omitted so much of the above passage as related to legacy duty without any communication thereon with or instructions from the testator.

4. We proved the said will of the 3rd December, 1859, in her Majesty's Court of Probate on the 2nd day of June, 1860.

5. We refuse to pay legacy duty in respect of the testator's personal estate, on the ground that the testator was, as appears from the facts set forth in the information and in the answer, domiciled at the time of his death in the kingdom of Portugal, and also on the ground that the [16] testator was, in the year 1857, appointed by his late Majesty the then King of Portugal, an attaché to the legation of his Majesty in England, which appointment was duly notified to and recognized by her Majesty's then Principal Secretary of State for Foreign Affairs, and which appointment the testator continued to hold from the year 1857 until his death, and in respect of which the testator, in the year 1858, claimed and obtained from the Board of Inland Revenue an exemption from the payment of assessed taxes.

The Attorney General, the Solicitor General, Locke and Hanson, for the Crown. There are two questions: first, what is the conclusion from the evidence, apart from any special influence of the testator's diplomatic character? Secondly, what effect had that character? This is stronger than any case in favour of the conclusion that the testator acquired an English domicile which continued up to the time of his death. There exists both the factum and the animus, for there is the fact of a protracted residence in England, without an animus revertendi. At the age of twenty-four the testator came to England, and was engaged in commerce from the year 1818 to the year 1833. That alone would be some evidence of the animus or intention to change his domicile. Moreover, he continued to reside in this country until his death in 1860, and it does not appear that he ever visited his native country, or communicated

with any person there. A series of cases have established that personal property, having no situs of its own, follows the domicile of its owner; and the question whether legacy duty is payable depends on the place of domicile at the time of the testator's death: *Thomson v. The Advocate General* (12 Cl. & F. 1). The principle on which the doctrine proceeds is "*mobilia sequuntur personam*." [Mar-[17]-tin, B. That was acted upon in the recent case of *The Attorney General v. Pottinger* (6 H. & N. 733).] If the testator had not been appointed an attaché of the Portuguese Embassy, there could have been no question. Then what is the influence of the diplomatic character? None whatever; because, when once the domicile is ascertained, there must be a departure to some other place with an intention to remain there. It will, perhaps, be argued that there was a constructive departure because the testator accepted the office of attaché to a foreign embassy. That argument is founded upon language used for a different purpose by writers on international law. Thus, in Vattel, bk. 1, ch. xix., § 217, it is said, "that children born out of the country in the armies of the state, or in the house of its minister at a foreign court, are reputed born in the country; for a citizen who is absent with his family on the service of the state, but still dependent on it and subject to its jurisdiction, cannot be considered as having quitted its territory." Again, in Wheaton on International Law, pt. 3, ch. 1, § 15, it is said: "To give a more lively idea of the complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal status and rights of property, whether derived from contract, inheritance or testament. His children born abroad are considered as natives." That is stated by Lord Stowell, in the case of *The Caroline* (6 Rob. Adm. Rep. 468) to be a mere fiction of law, which ought not to be extended. The testator, as member of a foreign embassy, was entitled, during his life, to all the privileges and immunities conceded by the comity of nations to persons engaged in the diplomatic service; but that cannot [18] affect the domicile which he acquired in England. If a foreigner comes to this country in a diplomatic character, and remains here however long, no inference can arise of an intention to acquire an English domicile, because his residence must naturally be referred to a desire to carry out the orders of his sovereign; but where a foreigner has acquired an English domicile, the fact of his appointment as attaché to an embassy cannot revive his domicile of origin. Notwithstanding the general rule, a foreign ambassador may, by his declarations and acts, coupled with residence, acquire an English domicile: *Heath v. Samson* (14 Beav. 441). At all events, that case is an authority that where a foreign ambassador has acquired an English domicile, it is not affected by his having accepted another diplomatic employment from his own government. The expressions of the testator in the will of 1857 tend to shew a consciousness that he had acquired an English domicile, and a desire that his property should not be subject to legacy duty. The expression of an intention not to renounce a domicile of origin cannot prevail against the intention and facts collected from the acts of the party, if they are otherwise sufficient to constitute a domicile abroad: *In re Steer* (3 H. & N. 594). So, where a British subject has resided for a long period in a foreign country, the animus revertendi and claim to be considered a British subject will not preserve his domicile of origin, if from other circumstances there is evidence of his having acquired a foreign domicile: *Stanley v. Bernes* (3 Hag. Eccl. Rep. 373). They also referred to *In re Bruce* (2 C. & J. 436) and *Bruce v. Bruce* (2 Bos. & P. 229, note).

Montague Smith, Dr. Phillimore and Welsby, for the defendants. No legacy duty is payable. First, there is no evi-[19]-dence from which it can be inferred that the testator acquired an English domicile, beyond the mere fact of residence. A domicile of origin is not easily changed, and, when it is, it easily reverts. Then, was it ever in this case changed? The testator was a Portuguese subject, who, about the year 1818, came to England as agent of a wine Company established under the authority of the Portuguese government, and continued in that capacity until the year 1833. No inference can be drawn from his appointment in 1857 as attaché that he intended to abandon his Portuguese domicile. The only declaration which occurs is that in the will, and which shews that he had no intention to acquire an English domicile. In *Heath v. Samson* (14 Beav. 441) there was cogent evidence of the animus or intention of the testator to abandon his domicile of origin. If any

inference is to be drawn from the fact of an appointment to a diplomatic office, is it not more likely that a person would be appointed who had not renounced, but retained an interest in, his own country? The factum is not enough unless it is accompanied by the animus. [Wilde, B. Mr. Justice Story (Conflict of Laws, chap. 3, § 43), after mentioning a variety of definitions of domicile, says that "it would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom."] The presumption of law is against an intention to abandon a domicile of origin, and the onus probandi is on the party who affirms it. There is a category of persons who are incapable of acquiring a domicile in this country—persons who are entitled to the privilege of extra-territoriality. *Hodgson v. De Beauchesne* (12 Moore, P. C. 285) was the case of a military officer; but an ambassador and his suite are equally incapable of acquiring a domicile in this country. Secondly, assuming that the [20] testator acquired an English domicile, his appointment as attaché revived his domicile of origin, and exempted him from the taxation of this country. By the law of nations, an ambassador is not subject to the civil or criminal law of the country in which he resides, because, by a fiction of law, he is, for all legal purposes, considered as being in his own country. [Martin, B. You say it is the same as if he had lived and died on board a Portuguese ship.] No doubt. His marriage in this country, according to the Portuguese form, would have been valid. In *Black. Com.*, vol. 1, p. 253, it is said: "The rights, the powers, the duties and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the controul of the private law of that state wherein they are appointed to reside." [Bramwell, B. Do you say that if the testator had acquired an English domicile, nevertheless, upon his being appointed attaché, he would lose that domicile?] He would for the purpose of taxation. An appointment as attaché is inconsistent with an English domicile. In *Black. Com.*, vol. 1, p. 253, it is said: "He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made; but an ambassador ought to be independent of every power except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions." As an ambassador is not subject to taxation during his life, it would be inconsistent if his property were liable to legacy duty after his death. [Wilde, B. There is good reason for that. The immunity of an ambassador is a species of personal immunity; but if domiciled here, his property after his death is [21] administered or protected by the English law.] The 7 Ann. c. 12, which prohibited the arrest of ambassadors and their servants, was only declaratory of the common law: *Triquet v. Bath* (3 Burr. 1480). The exemption of an ambassador from the municipal law of the country in which he resides depends on the law of nations. It is not on account of the sacredness of the person of an ambassador that he cannot be sued, but because he is independent of the jurisdiction of the country in which he resides: *Vattel*, bk. iv. c. viii. § 110. By a fiction of law he is regarded as the person whom he represents, and is considered as not being within the territory of the state to which he is accredited, and consequently not subject to its laws: *Wildman on International Law*, vol. 1, p. 92. The maxim, "*mobilia sequuntur personam*," applies to this case. *Grotius* lays down the rule, that the personal property of an ambassador cannot be seized as security, nor taken in execution by judicial process, nor, as some have supposed, by the prerogative of the Crown for any debts by him contracted; for an ambassador should be exempt from all restraint, that he may have entire security (lib. ii. cap. 18, s. ix.). The law is stated in similar terms in *Wheaton on International Law*, pt. 3, ch. 1, § 15. A servant appointed by the ambassador is in a different position; for he is in no way connected with the Crown, but is merely appointed for the personal convenience and comfort of the ambassador. That distinction is adverted to in *Taylor v. Best* (14 C. B. 487). In *Story's Conflict of the Laws*, ch. iii. § 48, it is said: "Ambassadors and other foreign ministers retain their domicile in the country which they represent, and to which they belong." The privilege is not the privilege of the individual, but of the Crown. Originally, when a foreign sovereign came to this country, by the comity of nations all his acts were supposed to be done in his own [22] country. The principle was extended to a man of war, which is considered as a floating part of the foreign country, and

marriages and wills made on board are governed by the law of that country. The principle was further extended to ambassadors and their suite; and no instance can be found of duty having been paid in this country upon the personal property of an ambassador after his death. There is no distinction in this respect between the personal property of an ambassador and that of one of his suite. The 7 Ann. c. 12, s. 5, provides that no servant of a foreign minister shall take advantage of that Act unless registered, and it is not denied that the testator was registered. The privilege during life, and the privilege after death, cannot be separated, because they are founded on the same principle, viz. extra-territoriality. [Martin, B. Suppose the testator had resided all his life, up to the year 1857, in England, and had declared that he was domiciled here; but in 1857, having received a diplomatic appointment, he went to Portugal, saying "I am going for a temporary purpose, and intend to return to England, my place of domicile," and he afterwards died in Portugal, would not his personal property in England be subject to legacy duty?] Not if he held the diplomatic office at the time of his death. The principle of the decision in *Hodgson v. De Bearchesne* (12 Moore, P. C. 285) was that the testator, being in the service of the Crown of England, retained his English domicile though he resided and died in France. The foundation of the law is a passage in Grotius (lib. ii. cap. 18, s. 5), where it is said that ambassadors by a certain fiction are considered in the place of those who send them, and by a similar fiction they are, as it were, *extra territorium*, and thus are not bound by the civil law of the people among whom they live. Again it is laid down (lib. ii. cap. 18, s. 5) [23] that the moveable property of an ambassador cannot be taken or impounded for debt. It is also said in Fœlix, *Traité du Droit International Privé*, liv. ii. tit. ii., chap. 2, sect. iv., that an ambassador and his suite enjoy a complete immunity from the law of the state in which they reside. [Wilde, B. That relates to an exemption during his life; the reason for it ceases after his death.] It would be a violation of the comity of nations to tax an ambassador during his life, because he is considered as part of the Crown, and his moveable property as belonging to the Crown; therefore to tax his property after his death would be the same as taxing the property of the Crown: Vattel, bk. 4, ch. 8, § 113; id. bk. 4 ch. 9, § 120. Bynkershoek, fo. leg., cap. 5, lays down the proposition in similar terms. In cap. 10, he points out the distinction between a consul and an ambassador, and why the former is subject to the civil law, viz. because he does not represent the Crown. In cap. 15, there is a passage which expresses the identity which exists between the suite of an ambassador and the ambassador himself. It is conceded, on the part of the Crown, that if a foreigner is accredited to this country in an ambassadorial character, although he may remain here all his life he will not acquire an English domicile, and therefore will not be subject to the municipal taxation of this country, nor will his personal estate be liable to legacy duty after his death. The principle on which that is founded is that an ambassador is deemed to be resident in the country by which he is accredited, just as the sovereign of that country, if he came to England, would be deemed to be resident in his own country. In Story's *Conflict of Laws*, sect. 48, it is said: "Ambassadors and other foreign ministers retain their domicile in the country which they represent, and to which they belong." Then, assuming that the testator had acquired an English domicile, his appointment as attaché conferred on him all [24] the rights and privileges of an ambassador, and revived his domicile of origin the same as if he had returned to Portugal, or had lived and died on board a Portuguese man of war. It does not depend on the *factum* or *animus*, but it is a domicile cast on the party by operation of law. In Story's *Conflict of Laws*, § 49, after describing in what manner a domicile, whether of birth, choice, or otherwise, may be acquired, changed or lost, it is said: "From these considerations and rules the general conclusion may be deduced, that domicile is of three sorts; domicile by birth, domicile by choice, and domicile by operation of law." In the case of *Le Verguire* (5 Rob. Adm. Rep. 99) Lord Stowell said: "It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicile in the case of a native born subject than to impress the national character on one who is originally of another character."

The Attorney General replied.

POLLOCK, C. B. I am of opinion that the Crown is entitled to judgment. It is established by the case of *Thomson v. The Advocate General* (12 Cl. & F. 1) that the payment of legacy duty, or the immunity from such payment, depends on the

domicil of the party whose property is concerned; and the appointment of the testator as attaché to the Embassy of Portugal does not appear to me to vary the case, for after the decision in *Heath v. Samson* (14 Beav. 441), that a foreigner may fill the office of ambassador to a foreign power and yet be domiciled in England, it is clear that the testator might be domiciled in England notwithstanding he was an attaché.

Then the question is, whether the testator was domiciled [25] in England before his appointment as attaché. It appears to me he was, for the circumstances under which his residence commenced, and the total absence of any visit to his own country, or of any communication with any person in that country, tend to shew that long residence in England had that effect which Lord Stowell, in the case of *The Harmony* (2 Rob. Adm. Rep. 322, 324), said ought to be attached to time. I think the declaration in the will, which was not the last, is entitled to very little, if any, consideration. At the time the testator was appointed attaché he was domiciled in England, and, in my opinion, his appointment to that office did not put an end to his English domicil, or confer upon him any right to resort to a Portuguese domicil. For these reasons I think that the testator at the time of his death was domiciled in England, and therefore his property is liable to legacy duty.

MARTIN, B. I am of the same opinion. When the case is understood, it is very plain. The claim is for legacy duty, which is a duty imposed by act of parliament upon the personal property of deceased persons, the exigencies of the State requiring it. It has been established for years that, in order to ascertain the liability to duty chargeable on personal property, it is necessary to ascertain the domicil of the person to whom the property belonged; for the liability to legacy duty is governed by domicil.

Then the first question is, whether the circumstance of the testator having been at the time of his death an attaché to the Portuguese Embassy in any way alters his domicil. I think not; and the case of *Heath v. Samson* (14 Beav. 441) is a direct authority to the contrary. So long as the testator lived, he was exempt from payment of taxes by the rule of international law referred to; but this question arises [26] after his death; and what is there in the exemption, to which he was entitled during his life, to prevent his property being subject to legacy duty after his death? I apprehend there is nothing. Is there anything in the circumstance that at the time of his death he filled the office of attaché to the Portuguese Embassy? According to the case of *Heath v. Sampson* he may have filled the office of ambassador to a foreign state, and, nevertheless, have retained an English domicil. That being so, the question is one of fact, where was the domicil of the testator at the time of his death? According to Mr. Justice Story's (*Conflict of Laws*, ch. iii. § 43) definition, "that place is properly the domicil of a person in which his habitation is fixed, without any present intention of removing therefrom." In Dr. Phillimore's *Book on Domicil* (chap. ii. sect. xv. p. 13), it is stated that, in the opinion of the author, the American judges have laid down the more correct definition, and that it is "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there an unlimited time." Then, applying that to this case, what are the facts? The testator was born in 1795, and came to England in 1818, when he was only twenty-three years of age. He came, as agent of the Portuguese Government, to superintend a trade in Oporto wines, and so continued until the year 1833, when the business ceased. Up to that time, if I were called upon to draw an inference, I should be inclined to say that his domicil was Portugal. From the year 1833 up to the year 1857 he resided at Barnes, in Surrey, and during all that time he was as much domiciled in England as a foreigner could be. Then did anything afterwards take place to indicate a change of domicil? His appointment as attaché, in my judgment, had not that effect. It was an [27] office of honour, shewing the estimation in which he was held by the sovereign of his native country, and entitling him to certain privileges; but what is there in that to shew that he had formed any intention to abandon his English domicil? There is this circumstance, that in a will in his handwriting he says, "As I am a foreigner who always intended to return to my country, and besides being an attaché, &c., my property is not subject to legacy duty." Now I find it stated by Mr. Justice Story (*Conflict of Laws*, ch. iii. § 46), "that if a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period." Therefore, giving full credit to the statement of the testator, that he had an intention

to return to Portugal, that would not alter the domicile which he acquired in this country. Perhaps I am drawing too strong an inference from his statement, but assuming that such was his real intention, it seems to me that it is not sufficient to alter his domicile. For these reasons I am of opinion that the Crown is entitled to judgment.

BRAMWELL, B. I am of the same opinion. Setting aside for a moment the nature of the office of attaché, and the effect which it is contended it would have upon the acquired domicile of the testator, if he had one, I am of opinion that the testator, at the time of his death, had an English domicile. I will not repeat the arguments used by my brother Martin, which are to my mind demonstrative. Giving the greatest weight to the considerations in favour of the testator's intention to return, at some time or other, to his native country; and adopting any definition of domicile most favourable to the defendants, I am never-[28]-theless of opinion that the testator, at the time of his death, had an English domicile.

It is said that the effect of his accepting the office of attaché was, that notwithstanding the factum and animus—his continuous residence in England for a series of years and his evident desire to retain an English domicile—the fact of his having become an attaché would cause him to lose that domicile; because an ambassador and his suite are extra-territorial, and therefore, as soon as the testator was appointed attaché, he became as it were out of England and in Portugal. I am clearly of opinion that it is not so, and I cannot help adverting to what was said by Lord Mansfield in *Mostyn v. Fabrigas* (Cowp. 177), "It is a certain rule that a fiction of law shall never be contradicted to defeat the end for which it was intended, but for every other purpose it may be contradicted." Assuming that the Portuguese ambassador and his suite are exempt from local jurisdiction, because they may be considered as residing in Portugal; that is only for the purpose of their protection, dignity and comfort, not for the purpose of rendering their property free from legacy duty after their death. We must not be supposed to be deciding contrary to the comity of nations. We do not say that if a foreigner came to England and resided here as ambassador for forty or fifty years, he would thereby, simpliciter, acquire an English domicile and his property become subject to legacy duty. What we say is that a foreigner, having acquired an English domicile, does not lose it, ipso facto, by accepting a diplomatic appointment. For these reasons I am satisfied that the Crown is entitled to judgment.

WILDE, B. I am of the same opinion. The principle on which to decide whether the domicile of an individual has been determined or not, has been stated by the rest of [29] the Court; and the facts shew that this case comes within that principle. There was a long continuous residence in England without any declaration of an intention to leave it; and there is the fact of the individual dying in this country. There is therefore strong evidence of an English domicile.

Then the question is whether the fact of the testator having filled the office of attaché from the year 1857 until his death altered the domicile which he had previously acquired. It has been argued that it did, because by a fiction of law it put him out of England and into Portugal. But, I agree with my brother Bramwell, that is straining the fiction of law to a purpose which was never intended. I am fortified in that opinion by a passage in Wheaton on International Law (pt. 3, ch. 1, § 15), which was relied on by the defendants' counsel: "From the moment a public minister enters the territory of the state to which he is sent, during the time of his residence until he leaves the country, he is entitled to entire exemption from local jurisdiction, both civil and criminal. Representing the rights, interests and dignity of the sovereign or state by whom he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from local jurisdiction the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign." To the same effect is the passage cited from Grotius (lib. ii. cap. 18, 5), in which he uses the words "quasi extra territorium;" meaning only that such is the sacredness of the person of an ambassador, and his immunity from the civil and criminal law of the country in which he resides, that he is to be regarded as residing within his own country. It may be observed, that subjection to the civil and criminal law does not depend upon domicile. A foreigner who comes to [30] this country is subject to the civil and criminal law of England, though he may not be domiciled here; and as the obligation of those laws upon him does not depend on his domicile, so the immunity

from them does not shew that he is not domiciled in this country. It seems to me that the argument has wholly failed to establish that the testator ceased to be domiciled in England, because he enjoyed those immunities.

But a wider and more dangerous argument was used, to the effect that whether the testator was domiciled here or not, the law of this country as to property chargeable with legacy duty did not apply. Domicil has its rights as well as its burthens; and it would be hard if a foreigner, by becoming an ambassador, lost his English domicil, though he might wish to retain it. There is no authority to support such a proposition. A dictum has indeed been quoted, to the effect that personal effects or moveables belonging to a minister within the state where he resides are entirely exempt from the local jurisdiction (*a*)—a very untenable proposition. But the next passage is this:—"Nor is the personal property of which he may be possessed, as a merchant carrying on trade, &c., exempt from the operation of the local law;" and, following that out in *Taylor v. Best* (14 C. B. 487), the Court of Common Pleas considered that the exemption only extended to moveables, which could not be interfered with without affecting his personal comfort and dignity as an ambassador. Assuming that the exemption was the same after death as during life, still it would only extend to a certain class of property, which is not the subject of this information. For these reasons I am of opinion that the Crown is entitled to judgment.

Decree accordingly.

[31] *THE ATTORNEY GENERAL v. LADY ROWE*. May 12, 1862.—In 1856 R., whose domicil of origin was England, was appointed Chief Justice of Ceylon, during the pleasure of the Crown, and he resided with his family there, in the exercise of the duties of his office, until his death in 1860. He left a library and other effects in England, and he invested large sums of money on mortgage in Ceylon. Held that, in the absence of any evidence of an intention to acquire a foreign domicil, R. retained his domicil of origin, and therefore his personal property was subject to legacy duty.

[S. C. 31 L. J. Ex. 314; 8 Jur. (N. S.) 823; 10 W. R. 718; 6 L. T. 438.]

Information in equity by the Attorney General as follows:—

1. The object of this information is to obtain from the defendant, who is the sole executrix of the will of her late husband, Sir William Carpenter Rowe, Knight, deceased (hereinafter referred to as the "testator"), payment of the legacy duty which has become due to her Majesty, in respect of the testator's personal estate; and the question for the decision of the Court is, whether the testator was at the time of his death domiciled in England.

2. The testator died at Colombo, in the Island of Ceylon, some time in the month of November, 1859.

3. He was born in England of English parents, and resided in England, practising as a member of the English bar, down to the beginning of the year 1856, previously to which time he had been appointed one of her Majesty's counsel. In the month of February, 1856, he was appointed by her Majesty to be Chief Justice of the Island of Ceylon; and, in consequence of such appointment, he shortly afterwards left England and proceeded to Ceylon, and with his wife and family continued to reside in the island, holding during the whole period the said office of Chief Justice there, down to the time of his death.

4. The mode of appointment to the said office is by letters patent, under the seal of the island, which are prepared and issued pursuant to and in accordance with the directions contained in a Royal warrant addressed to the Governor of the island requiring him so to do. The warrant for the appointment of the testator to be Chief Justice of [32] the island was (according to the usual form of such warrants) in the following terms:—

"To our trusty and well-beloved Sir Henry George Ward, Knight, Grand Cross, &c., our Governor and Commander-in-Chief, in and over our Island of Ceylon, &c. &c.

"Trusty and well-beloved, we greet you well. We being well satisfied of the loyalty, integrity, and ability of our trusty and well-beloved William Carpenter Rowe,

(a) Wheaton on International Law, pt. 3, chap. 1, § 18.

Esquire, one of our counsel learned in the law, have thought fit hereby to authorize or require you forthwith to cause letters patent to be passed, under the seal of our Island of Ceylon, constituting and appointing him, the said William Carpenter Rowe, to be Chief Justice of our said island, in the room of our trusty and well-beloved Sir William Ogle Carr, Knight, to have, hold, exercise, and enjoy the said office and place during our pleasure, with all the rights, profits, privileges, and advantages thereunto belonging or appertaining, and you are to cause to be inserted in the said letters patent a clause or proviso, obliging him the said William Carpenter Rowe to actual residence within our said island, and to execute the said office in his own person, except in case of sickness or other incapacity, and all such other clauses and provisos as are requisite and necessary in this behalf, and for so doing this shall be your warrant. Given at our Court at Buckingham Palace, this 8th day of February, 1856, in the 19th year of our reign."

5. The testator, while residing in the said Island of Ceylon, made his last will and testament in writing, dated the 15th day of October, 1859, and signed the same in the presence of five witnesses present at the same time, who attested and subscribed the same in his presence; and he therein described himself as "Sir William Carpenter Rowe, Knight, Chief Justice of Ceylon;" and he thereby constituted his wife, the above-named defendant, sole executrix [33] of his said will. He died at Colombo, as before stated, in the month of November following, holding at the time of his death the office of Chief Justice of the said island.

6. The defendant proved the testator's said will, in the Principal Registry of Her Majesty's Court of Probate, on the 6th day of March, 1860, and thereby became and is now the sole legal personal representative of the testator. But she has not paid legacy duty in respect of the testator's personal estate, and she declines to pay the same, alleging that she is advised that the testator was not at the time of his death domiciled in England, but was domiciled in the island of Ceylon, and that consequently no such duty is payable. The defendant has in her possession the probate of the testator's will, and she ought to produce the same if necessary.

Prayer. That it may be declared that the testator, Sir William Carpenter Rowe, was domiciled in England at the time of his death, and that legacy duty is payable to her Majesty in respect of his personal estate, and that the defendant is accountable for the same, &c.

The answer of the defendant was as follows:—

1. I admit that the several statements contained in the said information are correct and true, but I crave leave to add thereto the facts following, (that is to say),

The testator, after his said appointment, and while he resided in the island of Ceylon, invested a large sum of money, that is to say 20,000*l.* and upwards, on mortgage of real property in the said island of Ceylon; and in respect thereof, and of other personal property in the said island, I, after his death, obtained probate of his said will from the District Court of Colombo in the said island.

2. I decline to pay legacy duty on the personal estate of the testator, on the ground that, upon the facts set forth in the information, and in this my answer thereto, the [34] testator was at the time of his death domiciled in the island of Ceylon and not in England.

The Attorney General, the Solicitor General, Locke, and Hanson, argued for the plaintiff (May 9). The testator was domiciled in England at the time of his death. He did not remove the whole of his property to Ceylon, and no doubt his intention was to remain there so long as his health permitted him to discharge the duties of his office, and then to return to England. It is not that sort of indefinite intention which depends on contingencies which may never happen; but an intention which, in the ordinary course of events, must at some time have been carried into effect, if the testator had lived so long. His domicile of origin was England, and therefore the onus is on the defendant to shew that, *animo et facto*, he acquired a Cingalese domicile. There is no evidence of an intent to abandon his domicile of origin, except that he went to Ceylon to fulfil the duties of a judicial office, which he held at the pleasure of the Crown, and which he might at any moment have resigned. This case is different from that of a person who formerly went to India in the civil or military service of the East India Company, for there the Indian domicile was based upon the nature of the occupation, the fulfilment of which imposed upon him the obligation of permanent

residence. In that case, the law presumed an intention consistent with his duty, and held his residence to be *animo et facto* in India: *Forbes v. Forbes* (Kay, 341). Here it was not only at the option of the testator how long he should remain in Ceylon, but he held his appointment at the pleasure of the Crown. This case resembles another class, where persons leave England in a public capacity of a temporary nature; in which case the English domicile is not lost. In the case of a governor of [35] a colony, the place in which the duties of his office require him to reside does not affect his domicile of origin. That distinction is pointed out in *The Attorney General v. Napier* (6 Exch. 217), where it was held that an officer in her Majesty's service who died while on duty in India, did not acquire a domicile in that country; but it was otherwise with an officer in the service of the East India Company, because in the latter case there was an obligation of permanent residence. In Phillimore on Domicil, chap. vii. p. 61, reference is made to the following rules laid down in the French Code respecting the domicile of officers in the civil or military service of the state:—"If the office be conferred for the life of the holder and irrevocable, the law fixes his domicile in the place where its functions are discharged, and admits of no proof to the contrary; 'for the law,' says Denisart, 'will not presume an intention contrary to an indispensable duty.'" "If the office be of a temporary and revocable nature, the law does not presume that the holder has changed his original domicile, but allows the fact that he has done so to be established by the usual proof." Lord Cottenham, in his judgment in *Munro v. Munro* (Cl. & F. 842, 876), said, "Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the law of England, but generally by the law of other countries." Then is the fact of the testator having accepted this office of uncertain tenure, and having gone to Ceylon for the purpose of fulfilling its duties, reasonable evidence of an intention to acquire a domicile in that country? In defining domicile, and what is necessary to [36] effect a change of domicile, jurists have adopted sometimes an affirmative and sometimes a negative form of definition. Thus, according to Vattel, bk. 1, ch. xix., § 218, "Domicil is an habitation fixed in some place with an intention of remaining there always." Therefore a man does not establish a domicile in any place unless, either tacitly or by express declaration, he makes known his intention of always remaining there. Then the negative form of definition is, if a person takes up his habitation *sine animo revertendi*—there must be the absence of a definite intention to return. The mere expression of a hope or desire to return is consistent with remaining abroad so long as the particular engagement may render it necessary, which may be for the whole period of life. In Story's Conflict of Laws, ch. iii. § 44, it is said: "Two things must concur to constitute domicile, first, residence; and, secondly, the intention of making it the home of the party. There must be the fact and the intent; for, as Potier has truly observed, a person cannot establish a domicile in a place, except it be *animo et facto*." Here there is a *factum*, but not the *animus*. In Phillimore on Domicil, ch. x. p. 147, after stating the result of the doctrines of the Jurists, reference is made to the following passage in Menochius (*De Præsumpt. lib. vi. xlii. 2*): "*Et primum dicendum est habitationem et domicilium inter se differere. Nam domicilium habere quis dicitur in loco qui animo ibi commorandi perpetuo habitat. Is vero qui pro emptione aliqua ex causâ, puta studiorum, vel litis, vel simili commoratur, habitare dicitur.*" And the learned author says: "The merchant engaged in a special or limited venture; the student who resides for the sake of prosecuting his studies; the individual retained by the prosecution of a law suit; the officer employed by the state in a particular service; all fell under this exception of the civilians, because they were held to [37] retain their intention to return to their original domicile." In *The Attorney General v. Pottinger* (6 H. & N. 733), it was held that the domicile of origin was revived on the return of the testator from China to England, and was not lost by his subsequent residence as Governor of the Cape of Good Hope, and declaration of his intention to return to India. *The Attorney General v. Dunn* (6 M. & W. 511), shews how completely the *factum* and *animus* must concur in order to effect a change of the domicile of origin. Neither the nature nor the tenure of the office which the testator accepted required him to entertain any intention of acquiring a foreign domicile; for every duty of that office might be fulfilled consistently with a temporary residence in Ceylon. [Bramwell, B. Suppose an Englishman went abroad under an engagement to stay there thirty years;

and he said, "I shall stay here for thirty years and then return to England," but in the meantime he died, would he have acquired a domicile in that place? It is submitted that he would not. The moment the absence of intention to remain is ascertained, residence becomes immaterial. If a person goes abroad under an obligation to remain there for an indefinite period, as was formerly the case with a covenanted servant of the East India Company, he has no option of returning at any time: *Bruce v. Bruce* (2 Bos. & P. 229, note), *Craigie v. Lewin* (3 Curt. Eccl. Rep. 435). [Bramwell, B. There is that difference between the case of a covenanted servant and a barrister.] It may be said that the fact of the testator having taken his wife and family to Ceylon, was indicative of an intention to change his domicile; but he clearly never intended that the residence of his family should have any permanent character beyond the contingent duration of his official residence. [Bramwell, B. The same remark would apply if he had only gone for a year.] Upon the [38] face of his will there is strong evidence of the testator's intention to return to England. He left in the custody of his relations in England, amongst other effects, a library of books, which he disposes of by his will. (a) A similar circumstance occurred in the case of *Wicker v. Hume* (7 H. L. Cas. 124, 147), and that was held a strong indication to return to this country when circumstances rendered it desirable to do so. They also referred to Story's Conflict of the Laws, sect. 46, p. 45.

Karslake and Welsby, for the defendant. The testator, at the time of his death was domiciled at Ceylon. It is erroneous to say that, in every case, it is necessary to shew an intention to acquire a new domicile. Although that is correct as a general proposition, there are exceptional cases. If a person went to India in the civil or military service of the East India Company, an intention to return, however strongly expressed, would not affect the question of his domicile, because he had no power of returning. So, in this case, the testator accepted an appointment which bound him to reside at Ceylon during her Majesty's pleasure. [Pollock, C. B. A Judge is under no obligation to hold the office any longer than he pleases.] The testator could not vacate his office unless his tender of resignation was accepted. [Pollock, C. B. There is this difference between a civil and a military officer; if the latter were to go away, he would be liable to be tried by a court martial, and punished; but in the case of a Judge it would only be disrespectful not to tender his resignation and wait until his [39] successor was appointed.] There is no case in which it has been laid down that, in order to change a domicile of origin, it is necessary that the appointment to an office in a foreign country should be for life. The word "permanent" is not used in the sense of continuing during life, but merely "not limited in duration." In *The Attorney General v. Pottinger* (6 H. & N. 733, 747) Bramwell, B., referring to *Ex parte Steer* (3 H. & N. 594), substituted for "permanent" the word "indefinite," as a more correct expression. Here the appointment was for an indefinite time. [Bramwell, B. I do not think the term "permanent" is incorrect, except that it is ambiguous. It may mean "for ever," or for "an enduring time."] Domicil has been defined by American Judges as "an indefinite intention of remaining:" *Elbers v. Krafts* (16 Johns. Amer. Rep.); "a permanent settlement for an indefinite time:" *The Francis* (8 Cranch, 363; 1 Buney, Amer. Rep. 349, note); "a residence at a particular place, accompanied with positive proof of continuing there for an unlimited time:" *Guiz v. Daniel*. But in Phillimore on Domicil, chap. 2, p. 13, it is said that the more accurate definition is "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." The onus is not on the defendant to shew that the testator intended to abandon his domicile of origin. This case does not differ from that of an officer in the service of the East India Company, for the acceptance of the office of Judge imposed upon the testator the obligation of residing at Ceylon for an indefinite period. An Indian officer, at the time of his appointment, might have the fullest intention of resigning at the end of four or five years, but that would not prevent him from acquiring an Indian domicile. [40] So

(a) The following passage in the will was referred to by the Attorney General: "I bequeath to my son William all my books and other effects in the custody of my sister Mrs. Gurney, of Grebursseg, Cornwall; and to my son Francis all the books now in the custody of Mrs. Storey in Bryanston Square, his grandmother; save and except such of them as are law books, all of which I bequeath to my nephew, William Covyndon Gurney."

here it is immaterial whether the testator intended to return to England at some future time of his life, for as long as he remained in Ceylon that was his home, and therefore *primâ facie* his domicile. By the terms of the warrant he was obliged to execute the office in his own person, except in case of illness, and consequently so long as he retained his office he was as much bound to reside in Ceylon, as an Indian officer was formerly bound to reside in India; so that there was an enforced residence for an indefinite time. [Wilde, B. That assumes that he could not of his own will have resigned the office, and therefore he would hold it for life if the Crown did not think fit to relieve him. Pollock, C. B. A person who accepts an office during the pleasure of the Crown is no more bound to retain it than a tenant at will is bound to remain at the will and pleasure of his landlord.] There being no stipulation that the testator might of his own will resign the office, he was bound to hold it until relieved of it by the Crown. An office held during the pleasure of the Crown is held during an indefinite time. A military officer cannot resign his commission without the consent of the Crown. [Wilde, B. referred to Com. Dig. "Officer" (K. 9).] Under the terms of this warrant the testator accepted the office, and undertook to hold it, during the pleasure of the Crown. [Pollock, C. B. That is a perversion of its meaning. The Crown merely retains the power of terminating the appointment at any moment.] The French Code is no authority in this case, for the rules there laid down are rules of that particular Code, and do not profess to be of universal application. *Craigie v. Lewin* (3 Curt. Eccl. Rep. 435) is an authority that they do not govern the English law of domicile. The law as to Indian officers is thus stated by Wood, V.-C., in *Forbes v. Forbes* (Kay, 341, 356):—"I apprehend the question does not [41] turn upon the simple fact of the party being under an obligation by his commission to serve in India, but when an officer accepts a commission or employment the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India." Secondly, assuming that the testator did not hold his office for an indefinite period, the question arises whether in accepting the office he did not intend to resign his English domicile, at all events whilst he remained in Ceylon. [Bramwell, B. Suppose a person on going abroad said, "I mean to go to Paris and not to come back again, but I do not mean to have a French domicile." What would be the effect of that?] *Ex parte Steer* (3 H. & N. 594) is an authority, that though a person may use the strongest expressions that he does not intend to give up his domicile of origin, they will not prevail against the facts which shew that he has done so. If a person said, "I do not intend to give up my English domicile, but I intend to be domiciled for the next twenty years in Ceylon;" if he resided there he would acquire a Cingalese domicile for that period. The testator did not go to Ceylon for a temporary or special purpose, as in the case of a merchant, or student, or others mentioned in the passage cited from Phillimore on Domicil, p. 147, but with the object of remaining there an indefinite period. The obligation to remain for an unlimited time rendered it necessary that he should acquire a domicile in Ceylon: *Hodgson v. De Beauchesne* (12 Moore, P. C. 285). The testator does not in his will describe himself as of England, but as Chief Justice of Ceylon. The fact that he left his books in England is entitled to little or no weight, for he took with him to Ceylon all his house-[42]-hold goods. If the question of intention is to be regarded, there are many criteria of a Cingalese domicile. There is the character and permanent nature of the appointment; the facts that he took with him his wife and family, and invested a large sum of money on mortgages in Ceylon. The direction in his will that, after his death, his property should be invested in the English funds, tends to shew that he contemplated dying in Ceylon. They also referred to Story's Conflict of the Laws, p. 45, and the judgment of Lord Thurlow in *Bruce v. Bruce* (Bos. & P. 229, note).

The Attorney General replied.

Cur. adv. vult.

POLLOCK, C. B., now said,—We are all of opinion that the Crown is entitled to judgment.

It appears to me that our decision may be rested on a very short ground. In the case of *Aikman v. Aikman* (3 Macqueen, 854, 877) Lord Wensleydale said: "The rule of law is perfectly settled. Every man's domicile of origin must be presumed to

continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*; and the burthen of proof unquestionably lies on the party who asserts that change." Lord Wensleydale goes on to say that this rule is laid down in the case of *Somerville v. Somerville* (5 Ves. 749, 787).

Applying that rule to this case, the testator's domicile of origin having been England, what is there to shew that he acquired a domicile in Ceylon? He accepted a judicial office at Ceylon during the pleasure of the Crown; but there is not a single fact which indicates an intention [43] to reside there permanently. It is true, he took with him his wife and family, and all the ordinary appurtenances of civilised life; but it appears that he had left behind him his library, and, if any conclusion is to be drawn from that, it is that he intended to return to England.

The ground on which I rest my decision is, that the domicile of origin is clear, and there is nothing to shew, in point of fact, an intention to change that domicile; therefore the domicile remained, and the Crown is entitled to judgment.

BRAMWELL, B., said,—I am also of opinion that the Crown is entitled to judgment.

The question, which arises upon a claim to legacy duty, is whether the testator, at the time of his death, acquired a Cingalese domicile. His domicile of origin was England, and he retained that domicile, which subjects his personal estate to legacy duty, unless he acquired a Cingalese domicile. That depends on the *factum* and *animus*.

The facts are, that the testator was appointed to a judicial office at Ceylon; he accepted it, and went there to fulfil the duties he had undertaken. There is scarcely another material fact; because, although other matters are stated, they are of little value. The inference I draw from the facts is that he intended to stay until such a time as practically (for no time is limited) his pension would be earned. If his health had been good, and the emoluments of his office greater than the pension, and the climate had agreed with him, and he liked the society of the place and the duties of his office, he probably would have stayed in Ceylon after the time when he had practically earned his pension. On the other hand, if his health had failed, the climate become disagreeable, and he had succeeded in getting a pension for a term of service short of the ordinary time, he would probably have returned to England.

[44] That is the view I take of the facts, treating them as facts found by the special verdict of a jury; and then the question is, whether I can come to the conclusion that the testator acquired a Cingalese domicile. That must, to some extent, depend upon the meaning of the word "domicil," and, in my opinion, nothing can be more vague. I find it stated in *Phillimore on Domicil* (chap. 2, p. 13), that Lord Alvanley commended the wisdom of a great jurist, named Bynkershoek, in not giving a definition of that word; and certainly it is difficult for any one to do so. Mr. Karslake relied on the definition in *Phillimore on Domicil*, founded on the dicta of American Judges: "A residence at a particular place, accompanied by positive or presumptive proof of an intention to continue there for an unlimited time." If that means an endless time it is scarcely an accurate expression; if it means a residence without any actual time assigned to it, it is probably more accurate. Another expression relied on is: "An indefinite intention of remaining;" the next is: "A permanent settlement for an indefinite time," or probably it might be more correct to say, "an indefinite permanency." With these is coupled the expression: "If a person has a vague and floating intention of returning, that will not prevent his acquiring a domicile." Such definitions seem to me to arise from a vague notion of the term "domicil," and certainly it is very difficult to define it.

In *Phillimore on Domicil* (chap. 2, p. 13) there is the suggestion which Mr. Welsby made, and which occurred to me, whether the word "domicil" may not be interpreted by substituting for it the word "home," not in the sense in which a person going to a lodging which he has taken for a week at a watering place might say he was "going home;" nor in the sense in which an Englishman, residing in a colony and intending to live and die in England, might say he was "coming home;" but using the [45] word in the sense in which a man would say, "I have no home; I live sometimes in London, sometimes in Paris, and sometimes in Rome." Mr. Welsby says, "Adopt that word, and what would have been the answer of the testator if he had been asked, where was his home?" "In Ceylon." But I doubt whether he would not have said: "I am staying at Ceylon, and may do so for a considerable time; but my home is England."

However, I have not been able, applying any of the tests which I have suggested, or any of the authorities which I have had an opportunity of consulting, to determine with precision what is "domicil." I have had recourse to the 36 Geo. 3, c. 52, s. 2, the original Act imposing legacy duty, which is general in its terms and comprehends this case. It is true, as said by Tindal, C. J., in *Thomson v. The Advocate General* (12 Cl. & F. 1), that "the very general words of the statute, 'every legacy given by any will or testamentary instrument of any person,' must, of necessity, receive some limitation in their application, for they cannot in reason extend to every person everywhere, whether subjects of this kingdom or foreigners, whether at the time of their death domiciled within the realm or abroad." That being so, it is said that the limitation in the Act extends only to those persons who are domiciled in England. That leads me to this consideration, may not the word "domicil" have a different meaning according to the purpose for which it is used? According to the authorities collected in Phillimore on Domicil, it is clear that the word "domicil" may have a different meaning under different circumstances. Then, I ask, why should the testator's domicil be said to be out of England, so as to exempt his personal estate from the payment of legacy duty? I can see no reason, though I can well understand that, for many purposes, he [46] might be considered as domiciled in Ceylon. Suppose some Cingalese law required a will to be made in a particular form, it would be a hardship to say that he was so domiciled there as to require his will to be made in that form. Therefore, looking at the Act of Parliament, and the construction put upon it by Tindal, C. J., viz., that it is limited to persons domiciled in England, the question is whether there is in this case such a domicil.

It was said that the testator was as much bound to reside in Ceylon as a civil or military officer of the East India Company was formerly bound to reside in India, because he could not resign his judicial office without the consent of the Crown. I doubt that; but it is not necessary to discuss the point, because it is admitted that practically the Crown never refuses its consent. So, in the case of an Indian officer, the East India Company never withheld its consent to his resignation; and therefore it was said that, as the two cases are similar, they ought to follow the same rule. I own I thought it difficult to see the distinction between this case and that of a barrister who goes to make his fortune in India, but, on consideration, I think there is a vast difference between the case of a young man who goes to India with the desire to obtain a position and acquire a competency, and then return to England, and the case of a Judge, who is presumed to be a person who has already obtained a position, and who goes with a certain income and at a time of life which renders it probable that he only intends to stay abroad a few years?

For these reasons I think that our judgment ought to be for the Crown.

WILDE, B., said,—Domicil, no doubt, is a question of fact; and in general there is a greater collection of facts from which the Court is to draw its conclusion, than in [47] the present case. The Court has already laid down an important rule as to domicil. (a) The facts in this case are extremely meagre. The testator went as a Judge to Ceylon; but the case is devoid of any expressions or act of his, from which the Court can draw a conclusion that he intended to make that place his domicil. The fact that he left his library in England points the other way. The onus is on those who wish to establish a foreign domicil; and they have nothing to rely upon but the isolated fact, that the testator accepted a judicial office and went to Ceylon. England was his domicil of origin; he had lived there all his life, and he left on his appointment as Chief Justice of Ceylon. There was nothing permanent in the nature of that appointment, nothing inconsistent with his domicil of origin. If regarded strictly, and without the knowledge which we extra-judicially possess, it was a colonial office during the pleasure of the Crown, and therefore of a temporary nature; if regarded with the light of that knowledge, it was an office to be enjoyed for a limited time, after which a pension would probably have been granted to him. It is therefore a case of residence adopted for a special and temporary purpose, and for a time which, though not definitely fixed, was not likely to be indefinitely prolonged. Such a residence does not, in my opinion, of itself create a domicil, though possibly a domicil might emanate from such a residence if protracted for a considerable time. In this case

(a) *The Attorney General v. Kent*, ante, p. 12.

there was no such lapse of time, and therefore, in my opinion, no new domicile was acquired.

It was said that, as the grant of the office was during the pleasure of the Crown, the testator could not by any act of his own, and in the exercise of his own discretion, divest himself of it. That was a mere proposition, wholly unsupported by any authority or analogy, and I see no reason for [48] adopting it. If we did, it might probably lead to a different conclusion.

For these reasons I agree that our judgment ought to be for the Crown.

Decree accordingly.

JONES v. NIXON. April 28, 1862.—A demise for “a term of three years determinable on a six months’ previous notice to quit, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times,” is a demise for three years certain, determinable only at the end of that period by six months’ previous notice; and if not determined, a subsisting tenancy from year to year.

[S. C. 31 L. J. Ex. 505; 8 Jur. (N. S.) 648; 6 L. T. 330.]

Declaration. For that the plaintiff by deed, bearing date the 2nd of February, A.D. 1860, let to the defendant a house, buildings and land, to hold to the defendant, to wit, for three years from the said 2nd of February, A.D. 1860, as to the said land, and from the 2nd of May, A.D. 1860, as to the said house and buildings, and unless the said tenancy should be then determined by a six months’ previous notice to quit, the same to continue afterwards as a tenancy from year to year, until it should cease by notice to quit at the usual times; rendering therefore during the said term the yearly rent of 150*l.* for the first two years, and 180*l.* for the third year and every succeeding year respectively, payable half-yearly by equal payments on the 2nd of July and the 1st of February in every year, the first of such half-yearly payments to be made on the 2nd of July, 1860. And the defendant by the same deed covenanted with the plaintiff to pay him the said rent during the said term, and so long after as the defendant should continue as yearly tenant of the premises as aforesaid, on the days and in the manner aforesaid. Yet one half-year of the said rent, amounting to 75*l.* afterwards, and during the said term, became due to the plaintiff on the 2nd of July, A.D. 1861, and is still in arrear and unpaid.

Plea. That the material parts of the deed, whereby the [49] said premises were let to the defendant as in the declaration mentioned, were and are in the following words:—This indenture made the 2nd of February, 1860, between James Jones of, &c., of the one part, and William Nixon of, &c., of the other part, witnesseth that the said J. Jones doth hereby demise unto the said W. Nixon, his executors, &c., all that estate, farm, and lands, called, &c.; to hold the said premises unto the said W. Nixon, his executors, &c., for the term of three years from the day of the date of these presents, as to the land, and as to the dwelling house and buildings from the 2nd of May next, determinable on a six months’ previous notice to quit by either lessor or lessee, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times: rendering therefore during the said term the yearly rent of 150*l.* for the first two years, and 180*l.* for the third and every succeeding year, by equal payments on the 2nd of July and the 2nd of February in every year; the first of such half-yearly payments to be made on the 2nd of July next. And the defendant says that the lease contained covenants by the defendant that he would, “during the said term and so long after as he should continue a yearly tenant,” pay the yearly rent, &c., “and at the legal expiration, or sooner determination of the said term, yield up the said premises,” &c.; and a covenant by the plaintiff for quiet enjoyment “during the said term.” Averment: that before the accruing due of the rent in the declaration mentioned, the defendant gave the plaintiff a six months’ notice to determine the said term of three years at the end of the first year thereof. The plea then set out the notice, and averred that it was served upon the plaintiff more than six calendar months before the expiration of the said first year of the said term, to wit, on the 30th of July, A.D. 1860.

Demurrer and joinder therein.

[50] Milward appeared in support of the demurrer, but the Court called on

C. Hutton, to support the plea. According to the true construction of the lease, there was a demise for a term of three years, determinable at the option of the lessor or lessee, by a six months' notice prior to the end of the first or second year. The stipulation as to six months' notice would otherwise be nugatory, for the term would expire without notice at the end of the third year. The words, "otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," shew that the intention of the parties was that the term should be determinable by a six months' notice to quit, in the same way as if it was a demise from year to year for three years. "Determinable" must mean "capable of being determined before the term of three years expires." [Pollock, C. B. The meaning is that the term of three years may be determined by six months' notice, ending with the third year; if not, the demise is to continue from year to year. That is the only construction which gives effect to the contract. Bramwell, B. I should have thought the defendant's construction right, but for the expression "otherwise to continue from year to year," &c. That must refer to the tenancy after the expiration of the three years.]

Per Curiam.(a) There must be judgment for the plaintiff.

Judgment for the plaintiff.

[51] THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF BRECON v. EDWARDS. April 28, 30, 1862.—A sale by sample, on a market-day, near to but without the limits of the market is not a disturbance of the market, unless it is done designedly and with the intention to evade payment of toll.

[S. C. 31 L. J. Ex. 368; 8 Jur. (N. S.) 461; 6 L. T. 293. Distinguished, *Wilcox v. Steel*, [1904] 1 Ch. 221.]

The declaration stated that, at the time of the committing of the grievances, &c., the plaintiffs were possessed of a market for the sale of corn, grain, &c., holden in the borough of Brecon, in the county of Brecon, on Saturday and Wednesday in every week, together with tolls, stallages, and other profits to the said market appertaining, and that all persons selling corn and grain on Saturdays and Wednesdays, within the said borough, of right ought to sell the same within the said market, or at their own respective dwelling-houses, shops, or premises, and not elsewhere, within the said borough. That the defendant disturbed the said market of the plaintiffs, and prevented their enjoyment thereof, and of the said tolls, stallages, and other profits, by unlawfully selling certain corn and grain on the said market days at and in a place within the said borough near to, but outside of, the place where the said market of the plaintiffs was holden as aforesaid (the said place where the defendant so sold the said corn and grain as aforesaid not being the dwelling-house, shop, or premises of the defendant), whereby the plaintiffs lost the tolls and profits which would have been paid to them upon the sale of the said corn and grain had the same been sold within the said market, and could not and did not enjoy their said market and the tolls and profits thereof in so ample and beneficial a manner as they of right ought to have done, &c.

Pleas. First: not guilty. Secondly: that all persons selling corn and grain on Saturdays and Wednesdays, within the said borough, ought not of right to sell the same within [52] the said market, or at their own respective dwelling-houses, shops, or premises, and not elsewhere, within the said borough, as alleged. Issues thereon.

The cause came on for trial, before Byles, J., at the last Spring Assizes for the county of Brecon, when a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:—

By an Act passed in the year 1838 (1 & 2 Vict. c. xii., local and personal), intituled "An Act for providing market-places and for regulating the markets within the borough of Brecon, in the county of Brecon," after reciting that the markets for supplying the inhabitants of the borough of Brecon, in the county of Brecon, and the neighbourhood thereof, with corn, grain, and agricultural produce, fish, poultry, and other provisions, and with live and dead stock and certain other commodities, had

been long held in the principal streets and other public thoroughfares within the said borough, whereby the same are rendered dangerous and inconvenient to the inhabitants and the public at large passing through the same; and that the market for buying and selling butcher's meat, and also cheese, butter, seeds, hops, and other things, had been usually held in an inclosed space under the Guildhall of the said borough; and that the mayor, aldermen, and burgesses of the said borough were willing and desirous to erect a proper market-place and buildings for the sale of meat, fish, &c., with proper stalls, standings, and other accommodations therein, it was, among other things, enacted:—

Sect. 42. "That the tolls theretofore payable in respect of the market in the said town should continue until the intended new market should be completed and opened for public use; and upon and from and after the opening thereof there should be paid to the said mayor, aldermen, and burgesses, or to the person appointed by them to receive the [53] same, by every person holding, using, or occupying any stall or standing, or selling, or offering or exposing to sale, any meat, fish, &c., corn, grain, flour, &c., brought into the said markets, or either of them, such tolls, rents, and stallages as should from time to time be fixed and appointed by the said mayor, aldermen, and burgesses, not exceeding the several tolls, rents, and stallages specified in the second schedule to that Act annexed," &c. In case of refusal or neglect to pay toll, power was thereby given to the mayor, aldermen, and burgesses to levy the same by distress and sale of the goods exposed to sale, or other goods of the person so refusing or neglecting.

Sect. 52. That the said new market should be appropriated to the sale of meat, fish, &c., and other marketable provisions (except corn, grain, &c.), and should be called the "New Market," and the present market, which was situated under the Guildhall, should be appropriated only to the sale of corn, grain, &c., and should be called the "Corn Market."

Sect. 53 empowered the mayor, aldermen, and burgesses to hold the markets on Wednesday and Saturday in every week throughout the year, and on and at such other days and hours of the day as might from time to time be appointed by the said mayor, aldermen, and burgesses.

Sect. 59. "That when the said new market-place for the sale of meat, fish, &c., and the new market for the sale of live cattle, &c., should be built, appropriated, and set apart, ready to be opened for public use, the said mayor, aldermen, and burgesses, or their successors, should, and they were thereby required, by a printed handbill or advertisement signed by the clerk for the time being acting in pursuance of the said Act, to be circulated in the said borough and the neighbourhood thereof, and by inserting the same in some newspaper circulated in the said county, to give ten [54] days' notice of such market-places, or either of them, having been so built, appropriated, and set apart, and ready to be opened for public use, previous to the day on which such market-places, or either of them, should be opened for public use; and from the same period the said market-place, or space under the Guildhall, should be appropriated for the sale of corn, grain, flour, &c.: Provided always, that the tolls, rents, and stallages imposed by the said Act should not be paid or payable until the market-place in which the same should be authorized to be demanded should have been opened for public use as aforesaid."

Sect. 60. "That if any person should on any market day, or any other day, after the said intended new market, and the necessary buildings and conveniences thereto, should have been erected, completed, and opened (and notice thereof should have been given as provided by the said Act), sell or expose to sale, at any time, any corn, grain, flour, &c., within the said borough, in any place other than in that part of the existing market-place which is situate under the Guildhall, or any meat, fish, &c., in any place within the said borough other than the said intended new market-place, every person so offending should, for every such offence, forfeit and pay any sum not exceeding 5l.: Provided, nevertheless, that nothing therein contained should extend, or be construed to extend, to prevent any persons from selling or exposing for sale any corn, grain, &c., or any meat, fish, &c., in their own dwelling-house, or in their own shop or premises, in any part of the said borough, in such manner as they might, at the date of the now reciting Act, lawfully do, or to restrain or prohibit any person from selling fish, vegetables, &c., from door to door within the said borough."

Sect. 73 made it lawful for any justice having jurisdiction, where any penalty was

by that Act made recoverable before a justice of the peace, to proceed by summons, without in-[55]-formation in writing, and to hear and determine the matter of complaint, and on proof to convict, and adjudge payment of the penalty incurred, and proceed to recover the same.

It was proved at the trial, that for some time since the coming into operation of the said Act the market for corn, grain, &c., sold in bulk had been held in the market-place, under the Guildhall; and that on Saturday, the 12th March, 1859, William Edwards, a son of the defendant, and acting on his behalf, came to the house of Mr. Frederick Hodges, a grocer, of Brecon, occupying a house and shop in High Street, within the borough, near to the said market-place, in the same street as the present corn-market, and there sold, by sample, to Mr. Hodges, twenty sacks of oats, which oats, at the time of the contract, were not exposed for sale in bulk, but were brought into the town and delivered by the defendant to Mr. Hodges on the following Wednesday, which is also a market-day.

The said local Act was put in by the plaintiffs, and is to form part of this case.

The plaintiffs contended at the trial, and still contend, upon this evidence, that in selling the corn in the manner and under the circumstances above stated the defendant had infringed their right of market, and that he had no right to sell the corn, under the circumstances stated in the case, elsewhere than at the market-place under the Guildhall, or without paying to the plaintiffs the tolls which would have become due on such a sale. The defendant denied his liability, and objected that there was no proof of any notices or advertisements having been given or published under sect. 59 of the said Act, and contended that there was no evidence of an infringement of right of market in respect of which he was or could be liable to the action.

The question for the opinion of the Court is, whether there was evidence for the jury that the defendant had in-[56]-fringed the plaintiffs' right of market. If the Court should be of opinion in the affirmative thereof, then the verdict is to stand. If the Court should be of a contrary opinion, then a nonsuit is to be entered, the plaintiffs' title to a market not to be disputed.

Giffard for plaintiffs. The question is, whether a sale by sample within the borough, but without the limits of the market, is evidence of an infringement of the plaintiffs' right of market. A person who sells corn, by sample, in a market derives as much benefit from the market as if the corn was there in bulk; and if he refuses to pay toll, an action may be maintained against him for disturbance of the market: *The Bailiffs, &c., of Tewkesbury v. Bricknell* (2 Taunt. 120). Here there was a sale by sample without the limits of the market, but if that was done for the purpose of evading payment of toll, it was a fraud on the owner of the market for which an action on the case will lie: *Blakey v. Dinsdale* (2 Cowp. 661). Though the commodities are left beyond the limits of the market, if the seller derives a benefit from it, and refuses to pay toll, he is guilty of a disturbance of the market: *Bridgland v. Shapter* (5 M. & W. 375). [Martin, B. It does not appear, from the facts stated, that the sale was made with the intention of evading the payment of toll. Suppose a person went to a friend's house adjoining a market, when it happened to be a market-day, and the latter said to him "I want to buy some oats," upon which he replied "I can sell you some, I have a sample in my pocket," and having exhibited it, a sale takes place, that would not be a disturbance of the market. Pollock, C. B. There must be an intention to evade the payment of toll. Under the usury law, the mere taking more than 5l. per cent. was not an offence [57] unless it was found to have been done usuriously.] That was the case of a public illegality, and therefore the "mala mens" must exist; here it is only necessary to shew that the defendant deprived the plaintiffs of some profit of their market. In *Prince v. Lewis* (5 B. & C. 363), the defendant sold his vegetables in a street adjoining the market but without its limits, and it was assumed that he would have been liable to an action but for the fact that the owner had appropriated a portion of the market to other purposes than those specified in the grant, so that there was not room for the defendant within the market. [Pollock, C. B. There the defendant placed his goods in the street for the purpose of selling them out of the market. Wilde, B. In *Chitty on Pleading*, vol. 2, p. 626, 7th ed., the form of declaration for disturbance of a market contains this averment: "Which otherwise would and of right ought to have been brought to the market of the plaintiff." In this case it is not so alleged, nor does it appear that this was anything

more than a mere casual sale.] The defendant having sold the corn so near the market, the inference is that he intended to evade the payment of toll. It is like the case of a carrier, in which the non-delivery of goods is *prima facie* evidence of negligence. The limits of the franchise are shewn by the 60th section, which imposes a penalty on any person who, on a market-day or any other day, shall sell or expose to sale any corn, &c., within the borough, or in any other place than that part of the market situate under the Guildhall. [Pollock, C. B. That must mean any public place.] The section preserves the rights of shopkeepers, which would be unnecessary if that were the construction. The owner of a market has by law a right to prevent persons from selling goods in their private houses situate within the limits of his franchise: *Mosley v. Walker* (7 B. & C. 40). [Martin, B. That was [58] an ancient market, and there was evidence from which the jury found that the right existed. In *The Mayor, &c., of Macclesfield v. Pedley* (4 B. & Adol. 397, 403), Littledale, J., said that it has never been decided that the grantee of a newly created market could bring an action for the disturbance of his franchise against a person who did no more than sell in his own shop, not within the limits of the market-place, marketable articles on the market-days. Bramwell, B. In Roll. Abridg. Market (C.), Fair, pl. 1, it is said: "If a man has a market in one part of the vill of D., the inhabitants of the other part of the vill cannot erect new houses and there in their houses and stalls sell merchandise; for this is to the damage of the market: 2 E. 2, admitted."] As to the notice required by the 59th section, that the new market has been opened, the Act having passed in the year 1838, and the market having been held in the appointed place ever since that time, the maxim "*Omnia presumuntur rite esse acta*" applies.

Grove (Garth with him), for the defendant. This action is not founded on any common law right to an ancient market, but the right alleged is that all persons selling corn on market-days within the borough, ought to sell the same within the market, or at their dwelling-houses, shops, or premises, and not elsewhere within the borough. That right can only be supported by the statute, the preamble (b) [59] of which shews that the market was formerly held in the public streets. [Pollock, C. B. The 60th section uses the words "sell or expose to sale;" therefore the selling must be the result of an exposure to sale.] The statute was passed to remedy the danger and inconvenience of holding the market in the public thoroughfares; and by the 52nd section a particular place is appropriated for it. By section 42 toll is payable by every person "offering or exposing to sale" any meat, corn, &c., "brought into the said markets, or either of them," and there is a power of distress for enforcing payment. By section 59 toll is not payable until the markets are open for public use. Then, by section 60, if any person shall "sell or expose to sale," any corn, &c., within the borough in any other place than that named, he shall forfeit for every such offence a sum not exceeding 5l. There is no evidence of any such offence; and before the statute it was no offence to sell in shops or in the public streets. The 60th section goes on to provide that nothing therein contained shall prevent any persons from selling corn in their dwelling-house, shop, and premises, in any part of the borough, in such manner as they might at the date of the Act lawfully do. If this sale is a disturbance of the market, any contract made by sample for the sale of corn coming from a foreign port would be equally so. Assuming that the plaintiffs have a right of action on the statute, to constitute a disturbance of the market the sale must be

(b) The preamble of the Act is as follows:—

"Whereas the markets for supplying the inhabitants of the borough of Brecon, in the county of Brecon, and the neighbourhood thereof, with corn, grain, and agricultural produce, fish, poultry, and other provisions, and with live and dead stock, and certain other commodities, have been long held in the principal streets and other public thoroughfares within the said borough, whereby the same are obstructed, and rendered dangerous and inconvenient to the inhabitants and the public at large passing through the same: And whereas the market for buying and selling butcher's meat, and also cheese, butter, seeds, hops, and other things, hath been usually held in an inclosed space under the Guildhall of the said borough: And whereas the mayor, aldermen, and burgesses of the said borough are willing and desirous to erect a proper market-place and buildings for the sale of meat, fish, poultry, vegetables, garden seeds, fruit, cheese, butter, and other marketable provisions and commodities, with proper stalls, standings, and other accommodations therein."

fraudulent and with the intention to evade the payment of [60] toll. The judgments of Lord Mansfield in *The Bailiffs, &c., of Tewkesbury v. Bricknell* (2 Taunt. 120) and of Lord Abinger in *Bridgland v. Shapter* (5 M. & W. 375) proceed on the ground that the sale was a fraud on the owner of the market. In *The Prior of Dunstable's case* (11 Hen. 6, p. 19, pl. 13, B.), it was held that the allegation that meat was sold occulte was a material part of the declaration, and that the defendant's plea was defective in not traversing it. Here the declaration does not allege fraud, but simply a right to have commodities sold on market-days within the market, and in support of that right the plaintiffs give in evidence the act of parliament. No case has decided that a sale by sample out of a market is an infringement of the right of market. If goods are fraudulently sold out of the market for the purpose of evading payment of toll, the proper remedy is by action on the case: *Blakey v. Dinsdale* (2 Cowp. 661). In *Mosley v. Walker* (7 B. & C. 40) there was evidence of the exclusive right claimed by the owner of the market. This is an attempt to engraft ancient rights on a modern market, established for municipal purposes. The words, "expose to sale," in the 42nd and 60th sections have reference to goods in bulk. [Wilde, B. In *Mosley v. Walker* (7 B. & C. 40), which was an action for selling in a shop, the declaration uses the words "exposed to sale."] By exposing to sale, a person gets the benefit of the concourse of people who frequent the market. He also argued that the action would not lie, inasmuch as the statute which created the offence and imposed the penalty had provided a specific means of enforcing it. On this point he cited *Underhill v. Ellicombe* (M.C. & Y. 450), *Stevens v. Jeacocke* (11 Q. B. 731), and the 73rd section (ante, p. 54) of the 1 & 2 [61] Vict. c. xii. He further argued that the action could not be maintained, since there was no proof of notice that the new market was opened, as required by the 59th section.

Giffard, in reply. In *The Bailiffs, &c., of Tewkesbury v. Bricknell* (2 Taunt. 120), no express fraud was alleged, but Lord Mansfield held that the fact of the sale was a fraud on the owner of the market. It is not necessary to aver that the goods would otherwise have been brought into the market, it is enough that they might have been. In *Yard v. Ford* (2 Saund. 172), the fact that the new market might draw off customers from the old market, though held on a different day, was considered sufficient to justify the jury in finding it a nuisance. There is no authority for saying that the sale must be in a public place. In *Blakey v. Dinsdale* (2 Cowp. 661) it was in a private room. The defendant occulte availed himself of the benefit of a market-day to obtain a customer. He also argued that the action would lie, notwithstanding the statute which created the offence imposed a penalty: citing *Couch v. Steel* (3 E. & B. 402).

POLLOCK, C. B. I am of opinion that the defendant is entitled to judgment. The case is, in this respect, defectively stated, and probably evidence might have been given to clear up the point. If the defendant's son, who acted for him, went to Brecon on a market-day with a view of selling the corn on behalf of his father, and intended to expose it for sale in the market, or anywhere near where he could obtain the benefit of the market, that would have been a case which, in point of law, would have entitled the plaintiff to a verdict. But I agree with Mr. Grove that no case has yet decided that a sale by sample out of a market [62] is an infringement of the right of market. Here the only facts are that the defendant's son went, on a market-day, to the shop of a person within the borough and near the market-place, and there sold him, by sample, some oats, which were delivered on the following market-day. That leaves the matter so uncertain that I think there is no evidence from which a jury ought to infer an infringement of the market.

I forbear saying anything on the other points, some of which involve considerable doubt, since it appears to me that the facts do not warrant a judgment for the plaintiffs; and, as they have not established their case in point of fact, the defendant is entitled to our judgment.

MARTIN, B. I do not mean to dissent from the judgment of the Lord Chief Baron, and what I know is the opinion of my brothers Bramwell and Wilde, but I own that I entertain a strong impression that the facts are not stated as they existed, and that, if they had been, the plaintiffs would have been entitled to a verdict. In my opinion, the law is correctly laid down in *Bridgland v. Shapter* (5 M. & W. 375), where the defendant left his sheep on the premises of a public-house, in the immediate neighbourhood of a market, while he went into the market to find customers whom he brought back to the public-house, and there sold them the sheep, and it was held

that an action would lie against him; for he availed himself of the opportunity of a concourse of persons in the market to sell his cattle. I entirely concur with what was said by Lord Abinger in delivering judgment in that case.

I have no doubt the real facts of this case are, that the defendant, a farmer in the neighbourhood of Brecon, was in the habit of sending his corn for sale in the market at [63] Brecon; and if either he, or his son acting for him, went designedly there that is, knowingly and intentionally, for the purpose of selling the corn in the market, or anywhere near, so as to obtain the benefit of the market without paying toll, that would be a disturbance of the market, for which the plaintiffs might maintain an action against him. The word "fraud," in its usual sense, is not applicable to this case. The right to hold a market is a right of property in the market, which the law protects. But the question here is whether, upon the facts now stated, there was evidence for the jury that the defendant had infringed the plaintiffs' right of market, and in my opinion there was not; because I agree that if a person merely comes to a town to sell a commodity, and it happens to be a market-day there, that would not be a disturbance of the market, because the act must be done designedly, and with an intention to obtain the benefit of the market without payment of toll.

BRAMWELL, B. I am also of opinion that the defendant is entitled to judgment. With respect to the law, there ought not to be any doubt. The owner of a market has a right to toll; and consequently, if people bring their commodities to the market and avail themselves of it, they are subject to the toll, and the owner has his remedy for it as such. If, however, persons leave their commodities without the limits of the market, in order that they may not subject themselves to toll, but at the same time obtain the benefit of the market, that is a disturbance of it for which an action on the case will lie. Such is the principle of the decision in *Bridgland v. Shapter* (5 M. & W. 375), in which I entirely concur. Therefore, in this case, the plaintiffs ought to establish that they were entitled to a market, and that the defendant-[64]-ant disturbed it by taking the benefit of it without paying toll. Then is there any evidence of that? I think not. The defendant's son, acting for him, came to Brecon on a market-day, very likely intending to sell his oats in the market, if he could not find a customer in the town. Although he came on a market-day, the sale had no more to do with the market than if a person, invited to stop at the house of a friend, in the course of conversation mentioned that he had some oats to sell, and thereupon a sale of them took place at the friend's house on a market day. No doubt, if the defendant's son had met the purchaser in the market, and had said to him, "We had better go to your shop, and make the bargain there, otherwise I shall be liable to toll," a jury would have been warranted in finding that to be a disturbance, inasmuch as he took the benefit of the market without paying for it. So if he had said, "Let us go to a public-house, and settle the business there," the same observation would apply. But I think upon the case, as here stated, that all the defendant's son did was *bonâ fide*. He goes to a person in his shop (either because he intended to go there first, or because he had tried to find a customer in the market and had failed) and sells his oats in the shop. I cannot think that is a disturbance of the market. The principle may be tested by an extreme case. Suppose a commercial traveller from London, who had no knowledge of the market, happened to come on a market-day to Brecon for the purpose of calling on a customer, and on going into the market found him there and sold him some goods: why should the owner of the market have a right of action for a disturbance of it? The seller has derived no benefit from the existence of the market. Ought he to say to the customer, "Step out of the market, because if I sell you the goods here I shall be subject to toll." That seems to me [65] absurd. If that be so in the case of a commercial traveller coming from London, it would be equally true of a farmer coming from the neighbouring country. In this case, it seems to me that there is no evidence that the defendant got the benefit of the market, and no evidence of a disturbance by selling in the market. If, indeed, it had appeared that the defendant had in any way got the benefit of the market, I should have been of a different opinion; but, upon the facts stated, I see no reason for coming to any other conclusion than that the defendant is entitled to judgment.

WILDE, B. I am of the same opinion. The plaintiffs rest their claim upon a right of market, and the common law right which belongs to the owner of a market. The right, as stated in the declaration, is, that persons selling corn and grain on a market-day within the borough "ought to sell the same within the market or at their own

respective dwelling-houses, shops or premises, and not elsewhere within the borough ;” and that right is traversed by a plea. There is no evidence of immemorial or prescriptive right to this market ; but it is agreed that the right to some market shall not be disputed. The plaintiffs gave no evidence in support of this right but a local act of parliament, and they ask us to infer from that a right to the claim set up in the declaration. I should have thought there was great difficulty in coming to that conclusion. I gather from the act of parliament that the plaintiffs have some right of market, but whether or no they have the right claimed in the declaration does not appear by the Act. However, upon that point I give no opinion, because I am in favour of the defendant upon the question whether he has infringed the right, assuming it exists.

[66] Now, the action is for a disturbance of market ; and whether or no there has been a disturbance is not a question of fact. It is perhaps difficult to lay down an absolute definition of what constitutes a disturbance of a market ; though it is equally easy to suggest cases that would or would not be ; but, in order to warrant a jury finding a disturbance, it must be shewn that the defendant has taken the benefit of the market, or at least has deprived the owner of some profit which he would otherwise have obtained.

Then the question is, whether the facts of this case afford evidence for a jury of a disturbance. The only facts are that two persons, of whom the defendant's son was one, were in a house in Brecon on a market-day, when they struck a bargain for the sale of a quantity of corn by sample. It seems to me that is not a disturbance, unless every contract made within the borough, no matter how or under what circumstances, is a disturbance. What other facts may exist which might shew a disturbance, I do not surmise. Dealing with the facts before the Court, I think there is no evidence for the jury of a disturbance.

I may add that this is a deviation from the usual practice, and one which may be found inconvenient, viz., instead of moving the Court upon the question whether there was evidence for the jury, turning it into a special case. I never knew another instance of a special case being stated, in which the only question was whether there was any evidence for a jury.

Judgment for the defendant.

[67] HOLLAND v. COLE. May 13, 1862.—A lessee, who covenanted not to assign the demised premises without the consent in writing of the lessor, executed a deed, under the 192nd section of the Bankruptcy Act, 1861, whereby he assigned all his property to trustees for the benefit of his creditors. Held, that the assignment was a forfeiture of the lease.

[S. C. 31 L. J. Ex. 481 ; 8 Jur. (N. S.) 1066 ; 10 W. R. 563 ; 6 L. T. 503. Distinguished, *Porter v. Kirkus*, 1867, L. R. 2 C. P. 592 ; *In re Riggs* ; *Ex parte Lovell*, [1901] 2 K. B. 21.]

Ejectment to recover possession of a house and premises in Oxford Street, in the county of Middlesex.

At the trial, before Martin, B., at the Middlesex Sittings in the present term, it appeared that by indenture of the 29th November, 1858, the plaintiff demised the house and premises in question to one Clark for a term of twenty-one years. The indenture contained a covenant by Clark that he would “not assign or underlet, or otherwise part with possession of the said demised premises, or any part thereof, without the consent in writing of the said W. Holland (the plaintiff), his executors, &c., for that purpose, under his or their hand or hands first had and obtained.” There was the usual clause of re-entry, in case of breach of any of the covenants in the lease. By indenture of the 9th January, 1862, between Clark of the first part, J. Troup and J. Hazlett, trustees, for themselves and the rest of the creditors of Clark parties thereto of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors of Clark, of the third part : after reciting that Clark was indebted to the parties thereto of the second and third parts in the several sums set opposite to their respective names in the schedule thereunder written, which he was unable to pay in full, and he had therefore proposed and

agreed to assign all his estate and effects unto the said trustees for the benefit of his creditors: It was witnessed that Clark, for a nominal consideration, did bargain, sell, assign, &c., to the said trustees, their executors, &c. (inter alia), all that the lease of the house and premises in Oxford [68] Street, &c. This deed was duly registered pursuant to the provisions of the 197th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134). The trustees entered into possession of the house and underlet it to the defendant. The consent of the plaintiff to the assignment of the lease had not been obtained, and he brought the present action for the breach of the covenant.

It was submitted, on behalf of the defendant, that there was no breach of the covenant not to assign, inasmuch as, under the Bankruptcy Act, 1861, the trustees of Clark were in the same position as assignees in bankruptcy. The learned Judge was of opinion that the assignment was a forfeiture of the lease, and directed a verdict for the plaintiff.

J. B. Karslake now moved for a new trial, on the ground of misdirection. The indenture of assignment, when registered, vested the debtor's property in the trustees, in the same manner that it would have vested in assignees under a bankruptcy. The sections of the Bankruptcy Act, 1861, which relate to this subject, commence with the 192nd, and are headed: "As to trust deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor." The 192nd section renders certain deeds entered into between a debtor and his creditors, or a trustee on their behalf, valid and binding on all the creditors, provided certain conditions be observed. The 194th section requires the deed to be registered in the Court of Bankruptcy within twenty-eight days after its execution; and, by the 196th section, a memorandum of registration must be written on the face of the deed. By the 197th section, after registration of such deed, the parties thereto, or bound thereby, shall, in all matters relating to the estate and effects of the debtor "have the benefit of and be liable to all the provisions of this Act, in the same manner as if the debtor had [69] been adjudged a bankrupt, &c., and the trustees had been appointed creditors' assignees under such bankruptcy," &c.; "and the trustees of any such deed, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, &c., as are now possessed or may be used or exercised by assignees, &c., with respect to the bankrupt, or his net estate and effects in bankruptcy." The 198th section shews that this proceeding is in effect a bankruptcy, for it provides that, after notice of the filing and registration of the deed, no process shall be available against the property or person of the debtor. [Pollock, C. B. In this case there is an assignment of the lease by the debtor, with a view to proceedings which may or may not take effect; in the case of bankruptcy there is no assignment by the bankrupt.] Formerly a conveyance by a trader of all his property to trustees for the benefit of his creditors, was an act of bankruptcy and void, and therefore, if a lease was included in the conveyance, there was no valid assignment of it so as to create a forfeiture: *Doe d. Lloyd v. Powell* (5 B. & C. 308). Now, validity is given to trust deeds for the benefit of creditors, and the trustees are placed in the same position as assignees under a bankruptcy. [Channell, B. The title of the trustees is founded on the deed itself.] The deed could have no effect as regards the rights of the trustees against third persons, except by force of the statute. [Martin, B. In the case of bankruptcy the assignees take by operation of law, and therefore there is no breach of the covenant not to assign. Here there is an actual assignment of the lease by the debtor, and the lessor has elected to determine it.] At the time the assignment was executed, it was uncertain whether [70] it would have any effect, but as soon as the requisites of the statute were complied with, it ceased to be a voluntary conveyance, and became an assignment in bankruptcy. This is only a voluntary mode of becoming bankrupt, and the same rights exist against third persons as in the case of a hostile bankruptcy. The legislature could never have intended that the assignment should operate as a forfeiture of the lease; for in that case the object of the trust deed would be defeated.

POLLOCK, C. B. I am of opinion that there ought to be no rule. It may be that, if it had occurred to the legislature, some provision would have been inserted in the Act, to the effect that an assignment for the benefit of creditors should, when registered, be considered as an act of bankruptcy; but, instead of such an assignment being declared void, it is the very foundation of the title of the trustees. That being so,

the assignment is not by operation of law, but by the act of the trader; and the forfeiture takes place the moment the deed is signed and sealed by him.

BRAMWELL, B. I am of the same opinion. It has been argued that it never could have been intended by the legislature that an assignment of a lease for the benefit of creditors should operate as a forfeiture of it, because that would defeat the very object of the assignment. But the answer has been given by my Lord,—if the case had been contemplated most likely some provision would have been inserted in the Act to meet it. If the words of the Act be looked at, there is no ground for Mr. Karslake's construction of it. The sections in question are headed: "As to trust deeds for benefit of creditors, composition and inspectorship deeds, executed by a debtor." The 192nd section renders such deeds binding, provided certain conditions [71] be observed; one of which is that the deed is executed by three-fourths in value of the creditors, whose debts amount to 10l. or upwards. But the only consequence of the requisite number of creditors not executing the deed is that it is not binding upon those who have not executed it. The 194th section requires the deed to be registered. The 197th provides that, after registration, the parties to the deed, or bound thereby, shall in all matters relating to the estate and effects of the debtor, have the benefit of and be liable to all the provisions of the Act, in the same manner as if the debtor had been adjudged bankrupt, and the trustees had been appointed creditors' assignees under such bankruptcy. It does not make the debtor a bankrupt, but merely says that the trustees under the deed shall, in all matters relating to the debtor's estate, have the same powers as the creditors' assignees in bankruptcy. Therefore the title of the trustees is under the deed, not under the Act, which only provides in what way the deed shall be carried into execution. If the requisite number of creditors do not assent to the deed, it is manifest that the case is not within the Act; if they do, the operation of the deed depends upon itself, not upon the Act.

CHANNELL, B. I am of the same opinion, and for the same reasons.

MARTIN, B. A man makes a bargain that he will not assign his lease, and that if he does it shall be forfeited. He then assigns all his property to trustees: I cannot comprehend why that is not a forfeiture of the lease. If the Act said that notwithstanding the breach of such a condition a lease shall not be forfeited, the case would be different, but there is nothing of the kind in the Act.

Rule refused.

[72] TREDWEN v. HOLMAN. May 5, 1862.—A policy of assurance, in a Mutual Marine Insurance Association, was subject to the following rule:—"All average claims and claims of abandonment shall be adjusted and settled, conformably to the custom of Lloyd's or the Royal Exchange, by a professional average-stater. But should the committee or the assured be dissatisfied with the adjustment, they may refer the same to two professional average-staters, or to two other competent persons, with power to such two persons to appoint an umpire, and the award of such two persons shall be final; and all other cases of dispute, of whatever nature, shall be referred in like manner; but the committee or assured by mutual consent may refer all such adjustments or disputes to one person only, whose award shall also be final; and no action at law shall be brought until the arbitrators have given their decision." Held, that no action could be maintained on the policy for a total loss until the claim had been adjusted and settled by arbitration in pursuance of the rule.—In an action for a total loss the declaration set out the policy and the above rule, and averred that the plaintiff had always been willing that the loss and amount payable in respect thereof should be adjusted and settled according to the rule, and that he had performed all conditions precedent necessary to entitle him to maintain the action. It then alleged, as breaches, that the defendant would not settle or adjust, or allow to be settled or adjusted, the amount payable on the loss, in accordance with the policy and rules, and that the amount insured had not been paid. The defendant demurred to the declaration and also pleaded a plea which in terms traversed the breaches. Held, that the declaration was good on demurrer, since it must be deemed to be averred either that the defendant had refused to refer, or that a reference had been had and an award made in favour of the plaintiff, as for a total loss; but that the plea, being proved, was an answer to it.

[S. C. 31 L. J. Ex. 398; 8 Jur. (N. S.) 1080; 10 W. R. 652; 6 L. T. 127. Discussed, *Edwards v. Aberayron Mutual Ship Insurance Society*, 1876, 1 Q. B. D. 576. Approved, *Dawson v. Fitzgerald*, 1876, 1 Ex. D. 261. Explained, *Minifie v. Railway Passengers' Assurance Company*, 1881, 44 L. T. 554.]

Declaration for that the plaintiff, before and at the time of making the policy of assurance hereinafter next mentioned, to wit, on the 11th day of April, 1860, and thenceforth continually until the 5th day of March, 1861, was a shipowner and member, together with the defendant and divers other persons, of a certain society or association hereinafter mentioned, called "The Great Western Mutual Marine Insurance Association," and the ship or vessel hereinafter mentioned was from the day of the date and making of the said policy of assurance admitted into and entered in the said Society, and continued in the said Society until the loss thereof hereinafter mentioned. And the plaintiff, on the 12th of April, 1860, caused to be made a certain policy of assurance purporting thereby and containing therein, that the plaintiff, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did appertain, in part or in all, did make assurance and cause himself and them, and every of them, to be insured, lost or not lost, at and from the 11th of April, 1860, until the 20th of March, 1861, upon any kind [73] of goods and merchandise, and also upon the body, tackle, &c., of and in the good ship or vessel called the "Aurora." And the said ship, &c., and goods and merchandise, &c., for so much as concerned the assured, by agreement between the assured and assurers in the said policy, was thereby valued at 3860l., and insured from perils of the seas. And it was thereby further agreed by and between the plaintiff and the defendant that the said policy should be subject to certain rules thereunto annexed, which, so far as they are material to this action, are to the tenor and effect and in the words and figures following:—

1. That the affairs of this association shall be managed by a committee of seven persons chosen by and from the members, three to be a quorum, who shall meet once a quarter, or oftener if required, and order payment by the managers' draft at two months' date; and that the members of this association severally and respectively, and not jointly or in partnership, nor the one for the other of them, but each of them in his own name, shall insure each other's ships or shares of ships, from noon of the day of entry of each ship until noon of the 20th of March following, against losses, perils and damages which may be sustained or received by their respective ships, or caused or done by them to other ships, except when on the voyages in the trades or under the circumstances hereinbefore particularly excepted.

3. That all average claims and claims of abandonment shall be adjusted and settled, conformably to the custom of Lloyd's or the Royal Exchange, by a professional average-stater (except as otherwise directed by these rules). But should the committee or the assured be dissatisfied with the adjustment they may refer the same to two professional average-staters, or to two other competent persons, with power to such two persons to appoint an umpire, and the award of such three persons shall be final; and all other [74] cases of dispute, of whatever nature, shall be referred in like manner; but the committee and assured by mutual consent may refer all such adjustments or disputes to one person only, whose award shall also be final; and no action at law shall be brought until the arbitrators have given their decision.

11. That all losses by stranding or otherwise shall without delay be made known to the managers, and all protests, vouchers, surveys and average statements shall be sent to the managers, and laid before the committee, and be subject to the stipulations named in the rules of this association; and all ships lost or damaged, or doing damage to other ships, shall contribute to their own loss or damage, and no claim shall be admitted with any ship sold with her average without the approval of the committee; and in the event of any ship being stranded or damaged and not taken into a place of safety, it shall be lawful for this Society to use every possible means in their power to procure the safety of the ship, the owner bearing his proportion of the expenses incurred, and any owner refusing the co-operation of the agents of the association for the safety of a ship on the strand shall suffer a deduction of 50l. per cent. in the settlement of the claim: and it is hereby provided that no acts of the association or its agents under or in pursuance of the powers hereby reserved to the Society shall be deemed or taken to be an acceptance or recognition of any abandon-

ment of which the assured may have given notice to the association; and this Society under any circumstances shall only pay for the absolute damage caused by the dangers and accidents of the sea.

12. That all drafts for claims shall be duly accepted and punctually paid when due; and if any member shall neglect or refuse to accept or pay his contribution on receiving notice from the managers, his respective ship or ships shall immediately cease to be insured in or by this association, [75] but he shall still be liable to contribute to all losses which may occur during the continuance of the policy; that the solicitors for the association shall be directed to sue immediately for the amount due, and if not recovered through the insolvency of the member, the loss shall be borne by the members generally.

Averments. That the said association mentioned in the said rules was and is "The Great Western Mutual Marine Insurance Association," and that the said policy of assurance was made by the plaintiff for and on the part and behalf of himself and of G. Hellyar, &c.; and that the said writing or policy of assurance was subscribed with the name of the defendant and divers other persons by an agent of the defendant, and the said several persons in that behalf, as assurers for the sum of 1500l. upon the premises in the policy of assurance mentioned. And the plaintiff undertook and promised the defendant to perform and fulfil all things in the said policy of assurance, rules and regulations contained on his part and behalf to be done, performed and fulfilled. And the defendant undertook and promised that he would become and be an insurer to the plaintiff for his part and proportion of the said last mentioned sum of and upon the said ship or vessel upon the terms and according to the said policy of assurance and the said rules and regulations, and would perform and fulfil all things in the policy of assurance, rules and regulations contained on his part and behalf to be performed and fulfilled. And the plaintiff and the said other persons on whose behalf the said insurance was made as aforesaid, or some of them, were then and thence until and at the time of the loss hereinafter mentioned, interested in the said ship and premises to the amount of all the monies by him insured thereon. And the plaintiff says that after the making of the said policy of assurance and during the continuance thereof, and of the [76] risk against which the said ship was covered and protected by the said policy, the said ship was by the perils of the sea wholly wrecked and lost. And the plaintiff has always been willing that such loss, and the amounts payable in respect thereof, should be adjusted and settled according to the rules of the said association, whereof the defendant has always had notice. Breaches: although all conditions have been performed and fulfilled, and all things happened and were done, and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said agreement in the said policy and the said rules contained, and to maintain this action for the breach thereof hereinafter alleged, and although the plaintiff has requested the defendant and the members of the said association to settle and adjust, or to allow to be settled and adjusted, the amount payable in respect of the said loss of the plaintiff, and in accordance with the terms of the said policy and the said rules in that behalf, yet the defendant and the said members of the said association have wholly refused so to do, and the said amount insured has not, nor has any part thereof, been paid to the plaintiff; nor has the same been settled or adjusted in accordance with the said policy and rules. There was a second count on a similar policy in "The Metalled Freight Association," and subject to rules in the same terms as above.

Pleas (inter alia). Fifthly, to first count: That the plaintiff was not ready and willing to have the loss and amounts payable in respect thereof adjusted and settled according to the rules of the said association.

Sixth, to first count. That the defendant had not notice that the plaintiff was ready and willing to have the loss and amount payable in respect thereof adjusted and settled according to the rules of the said association.

Seventh, to first count. That the plaintiff did not request [77] the defendant and the members of the said association to settle and adjust, or to allow to be settled and adjusted, the amount payable in respect of the said loss of the plaintiff, in accordance with the terms of the said policy, and the said rules in that behalf as alleged.

Eighth, to first count. That the defendant and the said members of the said association did not refuse to settle and adjust the said claim as alleged, and were always ready and willing to settle and adjust it.

Ninth, to so much of the first count as alleged that the amount of the sum insured has not, nor has any part thereof, been paid. That the plaintiff's claim in respect thereof was a claim, to wit, a claim of abandonment within the meaning of the said third of the rules in that count mentioned, and that the said claim has not been adjusted and settled according to the said rule in that behalf; and that there was a dispute by and between the plaintiff and the said association and the committee thereof, in respect of the said claim, within the meaning of the said rule, and that it has not been arbitrated upon as provided for in this rule, nor have nor has such arbitrators or arbitrator as therein mentioned given a decision thereupon, or in respect thereof. The fifteenth, sixteenth, seventeenth, eighteenth and nineteenth were pleas to the second count, similar to the above pleas.

The defendant also demurred to the declaration.

The plaintiff took issue on the pleas, and also demurred to the ninth and nineteenth pleas.

At the trial, before Pollock, C. B., at the London Sittings after last Hilary Term, the following facts appeared:—The plaintiff was part owner of a ship called the "Aurora," and he had effected an insurance upon the ship and freight in "The Great Western Mutual Marine Assurance Association," of which the plaintiff and defendant were members. [78] The policy was subject to the rules mentioned in the declaration. The ship sailed from Venice with a cargo of wheat, and was lost in the Adriatic sea. The plaintiff sent to the association a claim for a total loss; and subsequently forwarded vouchers and documents relating to it, together with the average calculations of an average-stater. The committee of the association refused to entertain the claim on the ground that the captain's certificate was not in conformity with "The Merchant Shipping Act, 1854," and had been improperly obtained. Some correspondence took place between the plaintiff and defendant, in which the defendant expressed his willingness to refer this claim in manner provided by the third rule; but the plaintiff refused to do so. The plaintiff had also effected another policy in the association mentioned in the second count, and which was subject to similar rules. A verdict was entered by consent for the defendant on the above pleas, leave being reserved to the plaintiff to move to enter the verdict for him.

Montague Smith, in the following term, obtained a rule nisi accordingly, on the ground that upon the evidence the plaintiff was entitled to the verdict.

Honeyman shewed cause, and also argued in support of the demurrer to the declaration, and in support of the ninth and nineteenth pleas (May 2). No action is maintainable on this policy until the claim has been adjusted and settled by an arbitration in pursuance of the third rule. [Wilde, B., referred to *Horton v. Sayer* (4 H. & N. 643).] There the agreement was that all matters in difference should be determined by arbitrators, and that the parties should not prosecute any action at law or in equity without first submitting to such arbitration; and that was held an absolute agreement to oust the superior Courts of their jurisdiction, [79] and therefore void. This case resembles *Scott v. Avery* (5 H. L. Cas. 811), where it was provided that no action at law or in equity should be maintained on the policy until the matters in dispute had been decided by arbitrators, and then only for such sum as the arbitrators should award. *Horton v. Sayer* and *Scott v. Avery* have established this distinction: that a mere agreement to refer the matter in dispute to arbitration will not oust the superior Courts of their jurisdiction; but when the agreement is that no action shall be maintained until the amount in dispute has been ascertained by an arbitrator, that is binding on the parties. [Bramwell, B. If a tenant covenants that he will cultivate the demised land in a husbandlike manner, and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them.] A claim for a total loss is a claim which must be adjusted and settled in the manner prescribed by the third rule; for it provides that every dispute of whatever nature shall be referred to arbitration, and that no action at law shall be brought until the arbitrators have given their decision. The language which the parties have used renders the adjudication of the arbitrators a condition precedent to the right of action: *Hotham v. The East India Company* (1 T. R. 638), *Braunstein v. The Accidental Death Insurance Company* (1 B. & S. 782) and *Stavers v. Curling* (3 Bing. N. C. 355). If the declaration means that the defendant has

refused to have the claim adjusted and settled by arbitration, that is denied by the eighth plea, and the issue found for the defendant.

Montague Smith and Garth, in support of the rule, and [80] also in support of the declaration and demurrer to the ninth and nineteenth pleas. The action is maintainable. First, the case is not within the principle laid down in *Scott v. Avery*, but is governed by *Horton v. Sayers*. The third rule commences by providing for the cases of average claims and claims of abandonment. This is a claim for a total loss, and therefore not within that branch of the rule. The rule then provides that "all other cases of dispute, of whatever nature, shall be referred in like manner." That is an absolute agreement to refer all disputes to arbitration, and therefore void, as ousting the Courts of their jurisdiction.

Secondly, assuming that the agreement to refer is valid and applies to this case, the declaration is good. It avers that the plaintiff has always been willing that the loss should be adjusted and settled according to the rules of the association, and it is alleged as a breach that the defendant would not settle and adjust, or allow to be settled and adjusted, the amount payable in respect of the said loss of the plaintiff, and in accordance with the terms of the policy and the rules in that behalf. [Bramwell, B. It is not alleged that the defendant refused to refer.] There is a general averment of the performance of all conditions necessary to entitle the plaintiff to maintain the action; and therefore it must be taken either that the defendant has refused to refer or that there has been a reference and award, and that the defendant has refused to pay the sum awarded.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B. We are of opinion the defendant is entitled to judgment. The case of *Scott v. Avery* (5 H. L. Cas. 811) decided that [81] the insurer and the underwriter may contract that no right of action (to be enforced in a Court of law) shall accrue until an arbitrator has decided, not merely as to the amount of damages to be recovered but upon any dispute that may arise upon the policy. The question therefore is one of construction, and we think the parties to this policy have so agreed. The third rule, which is incorporated with the policy, after providing for disputes as to average claims and claims of abandonment, expressly declares that all other cases of dispute, of whatever nature, shall be referred; and no action at law shall be brought until the arbitrators have given their decision. The agreement is clear and unambiguous, and the parties probably meant to act upon *Scott v. Avery* and exclude the jurisdiction of the Courts of law, except for the purpose of enforcing the award to be made by the arbitrators. A case of *Horton v. Sayers* (4 H. & N. 623) was cited and relied on by the plaintiff. But we are of opinion that this case is governed by the case of *Scott v. Avery*, and not by that of *Horton v. Sayers*. The plaintiff is therefore in the wrong. The defendant proposed to him to refer the matter in dispute, in accordance with the third rule, to which he refused to accede, and he has failed to perform that which is a condition precedent to his maintaining the present action.

As to the entries to be made upon the record, there are two counts in the declaration upon two valued policies on the ship "Aurora" in two Societies of which the defendant is a member. The counts are similar. They begin by setting out the policies, including the third rule; they then aver the total loss of the ship, and aver the performance of all conditions precedent, generally, in compliance with the Common Law Procedure Act, 1852, s. 57. It was argued on behalf of the plaintiff that, assuming the third rule to create [82] a condition precedent, it must be deemed to be averred that the plaintiff had proposed to refer the dispute, or that a reference had been had and an award made in favour of the plaintiff, as for a total loss. This seems to be so. And it was then further argued that the breaches ought to be read as alleging that the defendant had not performed what he had contracted to do upon such conditions happening, viz., concur in a reference and pay the amount of loss awarded to be paid. The breaches, as alleged, are that the defendant would not settle or adjust, or allow to be settled or adjusted, the amount payable on the loss, in accordance with the policies and rules, and that the amount insured had not been paid. Now, assuming that the construction contended for may be put upon the breaches the counts are good, but then the defendant is entitled to the verdict upon the eighth and seventeenth pleas, which traverse them. He never refused to go into

a reference; on the contrary, he proposed one which the plaintiff rejected; and he never refused to pay an amount awarded, for no award was ever made. He is therefore entitled to have the verdict entered for him upon two material issues, which entitles him to judgment in the action.

As to the other issues in fact, they are only material as regards costs, and possibly the parties may arrange as to them, either by agreeing to an entry that the jury be discharged, or settling between themselves how the verdict is to be entered. If this cannot be done, they can be settled by a Judge at Chambers.

As to the demurrers to the ninth and nineteenth pleas, they are founded upon the assumption that the third rule creates a condition precedent. We think it does, and that the pleas are good.

The result is, that our judgment is for the plaintiff upon the demurrer to the declaration, for the defendant upon the [83] demurrer to the ninth and nineteenth pleas, and that the rule to enter the verdict for the plaintiff upon the eighth and seventeenth pleas, which traverse the breaches, be discharged.

Judgment accordingly.

WATTS v. AINSWORTH AND OTHERS. April 25, 1862.—The plaintiff wrote to the defendants, offering to sell them seed of growing turnips, to which the defendants replied asking what turnips he had in growth, their quantities and prices. The plaintiff answered that all that he could offer them at present was the produce of five acres of White Globe seed at 18s. per bushel. The defendants offered to take two or three acres at 16s. 6d. per bushel. The plaintiff replied that he could not accept less than 18s. The defendants then wrote to him as follows:—"In reply to your favour of this morning we beg to say as our neighbours are giving you 18s. per bushel for White Globe turnips, we, as a beginning with you, will take the produce of three acres at that price, to be delivered as soon as harvested, 1861, free of carriage to London Station. Let us know what other sorts, &c., you may have to offer, and also Wurzell seeds of sorts for 1861 harvest. Waiting your reply,—We remain," &c. The plaintiff wrote no answer to this letter; but subsequently saw one of the defendants at their warehouse, on which occasion it was found by the jury that the plaintiff verbally assented to the terms contained in that letter.—Held, that there was a sufficient memorandum or note in writing of the contract within the 17th section of the Statute of Frauds.

[S. C. 31 L. J. Ex. 448; 6 L. T. 252.]

The declaration stated, that the plaintiff agreed with the defendants to sell, and sold to the defendants, and the defendants then agreed with the plaintiff to buy and bought of the plaintiff, the produce of three acres of White Globe turnip seed of the growth of the year 1861, at the price of 18s. per bushel, to be paid by the defendants to the plaintiff; and upon the terms that the plaintiff should deliver the said White Globe turnip seed as soon as harvested in the year 1861, free of carriage, to the Bricklayers' Arms Station, London, of the South Eastern Railway, for the defendants, and that the same seed should be accepted by the defendants at that station. Averment: that the plaintiff has done all things necessary on his part, &c., to entitle the plaintiff to have the said White Globe turnip seed accepted and paid for by the defendants, according to the said contract. Breach: that they did not nor would accept the said White Globe turnip seed or pay the plaintiff the said price [84] for the same, but have wholly neglected and refused so to do, &c.

Plea. That the defendants did not promise as alleged. Issues thereon.

At the trial, before Wightman, J., at the last Kent Assizes, the following facts appeared:—The plaintiff was a farmer at Hythe, in the county of Kent, and the defendants were seed merchants in London, carrying on their business under the style of "James Carter & Co." In March, 1861, the plaintiff having grown some White Globe turnip seed, wrote to the defendants as follows:—

"Hythe, 7 March, 1861.

"Gentlemen,—Mr. Baydon of this place has handed me your card, stating that you were buyers of turnip seeds now growing. I do a large business with several of the most respectable houses in London and elsewhere, and possibly I may be in a position to offer you some sorts that you may be buyers of. If you will have the

goodness to name the sorts and quantities, I will at once say how far I can meet your wishes. My usual practice is to contract by the acre, the seedsman taking whatever the produce may be at a stated price per bushel.—I am, &c.

“JAMES WATTS.”

The defendant wrote in reply as follows:—

“James Watts, Esq.

“London, March 11, 1861.

“Dear Sir,—In reply to yours we beg to say we shall be glad to know what turnips, &c., you have in growth for 1861 harvest, with quantities and price, delivered carriage free to London Station. We should also be glad to know at what price you could do us four or six acres Scimitar Peas, if you have them in growth.—We remain, &c.

“JAS. CARTER & Co.”

To which plaintiff replied as follows:—

[85] “Messrs. Carter & Co.

“Hythe, 14 March, 1861.

“Gentlemen,—Since writing to you on the 7th inst., I have gone over my growing crops, and I find I do not stand very well for surplus, and all I can offer you at the present moment, is the produce of five acres White Globe, @ 18/6, five ditto Skirving's Swedes, @ 28/. Some of the latter was sold @ 30/ a few days since. You may entirely rely on the stocks of the above, and I will undertake to deliver them to the Bricklayers' Arms Station. I cannot offer you any Scimitar Peas. I have only six bushels left, barely sufficient to get up my stock. Your early reply will oblige.—Yours, &c.

“JAMES WATTS.”

“Messrs. Carter & Co.”

The defendants then wrote to the plaintiffs as follows:—

“James Watts, Esq.

“London, March 18, 1861.

“Dear Sir,—In reply to your favour we beg to say we have bought Skirving's Swede Turnips at a considerable less price than what you quote it at. We also think your price too high for White Globe. We could take two or three acres of the latter at 16/6 per bushel, just to make a beginning with you. Waiting your reply.—We remain, &c.

“JAS. CARTER & Co.”

The plaintiff replied as follows:—

“Hythe, 19 March, 1861.

“Gentlemen,—I am much obliged for your offer for two or three acres of White Globe, but I cannot accept it. My contract price was 18/ with the London Houses, and I see no reason to go below that now. I was asked 35/ for growing Swedes to-day at Ashford market. I cannot offer you any peas.—I am, &c.

“Messrs. Jas. Carter & Co.

“JAMES WATTS.”

The defendants wrote in reply as follows:—

“[86] James Watts, Esq.

“London, March 21, 1861.

“Dear Sir,—In reply to your favour of this morning we beg to say, as our neighbours are giving you 18/ per bushel for White Globe Turnips, we, as a beginning with you, will take the produce of three acres at that price, to be delivered as soon as harvested 1861, free of carriage to London Station. Let us know what other sorts you may have to offer, as also Wurzell Seed of sorts for 1861 harvest. Waiting your reply.—We remain, &c.

“JAS. CARTER & Co.”

The plaintiff wrote no answer to that letter, but on the 25th March called at the defendants' warehouse in London and had some conversation with Ainsworth, one of the defendants, about the purchase of some other seeds, when he said “I think we have some transaction with you,” to which the plaintiff replied “Yes, a contract for three acres of White Globes.” The defendant Ainsworth, however, stated that the plaintiff, when he called at their warehouse, refused to sell them the seed upon the terms they had offered, and that in consequence the defendants bought the seed elsewhere.

It was objected, on behalf of the defendants, that there was no note or memorandum in writing of the contract to satisfy the 17th section of the Statute of Frauds. The learned Judge left it to the jury to say whether the plaintiff, when he called at the defendants' warehouse, accepted or repudiated the offer contained in the letter of the 21st March. The jury found that he accepted it, and returned a verdict for the plaintiff for 79l. 4s., leave being reserved to the defendants to move to enter a verdict for them, if the Court should be of opinion that there was no valid contract within the 17th section of the Statute of Frauds.

Prentice now moved for a rule nisi accordingly. There [87] was no memorandum or note in writing of the bargain to satisfy the 17th section of the Statute of Frauds. The letters are mere proposals. Prior to the letter of the 21st of March there is no foundation for saying that there is anything to bind either party. By that letter the defendants offer to take the produce of three acres of White Globe turnip seed at 18s. a bushel, but the plaintiff never accepted the offer. It is evident that the defendants considered it a mere proposal, for they add: "Waiting your reply." Suppose that letter did not relate to the sale of goods, would it require a stamp as a binding contract? [Bramwell, B. Suppose the plaintiff had refused to deliver the seed, could an action have been maintained against him? It could not, for he never assented to the defendants' offer to take the produce of three acres. The plaintiff offered to sell them the produce of five acres, and was not bound by any offer of the defendants to take a less quantity. The parol assent of the plaintiff, which the jury have found, is not sufficient to satisfy the statute.]

MARTIN, B. I am of opinion that there ought to be no rule. It seems to me that the requirements of the statute are satisfied in two ways. I think the letter from the defendants of the 21st March amounted not merely to a proposal to take the produce of three acres of turnip seed at 18s. per bushel, but that it was a contract in writing properly so called. But assuming that is not so, the finding of the jury makes it a good memorandum of the bargain. After that letter was written, the plaintiff saw the defendants and agreed to the terms contained in it. Thereupon it became a sufficient note in writing to satisfy that part of the 17th section of the Statute of Frauds which requires that some note or memorandum in writing of the bargain [88] be made and signed by the parties to be charged by such contract: *Smith v. Neale* (2 C. B. N. S. 67).

BRAMWELL, B. I also think there ought to be no rule. It seems to me that there is a sufficient memorandum in writing within the 17th section of the Statute of Frauds. No doubt there is difficulty in all cases where the Court is called upon to put a construction upon a document with no authority to guide it in ascertaining the true meaning. But here I can see a note or memorandum in writing of the bargain. First, there is the letter of the 7th March in which the plaintiff states that he has been told that the defendants were buyers of turnip seeds then growing; and that possibly he might be in a position to offer them some sorts which they might buy; and that, if they would name the sorts and quantities, he would at once say how far he could meet their wishes. Thereupon the defendants wrote in reply, "We shall be glad to know what turnips, &c., you have on growth for 1861 harvest, quantities and price, delivered carriage free to London Station." The plaintiff says in answer, "All I can offer you at the present moment is the produce of five acres Globe 18s. 6d., five ditto Skirving's Swedes 28s." The defendants thereupon, in effect, say,—"We do not want all your produce: we want only two or three acres of White Globe: we do not agree to your price, but we could take two or three acres of White Globe at 16s. 6d. per bushel." The plaintiff replies, "I am much obliged by your offer for two or three acres of White Globe, but I cannot accept it—not because I object to the quantity, but because I object to the price;" which is equivalent to saying "I am willing to sell you two or three acres of White Globe turnips, but the price must be 18s. per bushel." The defendants thereupon say, "We will [89] take the produce of three acres at the price of 18s. per bushel, to be delivered as soon as harvested." The last words of the letter, "Waiting your reply," created a doubt in my mind; for if a man writes to another "I offer you goods at a certain price, answer and let me know whether I am right as to the terms," that would not be a bargain until the other answered "those are the terms." Then the question is, whether any such weight can be attached to the words "Waiting your reply." I think not, because the plaintiff would have no occasion to restate the terms, or to say "I agree to them," or to do

anything but say "Yes, you are right." I confess that on that score I entertained some doubt, but on consideration I think that no rule ought to be granted.

WILDE, B. I am of the same opinion. To my mind nothing can be more clear than the meaning of the correspondence, and I agree that the letter of the 21st March constitutes a note or memorandum in writing of the bargain within the meaning of the 17th section of the Statute of Frauds.

The only point upon which I will say anything in addition is with reference to the words "Waiting your reply." I agree that if the defendants in using those words intended, for whatever reason, that the matter should be still open, and that the letter should not be an acceptance of the previous offer, there would be no note or memorandum within the meaning of the statute. But I do not so regard the words "Waiting your reply." The defendants say, "We will take the produce of three acres of White Globe seed at 18s. per bushel;" and then they go on to say, "Let us know what other sorts you may have to offer, as also Wurzell seed of sorts for 1861 harvest." I consider that the meaning of the words "Waiting your reply," is waiting your reply to that question; and I do not construe those words as meaning [90] that the contract for the purchase of the White Globe seed was to be open.

I may add that the Lord Chief Baron is of the same opinion.

Rule refused.

HORSFALL AND ANOTHER v. THOMAS. May 5, 1862.—If a person purchases an article which is to be manufactured for him, and the manufacturer delivers it with a patent defect which may render it worthless, if the purchaser has had an opportunity of inspecting it, but has neglected to do so, the manufacturer is not guilty of fraud in not pointing out the defect.—The defendant employed the plaintiff to make for him a steel gun for which he was to pay by two bills of exchange. The plaintiff delivered the gun with a defect in it which the plaintiff might have seen on examination, and which would have justified him in refusing to receive it. The defendant without examining the gun accepted and delivered to the plaintiff the bills of exchange. Afterwards the plaintiff, in a letter to the defendant, stated that the gun was of the best metal all through and had no weak points that the plaintiff was aware of. The gun was tried and at first answered well, but after repeated trials burst in consequence of the defect in it. The plaintiff having sued the defendant on one of the bills, he pleaded that he was induced to accept the bill by the fraud of the plaintiff. Held, that there was no evidence for the jury in support of the plea.

[S. C. 31 L. J. Ex. 322; 8 Jur. (N. S.) 721; 10 W. R. 650; 6 L. T. 462: at Nisi Prius, 2 F. & F. 775. Distinguished, *Archbold v. Lord Howth*, 1866, Ir. R. 1 C. L. 629. Dissented from, *Smith v. Hughes*, 1871, L. R. 6 Q. B. 605. Applied, *Carlisle v. Salt*, [1906] 1 Ch. 341. Discussed, *Shepherd v. Croft*, [1911] 1 Ch. 530.]

Declaration on a bill of exchange, dated the 2nd July 1860, drawn by the plaintiffs, by the name and style of "The Mersey Steel and Iron Company," upon and accepted by the defendant for payment to the plaintiffs of 233l. 10s. twelve months after date.

Plea (inter alia). That the defendant was induced to accept the bill by the fraud, covin and misrepresentation of the plaintiffs.

At the trial, before Pollock, C. B., at the London Sittings after last Hilary Term, it appeared, by the evidence of the defendant in support of the plea, that the plaintiffs carried on the business of iron founders at Liverpool under the name of the Mersey Steel and Iron Company. In the year 1859 the defendant applied to the plaintiffs to make for him a cannon, for the purpose of testing some experiments which he was desirous of submitting to the consideration of the War Office. A long correspondence took place between the parties as to the terms, but at length the agreement was entered into contained in the following letters:—

[91] "Berkeley Square, Tuesday Afternoon,
"30th August.

"Dear Sir,—I had the pleasure of an interview with Mr. McNeil this morning respecting the 68-pounder 95 cwt. gun. It appears there has been some misunder-

standing with regard to the terms of payment. My object simply was to avoid having to pay the money this year (in case I should not receive any from the Government), my expenses having been already so heavy. I intended that one-half should be paid at the commencement of the year and the remainder six months afterwards. If you can only make the gun on condition of payment this year, I must distinctly tell you that (unless, of course, it is paid for by the Government) it would be entirely out of my power to do so. I should be glad if you would undertake to make the gun, but should feel obliged if you will let me know whether you can do so or not at your earliest convenience, as I have to return an answer to the War Office respecting it.—Yours very truly,

“LYNAL THOMAS.”

“G. H. Horsfall, Esq.

“P.S.—Of course, if the Government pay for the gun before the beginning of next year, I should remit the money to you forthwith; that, or any other arrangement not entailing the payment this year, I am willing to enter into, but it must be done at once.”

The plaintiffs wrote in answer as follows:—

“September 1.

“Dear Sir,—Your favour of Tuesday to Mr. G. R. Horsfall has been handed to us by him, requesting us to reply to it as it is a business matter. In reply, we shall be happy to supply you with a steel forging for a 68-pounder 95 cwt. gun, for the sum of 324l., payment to be made by bill, half at six months and half in twelve months, with the understanding that if the Government pay you before these [92] stipulated times, that you hand over the amount to us in settlement of the bills. We could, if you please, turn and bore the gun (by the latter we mean rough boring) for the further sum of 48l. You are aware that we have no machinery for rifling grooves, but no doubt you would be able to get that done at Woolwich. Trusting this arrangement will be satisfactory, we remain, &c.,

“THE MERSEY STEEL AND IRON COMPANY,

“L. Thomas, Esq. per WILLIAM CLAY.”

The defendant wrote in answer, assenting to these terms.

Some correspondence afterwards took place between the defendant and the plaintiffs with reference to some flaws which appeared in the gun during its boring. In consequence of these flaws, the bore was, with the consent of the defendant, increased from 6½ to 7 inches. It was also agreed that the plaintiffs should rifle the gun, for which they were to receive, in addition, 95l., making the price of the gun 467l. On the 2nd July, 1860, the defendant, in pursuance of the agreement, accepted two bills of exchange for 233l. 10s., payable respectively at six and twelve months after date. The gun was delivered, by the defendant's directions, at Woolwich. On the 12th July the defendant wrote to the manager of the Company, stating that he had seen the gun, and was very much pleased with its appearance; and he asked for some drawings of the rifling. These were sent, on the 17th July, to the plaintiff's agent in London, in a letter which he communicated to the defendant, and which concluded as follows:—“The gun is of the best metal all through, and has no weak points that we are aware of, and we hope it will turn out all that Mr. Thomas can desire.” After the first trial of the gun, the defendant wrote to the manager of the Company as follows:—

“22nd September, 1860,

“Saturday Afternoon.

“My dear Sir,—The trial of the gun commenced on Friday, but [93] there was only time to fire four rounds, you will be glad to hear, with the most perfect success. The largest charge used was 25 lb. with a shell of 174 lb. weight. The precision was admirable. The remainder (five) are to be fired on Tuesday afternoon, when I hope to tell you of a good range, as the higher elevations are to be used on that day. I have written to Liverpool to acquaint them with the result this post. The gun shews no sign of a strain. Everybody expected to see it fly to pieces the first shot. If the wish was father to the thought, they must have been woefully disappointed.—Yours very truly,

“LYNAL THOMAS.

“The greatest range, I believe (for I have not yet seen the list), was something over 4000 yards (some hundreds) at 10°, but the shot fell into the water, and could not be exactly estimated. They cut pretty furrows in the sand.”

"26th Sept. 1860.

"My dear Sir,—The trial is over. Yesterday's results were even better: 28 lb. of powder was fired with a shell of 174 lb. weight, at an angle of $37\frac{1}{2}$ degrees. The gun shews no sign of strain anywhere. Heaven knows what a range we got, but something very large. I shall get the official report, I hope, to-morrow, when I will let you know. I only know that it is greater than Armstrong's 7-inch gun considerably. The precision was beautiful, considering there was only a common sight on the gun, and that not adjusted properly. I shall not write to Liverpool until I get the report, but you can tell them.—Yours truly,

"LYNAL THOMAS."

The defendant's acceptance, payable at six months' date, was duly paid on 5th January 1861. The Government required that the gun should be further tried, and accordingly in June, 1861, further trials took place. Six rounds were fired, and at the seventh round the gun burst. The defend[94]-ant afterwards wrote to the manager of the Company as follows:—

"London, June 29th, 1861.

"My dear Sir,—My large gun was tried again yesterday, and after six rounds (21 lb. to 23 lb. of powder) it flew to pieces. On examining the remains, the metal in the bore presented a remarkable appearance, and it is scarcely possible to conceive that the gun could have stood what it did, so defective and unsound was the metal. But the weakest point, and that which probably gave way the first, was immediately behind the trunnions; here there were strong longitudinal flaws which appear gradually to have opened, so that with much smaller charges of powder the gun must eventually have gone, and before many rounds could have been fired. I applied immediately at the War Office for permission to replace it with another gun, with which to continue the experiments, which, I may observe, were for the purpose of testing my system, and not your metal alone, and which, prior to the bursting of the gun, shewed results even more remarkable than those of the last trial; an increase, indeed, in both range and accuracy was obtained; so that I believe there will be no opposition offered to the substitution of another gun in place of the first. Under these circumstances you will no doubt wish, on your own account, to supply a perfectly sound facsimile of the last for this purpose. I understand you to say that you could construct a perfectly sound gun by means of a new process, and I believe that, if the metal were sound, nothing could burst the gun. I should feel much obliged by a speedy reply, as I have my arrangements to make with the Minister of War.—Yours faithfully,

"W. Clay, Esq.,

"LYNAL THOMAS.

"Mersey Company, Liverpool."

The defendant's counsel, in his opening address to the jury, stated that, after the gun burst, it was discovered that [95] the breach end of the chamber was all soft and spongy, and that a metal plug had been driven into the breach over this soft part; that it would be proved by scientific evidence that this plug caused the bursting of the gun, and had rendered it practically useless. The defendant's counsel then contended that, inasmuch as the plug could not have been put into the gun without the plaintiff's knowledge, their statement that "the gun was of the best metal all through, and had no weak points that they were aware of," was false and fraudulent, and that, the defendant having been induced by this false and fraudulent representation to accept the bills, the plaintiffs could not recover.

The learned Judge was of opinion that, even if the facts stated by the defendant's counsel were proved, the defendant would not be entitled to a verdict on the plea of fraud: that as the plaintiffs had supplied the defendant with a gun, which, according to his own statement, possessed considerable merits, the circumstance that it burst after repeated trials, in consequence of the insertion of the plug in the breach, was only ground for a cross action. His lordship then directed a verdict for the plaintiffs for the amount of the bill and interest.

Bovill, in the present term, obtained a rule nisi for a new trial on the ground of misdirection in stopping the case and directing the jury that the facts opened and proposed to be proved, viz., that the gun had been knowingly, intentionally and fraudulently plugged, would not be any defence to an action on the bill.

Edwards James and Aspinall shewed cause (April 28). The facts relied on by the defendant afford no answer to the action. There was no fraud on the part of the

plaintiffs. They undertook to make for the defendant a steel gun for the purpose of his experiments, and he obtained what he bargained for. The gun, when first tested, answered every [96] purpose for which it was required, and it was not until after repeated trials, and in consequence of extreme pressure, that it burst. [Pollock, C. B. I thought that, even if there was fraud on the part of the plaintiffs, it would be no answer to the action; and that view is supported by the recent case of *Clarke v. Dickson* (E. B. & E. 148). Fraud may be of the most glaring description, and yet so ineffectual as to produce very slight damage. Here the object of the defendant was to ascertain whether a gun of that description would carry an immense weight of metal a great distance; and he has had the benefit of a trial. *Bramwell, B.* If one party wishes to avoid a contract on the ground of fraud, he must put the other party in the same situation in which he was when the contract was entered into.] The representation relied upon by the defendant as fraudulent was not made until the 17th July, which was after the gun had been delivered and the bills accepted. [Martin, B. There was no contract by the plaintiffs that the gun should not have a plug in it.] Their contract was to construct a steel gun: they made no representations as to its quality. If any representation is to be inferred from the delivery of the gun, it is simply that it was a gun according to the contract, that is, a steel gun. Whether or no the plug was a defect is not the question. The defendant, in his letter in which he informs the plaintiffs that the gun had burst, does not attribute it to the plug, but to the unsoundness of the metal. In his first letter, he states that the gun was tried with the most perfect success, and shewed no sign of a strain. In his next letter he says, that the results were even better. *Lewis v. Cosgrave* (2 Taunt. 2), which is relied upon by the defendant, was the case of an express warranty.

Bovill and Honyman, in support of the rule (May 2). The defendant was prepared to prove at the trial, not only [97] that the gun was unsound, but that the plaintiffs, with knowledge of its unsoundness, had taken effectual means to conceal the defect from the defendant and practised a fraud upon him. [Pollock, C. B. No gun is ever perfect in all its parts. The question is whether this gun had not answered the purpose for which it was bought. At all events the defendant had the use of the gun, and he has no right to keep it and refuse to pay for it.] The fragments are worthless. [Pollock, C. B. That cannot be assumed. There is no evidence that the defendant offered to return the gun, or took any step to rescind the contract. *Wilde, B.*, referred to *Street v. Blay* (2 B. & Adol. 456).] It is not denied that the defendant had the use of the gun, and some benefit from it, but that does not preclude him from setting up as a defence that the bill was obtained from him by fraud. In *Byles on Bills*, p. 94, 9th ed., after stating that a partial failure of consideration is no answer to an action on a bill of exchange, it is said: "But if fraud can be shewn, it is otherwise as between the parties, for there is then no contract." [Pollock, C. B. The evidence tendered was, not that the bill was obtained by fraud, but that it was given in part payment of a contract which was fraudulent. There is a wide distinction between being induced to accept a bill by a fraudulent misrepresentation, and accepting a bill in payment of a contract in which there is some fraud.] The concealment of the defect in the gun is evidence for the jury of fraud. If the plaintiffs had told the defendant that the gun was unsound, he would not have accepted the bill. [Bramwell, B. The defendant must not only shew that a fraud was practised upon him, but that he was induced by that fraud to accept the bill. Now, the defendant had not seen the gun, or at all events had not examined it, when he accepted the bill.] At the time when the plaintiffs [98] must have known that the gun was unsound, they represented to the defendant that it was "of the best metal all through, and had no weak points that they were aware of." Where a contract is void on the ground of fraud, the plaintiff cannot recover upon it, though he may recover on a new implied contract arising from the retention of the goods: *Grounsell v. Lamb* (1 M. & W. 952), *Campbell v. Fleming* (1 A. & E. 40), and notes to *Citter v. Powell* (Smith's Lead. Cas. 20).

Cur. adv. vult.

BRAMWELL, B., now said. This was an action by the drawer against the acceptor of a bill of exchange: and there was a plea that the bill was obtained by the fraud of the plaintiffs. The facts, opened by the defendant's counsel and partly proved (so far as is necessary to refer to them), were these: The plaintiffs contracted with the defendant to make for him a gun, which he was to pay for by two bills of exchange,

one at six, the other at twelve months' date. The gun was made, and delivered at Woolwich in pursuance of the defendant's directions, but he made no examination of it. The plaintiff drew on him the bills of exchange, one of which was paid, and on the other this action is brought. According to the opening of the defendant's counsel (and it may be assumed, for the purpose of this decision), there was such a defect in the gun as would have justified the defendant, had he known it, in refusing to accept the gun. Further, that the plaintiffs or their workmen had done something to the gun which would conceal the defect from any person who did not carefully inspect it. The gun was received by the defendant, and fired several times. At first it answered extremely well, but afterwards, as it was said, in consequence of the defect, it burst and became worthless.

[99] Upon this statement of counsel being made and partially proved, my Lord was of opinion that there was no evidence for the jury in support of the plea of fraud, and he directed a verdict for the plaintiffs. A rule for a new trial was obtained on the ground of misdirection, and the question is whether there was any evidence for the jury in support of that plea. We are of opinion that there was not, and that my Lord was right in the view he took of the case.

One matter relied on by the defendant (and which struck me forcibly on the application to me at Chambers to stay the execution) was, that the plaintiffs or their workmen had done something to the gun which concealed the defect in it; and had it turned out, upon the defendant's inspection of the gun, that what was done to it was done for the express purpose of concealing, and did in fact conceal, the defect from him; there might have been evidence of a fraudulent intent. But the defendant never examined the gun, and therefore it is impossible that an attempt to conceal the defect could have had any operation on his mind or conduct. If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him. Indeed, the defendant's counsel were obliged to concede that, as regards the question of fraud, the fact that the plug was put in the gun might be left out of consideration; and they were therefore compelled to say that the plaintiffs having told the defendant that the gun was of the best metal all through, and had no weak points that they were aware of, at the same time knowing that there was a defect in it which impaired its value and might render it worthless, were guilty of a fraud. We are of opinion that that proposition is not maintainable. If it be true in that sense, it is true in every sense, and [100] therefore we are called upon by the argument for the defendant to affirm, as a general proposition, that wherever a manufacturer makes for a purchaser a chattel, and there is a patent defect in it which either impairs its value or may render it worthless, although the purchaser has neglected to inspect it, if the manufacturer conceals the defect he is guilty of fraud. We are of opinion that no such proposition can be supported; and that it would be mischievous if it were so. To constitute fraud, there must be an assertion of something false within the knowledge of the party asserting it, or the suppression of that which is true and which it was his duty to communicate. Here there was no assertion of an untruth, and the only question is whether there was a suppression of anything which the plaintiffs were bound to make known to the defendant. Now, the manufacturer of an article is not always bound to point out its defects to the purchaser. If, indeed, there be a defect known to the manufacturer, and which cannot be discovered on inspection, he is bound to point it out; but if there be a defect which is patent, and of which the purchaser is as capable of judging as the manufacturer, he is not bound to call the attention of the purchaser to it. It would be mischievous if he were, for in such case he would be bound to point out everything which might by any possibility be considered a defect; and the consequence would be that if the manufacturer, for prudence sake, pointed out some flaw which made no difference whatever in the value of the article, the purchaser would immediately say, "There is a defect, I must have an abatement of the price."

Whether or no the plaintiffs committed a fraud may be tested in this way. Suppose the defendant had examined the gun, and seen the defect in it, but nevertheless accepted it, there would clearly have been no fraud on the part of the plaintiff because he did not point out the defect. So if he [101] had seen the defect and rejected the gun. Then suppose the defendant had examined the gun and not seen the defect, would there have been any fraud? If that depends upon his means of knowledge, and

the degree of diligence he used to find out the defect; here he had the means of knowledge, and, if he had diligently applied it, by the hypothesis he would have discovered the defect, because it was patent. Therefore it cannot be said there is any fraud in the manufacturer when the purchaser sees the defect, and either accepts or rejects the article, or does not see it because he has not used sufficient diligence to discover it. Then is there any fraud in the manufacturer where the purchaser has an opportunity of inspecting the article and seeing the defect in it, but neglects to do so? To hold that there is would be to make fraud in the manufacturer dependent on the sense and prudence of the purchaser in inspecting the article and judging for himself, instead of accepting it without first examining it. These considerations seem to me to shew, as a matter of demonstration, that the maker of an article in which there is a patent defect is not guilty of fraud because he does not simply tell the purchaser of it, but merely says, "There is the article; judge for yourself whether it is according to your order," and the purchaser does not think fit to do so.

For these reasons my brother Martin and myself are of opinion that my Lord was right, and that there was no evidence of fraud. My brother Wilde did not hear the whole of the argument, and therefore gives no opinion.

POLLOCK, C. B. I entirely concur in the judgment delivered by my brother Bramwell.

Rule discharged.

[102] THE MAYOR, ALDERMEN AND BURGESSES OF GREAT YARMOUTH v. MARTHA GROOM. THE SAME v. DANIEL. April 28, 1862.—Stallage is a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil. —Therefore where a person used a market with a chair and a "ped," that is, a wooden or wicker basket four feet long, two feet and a half wide, and two feet high, with a lid which, being turned back and supported by pieces of wood not fixed in the soil, formed a table on which he exposed his provisions for sale: Held, that he was liable for stallage.

[S. C. 32 L. J. Ex. 74; 8 Jur. (N. S.) 677; 7 L. T. 161. Approved, *Reg. v. Caswell*, 1872, L. R. 7 Q. B. 332. Referred to, *Duke of Bedford v. Overseers of St. Paul, Covent Garden*, 1885, 51 L. J. M. C. 44.]

These were actions brought to try the right of the defendants, who claimed to be exempt from toll, stallage, chiminage, pontage, pannage, piccage, murage and passage, as tenants in ancient demesne of the manor of Ormesby, and men of the town of Ormesby, in the county of Norfolk, to place, during the sale of their goods, on the ordinary market-days, in the public market-place of Great Yarmouth, a stall or stand and seat, for the purpose of exposing goods and provisions to sale, without making any payment for the same.

In the first action the first count of the declaration was for money payable by the defendant for the use, by the plaintiffs' permission, of the plaintiffs' land, and for stallage, groundage and other duties for and in respect of the defendant having put, placed and kept in the market, and upon the market-place of the plaintiffs, certain stands, peds, seats and chairs, for the purpose of exposing goods to sale, and for having placed and fixed in the soil of the market-place divers poles and posts. The second count was in trespass for breaking and entering the land of the plaintiffs, and putting and placing thereon divers stands and peds, chairs and seats, and placing and fixing in the soil thereof divers poles and posts, and keeping and continuing the same.

The defendant pleaded, to the first count, never indebted; and to the second count (inter alia): First, not guilty. [103] Fourthly, except as to placing chairs, seats and stands other than peds, a special plea, that there was a public market held by the plaintiffs upon the said land, and the defendants attended the market with marketable articles; and justifying the use of the peds as being necessary and proper for holding and containing the articles brought to market, and such as were commonly of right used in the market for that purpose, and commonly put and placed on the land for the purpose of exposing their contents to sale, and being a reasonable and customary mode of exposing the articles for sale. Fifthly, as to placing the chairs and seats, a custom from time immemorial for persons using the market for the sale

of provisions, and being desirous of having a chair or seat to sit upon during the market, to put and place, and have and enjoy the easement of putting and placing upon the land a chair or seat near to the provisions exposed to sale. Sixthly and seventhly, similar pleas, alleging the custom to have existed for forty years and twenty years respectively. Issue was joined on these pleas.

In the second action the declaration was for money payable by the defendant for the use, by the plaintiffs' permission, of the plaintiffs' land, and of divers standings in a certain market-place of the plaintiffs, and for tolls and other duties payable in respect of the defendant having put, placed and kept upon the market-place certain stands, peds and baskets for the purpose of exposing goods to sale. The defendant pleaded "never indebted," and issue was joined thereon.

By order of a Judge, these causes were referred to an arbitrator to find the facts, and state a case for the opinion of the Court. The arbitrator stated a case (so far as material to the present question) as follows:—

At and prior to the year 1448 there was, and thence continually until the present time, there has been, a public market for the sale of goods and provisions in the town of [104] Great Yarmouth, in the county of Norfolk, belonging to the plaintiffs, who are an ancient corporation, and have been incorporated from time immemorial; and the plaintiffs, at and prior to the year 1448, were, and ever since have been, the owners of the soil of the market-place where the market is held. The market is held on Wednesdays and Saturdays in every week, the principal market being on Saturday, and persons (except as hereinafter mentioned) having stalls or stands in the market, or using the market with peds, and with or without chairs or seats, for the sale of provisions, have always paid the corporation for so doing, no money difference having ever been made as to whether chairs or seats were used or not. The places in the market-place where the stalls or stands, or peds or baskets, were placed, have always been determined and allotted to the parties using them by the corporation, and the rate of payment has been from time to time varied by the corporation, but not at any time exceeding a reasonable sum. The payments have continued to be made up to the present time.

The ped is a wooden or wicker basket of the length of four feet, of the width of two feet and a half, and of the height of two feet, with a lid which turns back, and when supported by a stool, or pieces of wood not fixed in the soil, forms a table, upon which the provisions brought to market are exposed for sale.

The defendant Groom used the market with a chair and two peds, in which she brought provisions for sale, and the lids of the peds were turned back, and supported by pieces of wood not fixed in the soil, and formed a table on which she exposed the provisions to sale. The chair and peds were protected by a covering, supported by four poles shod with iron spikes and fixed in the soil, and upon which poles a wooden frame was placed, covered with a tarpaulin. The chair, and peds, and stall were her property. Payment [105] for her so occupying part of the market-place was first demanded of her by the plaintiffs on the 5th February, 1859. The sum demanded was a reasonable sum, and she refused payment.

The defendant Daniel, by his wife, used the market with a chair and a ped, but without a tarpaulin covering, in which she brought provisions for sale. The lid of the ped was turned back, and supported by pieces of wood not fixed in the soil, and formed a table, on which she exposed the provisions for sale. Payment of a reasonable sum was, on the said 5th February, in like manner demanded of him, and was refused.

The defendant Groom is the owner and occupier of about six acres of freehold land in the parish of Ormesby St. Michael, in the county of Norfolk, of which about three quarters of an acre were allotted to her under a local inclosure Act in 1842, in respect of rights of common belonging to her other land. She also occupies three acres of land as a yearly tenant.

The defendant Daniel is the owner and occupier of about seven acres of freehold land in the parish of Scratby, in the county of Norfolk, of which about two acres were allotted to him under the same inclosure Act. He also occupies about seven acres of land at Scratby as yearly tenant.

It was proved, on behalf of the defendants, that the manor of Ormesby, with the members, is a manor of ancient demesne, and extends into the several parishes of Ormesby St. Margaret, Ormesby St. Michael, the hamlet of Scratby, and several other parishes.

Some of the inhabitants of Ormesby St. Margaret, Ormesby St. Michael, and Scratby have attended at and kept the market at Great Yarmouth as far as living memory extends, and during that period have never paid, nor, until the year 1859, been required to pay, for their chairs and [106] peds in the market-place, whether the same have been covered and protected, as in the defendant Groom's case, or not; and there was no evidence given before the arbitrator, on behalf of the plaintiffs, that such persons ever paid for the use of the market-place for their chairs, peds, or coverings. Such of the inhabitants of Ormesby St. Margaret, Ormesby St. Michael, and Scratby as have kept the market have been sometimes owners and occupiers of land in those parishes, sometimes occupiers only, and the provisions they have brought for sale have sometimes been only the produce of their own lands, sometimes bought for the purpose of sale, and sometimes the property of other persons residing in those parishes and in other parishes, for whom they have sold them on commission.

The case came on for argument on the 11th November, 1861, when it was by consent remitted to the arbitrator to find the tenure of land of the defendants, and whether the goods sold were the produce of such land, and also to raise the question whether placing the peds entitled the corporation to stallage.

The arbitrator accordingly found as follows:—"That the land of the defendant Martha Groom is not of the tenure of ancient demesne, but is, as is stated in the said special case, part of freehold tenure and part of leasehold tenure. And that the land of the defendant Benjamin Daniel is not of the tenure of ancient demesne, but is, as is stated in the said special case, part of the freehold tenure and part of leasehold tenure. And that part of the goods sold by the said Martha Groom were the produce of her said land, and other part of such goods were not the produce of her land, but the produce of the land of another inhabitant of the said parish of Ormesby St. Michael; and that all the goods sold by the said Benjamin Daniel were the produce of his said land."

[107] The questions for the opinion of the Court are, whether the plaintiffs are entitled to stallage, or any payment in the nature thereof, for or in respect of the placing and using the said peds in the said market-place, in the manner stated in the case; and whether the defendants, or either of them, are exempt from paying any toll, or making any payment to the plaintiffs, for the use of the market by them in the manner stated in the case.

If the Court shall be of opinion that the plaintiffs are entitled to stallage, or any payment in the nature thereof, for or in respect of the placing and using the said peds as aforesaid, and that the defendants, or either of them, are not exempt therefrom, or that the plaintiffs are entitled to toll, or any payment in the nature thereof, for the use of the market as aforesaid, and that the defendants, or either of them, are not exempt therefrom, judgment is to be entered for the plaintiffs, 1s. debt or damages against both or one of the defendants, as the Court shall decide. If the Court shall be of opinion that the plaintiffs are not entitled to stallage or toll, or any payment in the nature of stallage or toll, as aforesaid, or that the defendants, or either of them, are exempt from stallage and toll, and from making any payment as aforesaid, judgment is to be entered for both or one of the defendants, as the Court shall direct.

Welsby, for the plaintiff. The arbitrator has found as a fact that the lands of the defendants are not of the tenure of ancient demesne, and therefore they are not entitled to exemption from stallage or toll. Even tenants in ancient demesne are not entitled to exemption from stallage. In Fitzherbert's Nat. Brev. (vol. 2, p. 226), tit. "Writ of being quit of Toll," no mention is made of stallage, and the toll from which tenants in ancient demesne are said to be exempt, [108] is toll properly so called. "Toll" is a reasonable sum payable in respect of commodities sold in a market; but stallage is in the nature of rent, and is payable for the liberty of erecting stalls, and occupying a portion of the soil of the market. Thus, in *Roberts v. The Overseers, &c., of Aylesbury* (1 E. & B. 423) it was held that the lessees of a market were rateable to the relief of the poor for stallage, because it was a payment in respect of the exclusive occupation of the soil, though for a limited time; but that they were not rateable for toll, because it was only payable for goods sold, without reference to whether they had been deposited on the soil. Though every person has of common right a liberty of coming into a public market for the purpose of buying and selling, yet he has not of common right the liberty of placing a stall there, but he must pay a compensation for it: *The Mayor &c. of Northampton v. Ward* (1 Wils. 107; 2 Str. 1238), Com. Dig. Market (F. 3).

In *The Mayor, &c., of Norwich v. Swann* (2 W. Black. 1116), it was held that trespass would lie for setting tables in a market-place for the sale of goods thereon, without leave of the owner of the soil. [Martin, B. Though a person may enter a market to sell his goods, he has no right to occupy a portion of it, to the exclusion of others, without paying for it.] The case finds that the places in the market where stalls, or stands, or peds, or baskets were placed, have always been allotted by the corporation to the parties, so that they have an exclusive use of the soil.

Hurlstone (Palmer with him), for the defendants. The plaintiffs are clearly not entitled to toll, for toll can only be claimed by grant or prescription. The question then is whether they are entitled to stallage, and that depends on whether the peds or baskets used in the manner described [109] were "stalls." Now, stallage and piceage are incident to the soil in a market or fair: Com. Dig. tit. "Market" (F. 3), *Heddey v. Welhouse* (Moore, 474), and the owner cannot claim any payment in respect of them unless there has been something in the nature of a disturbance of the soil, or of the right of soil. [Wilde, B. Stallage is money paid for a stall in a market, piceage for breaking the ground.] Merely placing baskets on the ground in a market is not a disturbance of the right of soil: *Wigley v. Peachey* (2 Ld. Raym. 1589). [Bramwell, B. That case only decided that the owner of the soil had no right to distrain the plaintiff's goods damage feazant because he refused to pay toll: it did not decide that he might not have maintained an action for a reasonable compensation in respect of the use of the soil.] Every person has, at common law, a right to frequent a market for the purpose of selling his commodities, and the defendants have merely exposed them for sale in baskets with the lids turned back so as to afford more space, and they have used chairs to rest themselves. [Martin, B. In the *Termes de la Ley*, "stallage" is said to be "money paid for pitching stalls in fairs or markets, or the right of doing it."] The definition in Tomlin's Law Dictionary is the same as that in Blunt, viz., "stallagium, stabulum, statio—the liberty or right of pitching or erecting stalls in fairs or markets." In Spelman's Glossary it is defined as "jus stationis, jus erigendi officinæ." These definitions shew that, to constitute stallage, there must be something erected on the soil. *Townend v. Woodruff* (5 Exch. 506, 512) decided that a person who exposes goods for sale in a public market has a right to occupy the soil with baskets necessary and proper for containing the goods. There Alderson, B., said: "Erecting a stall is very different from placing goods in baskets on the ground for [110] sale. A person must bring his produce to market in baskets or sacks or other convenient modes." Here the defendants have only adopted a reasonable mode of exposing their goods for sale in baskets.

POLLOCK, C. B. I am of opinion that our judgment ought to be for the plaintiffs. None of the cases cited on behalf of the defendants seem to me to interfere with the plaintiffs' right to maintain these actions. As my brother Bramwell observed, all that the case of *Wigley v. Peachey* (2 Ld. Raym. 1589) decided was that the parties had adopted a wrong remedy by distraining the goods damage feasant, and that the distress was not sustainable. Here the parties have adopted the remedy which the Court pointed out in that case; and, therefore, in my opinion the plaintiffs are entitled to recover.

MARTIN, B. I am of the same opinion. When it was found by the arbitrator that the land of the defendants was not of the tenure of ancient demesne there was virtually an end of the case. It is evident that was the real question intended to be raised by the parties, because, at the commencement of the original case, it is stated that "these were actions brought to try the right of the defendants who claimed to be exempt from toll, stallage, chiminage, pontage, pannage, piceage, murage and passage, as tenants in ancient demesne of the manor of Ormesby, in the county of Norfolk." That right is negatived by the finding of the arbitrator; and then the question arises upon the claim in respect of stallage. Now, the arbitrator finds that "persons, (except as hereinafter mentioned), having stalls or stands in the market, or using the market with peds, and with or without chairs or seats for the sale of provisions, have always [111] paid the corporation for so doing, no money difference having ever been made as to whether chairs or seats were used or not." So that it is clear, *prima facie*, that all persons using these peds exclusively used a portion of the market, and paid for it. But the argument of Mr. Hurlstone is that the use of these peds is not the use of a stall. It seems to me that is a question of fact for a jury. If, indeed, a person carried commodities in a basket to the market for sale, merely using the basket to exhibit the

commodities to customers, and making no other use of the ground, except when tired to place the basket upon it, intending when rested to go to another part of the market, such an use of the ground would not be stallage. It would be nothing more than using the market for hawking, and it might as well be said that cattle in a market, which it is impossible to keep stationary, have an exclusive occupation of one spot of ground, and therefore stallage is payable in respect of them. But in these cases there was an exclusive occupation of a particular portion of the market by chairs and peds placed upon the ground. In one case the chairs and peds were covered by a tarpaulin and supported by poles fixed into the soil, so that the ground was actually disturbed; in the other case the lid of the ped was supported by sticks not fixed in the soil. Therefore these cases seem to me to fall within the definitions of stallage cited by Mr. Hurlstone, and also of that given in the *Terms de la Ley*; and if I were asked to draw an inference I should say that these were stalls.

BRAMWELL, B. The only question is whether, under the circumstances stated, the stallage is payable by any person using the market in the way the defendants did. I agree with my brother Martin that it is a question of fact whether these chairs and peds, as placed on the ground by [112] the defendants, were stalls, and as matter of fact I determined it against the defendants. It may be difficult to give a strict definition of a stall, but I think that in these cases the defendants used stalls.

WILDE, B. I am of the same opinion. The real defence fell to the ground when the arbitrator found that the defendants were not tenants in ancient demesne. At one time I thought there might possibly be an exemption as old as the right to toll or stallage; but I am satisfied that the exemption is confined to tenants in ancient demesne.

Then the only remaining question is whether these chairs and peds, placed in the manner described, were stalls. Mr. Hurlstone was compelled to concede that if they were the plaintiffs' right was established. Now, there was a continuous occupation of a portion of the market by an erection placed there for the purpose of selling goods or exposing them for sale. That seems to me a "stall." I think it is immaterial, for this purpose, of what it was constructed, and whether fixed into the ground or not. For these reasons I think that the plaintiffs ought to recover.

Judgment for the plaintiffs.

- 113] DODD v. BURCHELL. (a) Jan. 24, 1862.—The owner of a plot of ground built upon it a house facing the highway, and at the back of the garden of the house he built a cottage. The access to the cottage was from the highway down a passage by the side of the house and its garden wall. The first floor of the house extended over part of this passage, and there was a door in the wall of the house and another door in the garden wall which opened into the passage. Across the passage about three feet from the backwall of the house there was another door, and this part of the passage was covered by a slab or "lean-to" which was cemented to the back part of the house. In 1851 the owner conveyed the cottage in fee to the defendant by the dimensions and abutments delineated in a plan, "be the same more or less." The plan described the defendant's land as eighty-seven feet six inches, of which five feet six inches consisted of a part of the passage over which the first floor of the house was built. In 1853 the owner conveyed the house in fee to the plaintiff. The deed purported to convey the whole of that part of the passage over which the first floor of the house was built; but there was no mention of any right of way. In 1861 the defendant blocked up the door in the wall of the plaintiff's house and in his garden wall. These doors had been used by the occupiers of the house for the purpose of going from it to a water-closet in the garden, but there was another way through the kitchen, a window of which opened into the garden. Held: That the plaintiff had no right of way over the passage either by grant or of necessity.

[S. C. 31 L. J. Ex. 364; 8 Jur. (N. S.) 1180.]

The first count of the declaration stated, that the defendant broke and entered a messuage and land of the plaintiff, situate and being No. 1 Church Terrace, Church

(a) Decided in Hilary Term.

Road, Battersea, in the county of Surrey, and pulled down, prostrated and destroyed an enclosure, lean-to, and door of the plaintiff, parcel of the said messuage and land, and blocked up a door of the plaintiff opening into the same, and erected a door-way and door upon the said messuage and land, and kept the same locked up and fastened over and across a certain passage, parcel of the said messuage and land; by means of which premises the back entrance of the plaintiff to his wash-house, garden and water-closet, parcel of his said messuage and land, from his house and from the highway there was obstructed, and he was deprived of all entrance thereto, except through one of the rooms of the said house, and his said house was thereby lessened in value. Second count: For that the plaintiff was possessed of a dwelling-house and garden, No. 1 Church Terrace, Battersea, in the county of Surrey, and by reason thereof was entitled to a way over certain land from his said house, and from a street [114] called Church Street into his said garden, and from his said garden over the said land to his said house and to the said street called Church Street; and the defendant by wrongfully fixing a door across the said land, and wrongfully blocking up and fastening the same, prevented the plaintiff from using his said way, whereby his said house and garden became and were lessened in value, and the plaintiff was inconvenienced in the occupation thereof.

Pleas. First: except as to the trespasses in the first count complained of, so far as they relate to a part of the messuage and land in that count mentioned: Not guilty. Second: to the first count, except as in the first plea excepted. That the messuage and land in that count mentioned, excepted as aforesaid, weren ot, nor was either of them, the plaintiff's. Third: to the residue of the trespasses in the first count complained of: Payment into court of 30s. Fourth: to the second count. That the plaintiff was not possessed of the dwelling-house and garden, as alleged. Fifth: to the second count: That plaintiff was not entitled to the way, as alleged. Issues thereon.

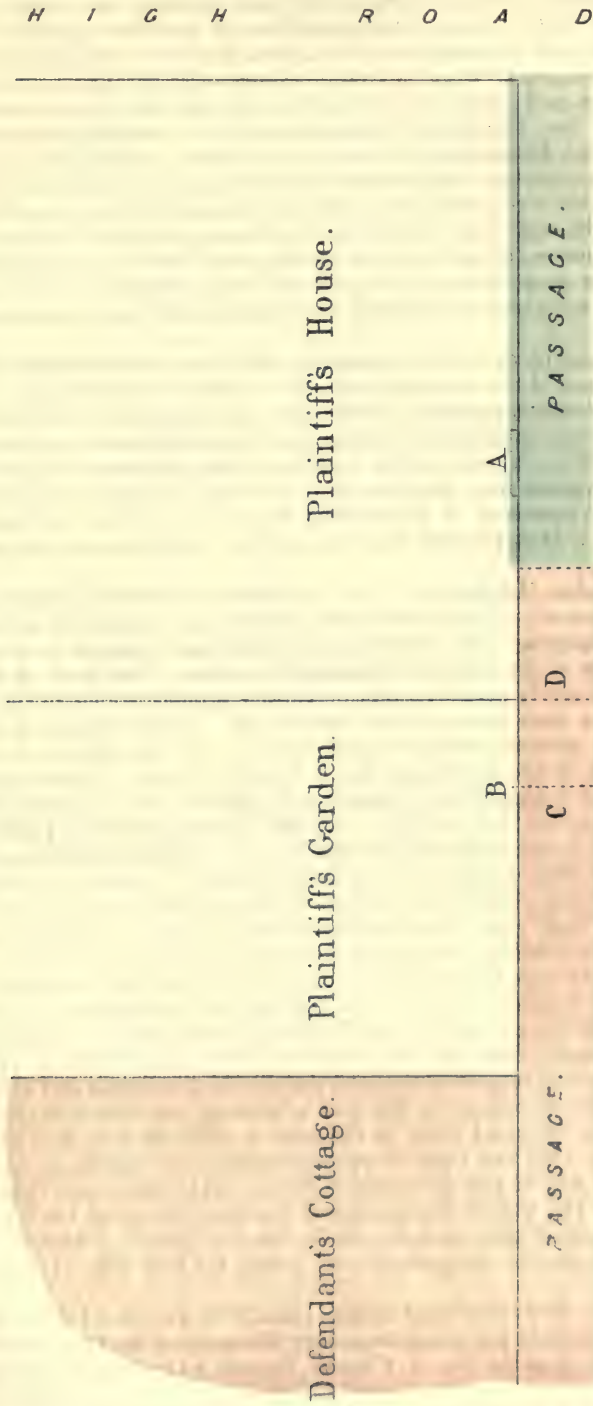
At the trial, before Blackburn, J., at the Surrey Summer Assizes, 1861, the following facts appeared:—The plaintiff was owner and occupier of a house, No. 1 Church Terrace, Battersea. The defendant was owner and occupier of a house called Park Cottage, situate at the back of the plaintiff's garden. The land on which these houses stood was formerly part of a plot of garden ground, which in the year 1842 was conveyed by the then owner to one Jones in fee. Jones built upon it a row of houses fronting the highway called Church Terrace, and he afterwards built Park Cottage at the back of the garden of No. 1 Church Terrace. The access to Park Cottage was from the highway by a passage at the side of No. 1 Church Terrace and its garden wall. The first floor of No. 1 Church Terrace extended [115] over this passage. There was a door (a) in the side wall of No. 1 Church Terrace, and another door (b) in its garden wall, which opened into this passage. Across the passage, about three feet from the back wall of No. 1 Church Terrace, and at right angles with the door in the garden wall, there was another door (c). This part of the passage was covered with a slab or "lean-to," which was cemented to the back wall of No. 1 Church Terrace. (d) From this spot the passage up to Park Cottage was uncovered.

In the year 1851 Jones conveyed Park Cottage to the defendant in fee, with a right of way through the passage, by the following description:—"All that piece or parcel of ground situate in the rear of a certain terrace called Church Terrace, &c., which said piece or parcel of ground contains the several dimensions and abutments more particularly shewn and delineated in the plan or ground plot drawn in the margin of this deed and therein coloured pink, be the same a little more or less, and all that cottage, &c., together with the right of egress, ingress, and regress, at all times, in, by, and through the way or passage coloured blue," as the same were then held and enjoyed by Jones. The plan in the margin of the deed described the length of the defendant's land, coloured pink, as eighty-seven feet six inches, of which five feet six inches consisted of a part of the passage over which the first floor of No. 1 Church Terrace extended.

In the year 1853, Jones conveyed to the plaintiff in fee, No. 1 Church Terrace, with the garden. The deed purported to convey the whole of that part of the passage over which the first floor of No. 1 Church Terrace extended, and consequently

(a) Marked A on the plan.
(c) Marked C on the plan.

(b) Marked B on the plan.
(d) Marked D on the plan.



included the five feet six inches already conveyed to the defendant. The plaintiff's conveyance [116] made no mention of any right of way. The quantity of land conveyed to the defendant corresponded with the description in his deed, within a few inches.

In March 1861 the defendant blocked up the door-way from the passage into the plaintiff's garden. The defendant also removed the door across the passage, and placed across it another door in a line with the back wall of the plaintiff's house, which door he kept locked. He also removed the "lean-to."

Evidence was given on the part of the plaintiff that the occupiers of No. 1 Church Terrace, from the time the house was built, used to go from the house by the side-door into the passage and from thence through the door into the garden, for the purpose of getting to a water-closet. It might, however, be reached by going through a kitchen in which there was a window which opened into the garden. This mode of access was used as frequently as the other. It was admitted that the money paid into Court was sufficient to cover any damage done to the plaintiff's walls, and by the removal of the "lean-to."

Upon these facts, a verdict was entered by consent for the plaintiff, with 40s. damages; leave being reserved to the defendant to move to enter the verdict for him.

Shee, Serjt., in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that the plaintiff had not a right of entrance into, or exit from, his garden into the passage from the defendant's house to Church Terrace, through the door alleged to have been blocked up.

Holl shewed cause. First, the ownership of the land having been in one freeholder, and there having been for a number of years a continuous user of the way, upon the severance of the land there was an implied reservation of the way, without which the land could not be reasonably [117] enjoyed. It is immaterial whether the dominant or servient tenement is first conveyed: the purchaser takes the land with the burthen or benefit which the owner has attached to it. The law is thus stated in Gale on Easements, p. 81, 3rd ed.:—"Upon the severance of an heritage a grant will be implied, first, of all those continuous and apparent easements which have in fact been used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have no legal existence as easements; and, secondly, of all those easements without which the enjoyment of the several portions could not be had at all." In *Nicholas v. Chamberlain* (Cro. Jac. 121), it was held by all the Court "that if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and quasi appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require." [Pollock, C. B. A right to the enjoyment of a conduit is very different from a right of way. Wilde, B. A conduit is a thing actually enjoyed with a house, and passes with a grant of the house; but it is not so with a right of way.] *Nicholas v. Chamberlain* (Cro. Jac. 121) establishes this general principle, that where there has been a continuous and apparent easement during the unity of ownership, it is not extinguished by the severance of the heritage, if it be necessary for the enjoyment of the property. That principle was recognised and affirmed by this Court in *Pyer v. Carter* (1 H. & N. 916). [Pollock, C. B. That was the case of a drain which ran under two adjoining houses, one of which was purchased by the defendant; and the other by the plaintiff; and we held that the [118] plaintiff was entitled, by implied grant, to the use of the drain for the purpose of conveying water from his house, as it was used at the time of the defendant's purchase.] That case is an authority that if the owner of property has, during its unity, made such a disposition of it that the one part has become servient to the other, the easement remains although the property is aliened by separate conveyances. [Martin, B. In *Pyer v. Carter* (1 H. & N. 916, 922) the Court said that "it seems in accordance with reason, that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house such as it is." That is sufficient to support that case. If the owner of land which has a natural stream flowing through it, grants to one person a part

of the land, and the remainder to another person, neither has a right to stop the flow of water through the land of the other. In fact, *Pyer v. Carter* was no more than an implied grant of a right analogous to that of flowing water.] It is not requisite that the way should be of absolute necessity for access to the property: a way of necessity may exist, which is not of itself a continuous or permanent easement, but one to be exercised from time to time while the necessity continues to occur: *Pheysey v. Vicary* (16 M. & W. 484). [Pollock, C. B. A right of way used and enjoyed during the unity of ownership will not pass upon a severance of the tenements unless there is something in the conveyance to shew an intention to create the right *de novo*: *Pearson v. Spencer* (1 B. & S. 571).] Here, the way is necessary for the reasonable enjoyment of the property, since it is the most convenient mode of access to the premises: *Pinnington* [119] v. *Galland* (9 Exch. 1). [Pollock, C. B. In *Morris v. Edgington* (3 Taunt. 31) Sir J. Mansfield said: "It would be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had."] In considering whether a way is one of necessity, the cost of constructing a new way cannot be taken into consideration, for by the word necessity must be understood the necessity at the time of the conveyance, and as matters then stood without alteration: *Pyer v. Carter* (1 H. & N. 916, 922).

Secondly, the land over which the right of way is claimed did not pass by the conveyance to the defendant. There are two sources of ambiguity on the face of the conveyance: first, it does not state the quantity intended to be conveyed, but merely says that the dimensions and abutments are delineated in a plan coloured pink, "be the same a little more or less." If the dimensions in the plan be taken they will not correspond with the land claimed by the defendant. If the ambiguity is one which admits of parol evidence to shew what was intended to pass, the words "more or less" may extend the quantity five or six feet. Next, the premises are described as "the same as are now held and enjoyed by W. Jones;" but at that time the door was three feet in arrear of the plaintiff's house, and continued so for some time after the plaintiff had bought it. No doubt the intention was to convey only to where the door stood. On this point he referred to *Quaintrell v. Wright* (Bunb. 274); *Longchamps v. Fawcett* (1 Peake, 71); *Doe d. Freeland v. Burt* (1 T. R. 701); *Anstee v. Nelms* (1 H. & N. 225). Shee, Serjt., and H. Lloyd appeared in support of the rule, but were not called upon to argue.

[120] POLLOCK, C. B. I am of opinion that the rule ought to be absolute. There is a wide difference between that which is substantial, as a conduit or watercourse, and that which is of an incorporeal nature, as a right of way. In my opinion if we were to adopt the principle contended for, it would be a most dangerous innovation of modern times. The law seems to me particularly careful and anxious to avoid important rights to land being determined by parol evidence and the prejudices of a jury. In some cases it may appear a hardship that a party is not allowed to shew that the language of a deed does not express his meaning; but why should a solemn instrument under seal be set aside because certain facts exist from which a jury might infer that the parties did not mean what they have said? It must be admitted that in some cases there have been expressions of regret at the operation of general rules of law. That more frequently occurs in the construction of wills, where the Courts have said that although the testator may not have meant what he has written, they must decide according to the language he has used. In the present case, I own, I feel no regret, because the principle contended for is of so vague, uncertain and unsatisfactory a nature, that it would unsettle questions of real property, by bringing under the consideration and for the decision of a jury matters which it has been the object of those who made the law and those who administer it, to submit to the judgment of a Court. For these reasons, and upon principle, I think that the rule ought to be absolute.

MARTIN, B. I am of the same opinion. We must ascertain the right which passed under the deeds. A Court, in construing a conveyance, ought, so far as is possible, to put itself in the position of the grantor and grantee, and then read the writ-[121]-ing. Having placed itself in that position, it is that which is written which is to determine the rights of the parties. Mr. Holl has cited Gale on Easements, where many of the propositions laid down are founded on the civil law, which is no authority for the administration of the common law of England. There is no sounder principle than this, that, where the parties have put their contract into writing, it is the writing

alone which is to guide the Courts in putting a construction upon it. It is argued that all the land which the defendant claims did pass to him, because his conveyances describes it of the dimensions and abutments delineated in a plan, "be the same a little more or less," but that cannot extend it or diminish it by five feet. Then reliance was placed on the words, "as the same were then held and enjoyed by the vendor," as shewing that the right of way was reserved; but I think they cannot so operate. *Pyer v. Carter* (1 H. & N. 916) went to the utmost extent of the law; but, if considered, that decision cannot be complained of, for if a man has two fields, drained by an artificial ditch cut through both, and he grants to another person one of the fields, neither he nor the grantee can stop up the drain, for there would be the same right of drainage as before, since the land was sold with the drain in it. I agree with the law as laid down in that case, and I think it may be supported without extending the doctrine to a right of way.

CHANNELL, B. I am also of opinion that the rule ought to be absolute. It seems to me that the plaintiff is out of Court unless this is a way of necessity, and upon the facts I am of opinion that it is not. The plaintiff's claim is founded on this, that he is the owner of the soil of a part of the [122] passage coloured pink, and that it was not conveyed to the defendant. There is some ambiguity in the defendant's conveyance, but its meaning is explained by the plan. It describes the land conveyed to the defendant as eighty-seven feet six inches, of which five feet six inches consist of part of the passage. According to that measurement the conveyance is substantially correct, and there is a mere inaccuracy which is obviated by the words "be the same a little more or less."

WILDE, B. A right of way may exist by prescription, grant, or necessity. It is not suggested that there is any right by prescription. Then, is there by grant? There is a grant of the adjoining land, but without any express reservation of the way, or any words from which it can be inferred that the plaintiff was to have the right claimed by him. Mr. Holl was therefore compelled to resort to the third class, viz., a right of way by necessity; and he cited several authorities to shew that where a right of way must exist by necessity, it may be implied though not reserved in a deed. Then, was this a way of necessity? It appears that at the time of the grant, in respect of which the right of way is claimed, there was a way from the house into the garden, and that way now exists. But it is said that the way now claimed is more convenient than the other. Then comes the question whether the plaintiff can claim it as a way of necessity on account of its great superiority over the other way. It seems to me that it would be most dangerous to hold that where a deed is silent as to any reservation of a way, because it is more convenient to use than another way, it must exist as a way of necessity. There is no foundation whatever for such a doctrine.

For these reasons, upon the first point I am clearly of [123] opinion the rule ought to be absolute to enter the verdict for the defendant.

Upon the second point I say nothing as I did not hear the whole of the argument for the plaintiff.

Rule absolute.

ALLAN AND OTHERS, Assignees of Lamont, a Bankrupt v. SUNDIUS AND OTHERS.

April 30, 1862.—The defendants, who were ship-brokers, being employed by an agent of the French Government to procure for them the charter of two ships, L., who was also a ship-broker, informed the defendants of two ships, called the "New York" and the "Glasgow," which might be chartered. After some negotiation and correspondence between L., the defendants, and the owners of the ships, the "New York" was chartered for six months, and the defendants wrote to L. stating, that "in consideration of his having assisted them in procuring the charter of the 'New York' they engaged to pay him a commission of two and a half per cent." The "Glasgow" was afterwards chartered, and the charter of the "New York" was renewed for another six months, and L. then claimed commission at the same rate on the charter of the "Glasgow" and also on the renewed charter of the "New York."—Held: First, that evidence was admissible of a custom among ship-brokers that an "introducing broker" should receive renewed commission on every renewal of a charter effected through him, since

such a custom was not inconsistent with the written agreement: Per Martin, B., and Bramwell, B. Pollock, C. B., dissentiente.—Secondly, that it should have been left to the jury to say whether the agreement to pay commission extended also to the “Glasgow.”

[S. C. 31 L. J. Ex. 307; 10 W. R. 648; 6 L. T. 359.]

The declaration stated, that by an agreement made by R. Lamont, before his bankruptcy, with the defendants, in consideration of R. Lamont introducing the defendants to certain persons who were owners of steam-ships, to wit, “The Glasgow and New York Steam-ship Company,” and Mr. Langlands, and assisting the defendants in procuring charters of steam-ships belonging to them from the French Government, the defendants agreed with R. Lamont that they would divide with him their commission, to wit, 5l. per cent. on such charters, and on receiving the same from them, pay the same to him. Averments: that the said R. Lamont, before his bankruptcy, did so introduce the defendants to the said persons, and did assist them in procuring charters of steam-ships as aforesaid; and that through and by reason of the premises, divers charters of divers steam-ships of the said Company, to wit, of the “Glasgow” [124] and of the “New York” were so procured and effected as aforesaid, and the defendants received large sums for commission in respect thereof: Yet the defendants did not nor would divide with R. Lamont, or with the plaintiffs since his bankruptcy, their commission or any part thereof, and wholly failed and refused so to do, and did not nor would receive or pay the said share of commission so due to R. Lamont, &c.

Pleas (inter alia). Non assumpsit.

The particulars of demand were as follows:—

To Commission due to the bankrupt on the charters of the “New York,” S.S., from 20th November, 1854, to 20th June, 1856, at 2½ per cent.	£2,474 19 9
Less the Commission for the first six months of that time	860 17 4
	£1,614 2 5
The like Commission in respect of the charters of the “Glasgow,” S.S., from the 10th February, 1855, to 10th August, 1856, at 2½ per cent.	2,354 4 10
	£3,968 7 3

At the trial, before Pollock, C. B., at the London Sittings after last Michaelmas Term, it appeared that in the year 1854, the bankrupt, Lamont, was partner in a firm carrying on business at Liverpool as ship-brokers, who were agents of “The Glasgow and New York Steam-ship Company.” According to Lamont’s evidence, he, having learnt that the French Government were in want of transport steamers for the Crimea, and that Messrs. Pastrie and Co., of London, were the agents of the French Government, and that the defendants Sundius and Co. were ship-brokers employed by Messrs. Pastrie, on the 7th of November, 1854, called on Sundius and Co. and had an interview with one of the firm, named Duncan, and told him that the “Glasgow and New York Steam-ship Company” had two ships, the “New York” and [125] “Glasgow,” which might be chartered by the French Government. At the same time Lamont stated the dimensions of the “Glasgow,” but not of the “New York.” Duncan said, that he thought they might do; and Lamont then proposed to communicate with the owners, saying, if he brought about a charter of these vessels he should wish to divide the commission with the defendants. To this Duncan assented, adding their commission would be 5l. per cent., besides 3l. per cent. which Messrs. Pastrie would claim as their (Pastrie’s) commission from the French Government, making 8l. per cent. in all. According to Lamont’s evidence, it was then agreed that if the charters were effected he was to receive 2l. 10s. per cent. as his share of the commission. Lamont then communicated with the Company, and received a letter, dated 7th of November from Langlands, the manager, entertaining the proposal, which he shewed to Duncan, and after some further correspondence Langlands came

to London, and accompanied by Lamont and Duncan went to the offices of Messrs. Pastrie, who then chartered the "New York" for the French Government at 56s. per month per ton, for six months from the 10th of November, but no provision was made for its renewal.

The following letter was then written :—

"Mr. R. Lamont, Liverpool.

"London, November 10, 1854.

"Sir,—In consideration of your having introduced us to Mr. Langlands, and assisted us in procuring the charter for the screw steam-ship *New York*, we hereby engage to allow you two and a half per cent. ($2\frac{1}{2}$) out of our commission as we receive it.—Your obedient servants,

"SMITH, SUNDIUS AND COMPANY."

The "*Glasgow*" was also mentioned at that interview and [126] her dimensions given, but there was no written agreement respecting her, because (it was said) she was then on her homeward voyage from America. On the following day (according to Lamont's evidence) Duncan came to him and represented that the commission which the French Government would have to pay, amounting in the whole to 8l. per cent., would probably be objected to, and asked him to consent to take 1l. per cent. only, and give the Company the benefit of the other 1l. 10s. per cent. Lamont stated that he did not intend, by so consenting, to alter the agreement under which he was to have half the commission received by the defendants; but only to agree that he would himself remit 1l. 10s. per cent. to the Company on receiving the 2l. 10s. from the defendants. Another letter was then written in the same terms as that of the 10th of November, except that two and a half per cent. was altered into one per cent. This letter was also dated the 10th of November and was substituted for the other. A long correspondence then ensued between Lamont, the Company, and the defendants, the result of which was that Lamont received the sum of 860l. 17s. 4d. as his share of the commission at $2\frac{1}{2}$ per cent. on the first six months of the charter of the "*New York*." Lamont afterwards left England, and on his return found that the "*Glasgow*" had been chartered by the French Government through Messrs. Pastrie, and that in December 1855 the charter of the "*New York*" had been renewed for a further period of six months; and that the defendants had received their commission on these charters. Another long correspondence took place between the parties, Lamont claiming 2l. 10s. per cent. as his share of commission on the charter of the "*Glasgow*" and the renewed charter of the "*New York*," which the defendants refused to pay.

Upon this evidence the Lord Chief Baron was of opinion [127] that the contract between Lamont and the defendants was contained in the substituted letter of the 10th of November, and that Lamont was only entitled to 1l. per cent. commission on the charter of the "*New York*" for a period of six months.

It was submitted, on behalf of the plaintiffs, that the agreement between Lamont and the defendants was a question for the jury, depending on the evidence of Lamont as to the verbal agreement between himself and Duncan, which, together with the correspondence, explained the substituted letter of the 10th of November. The plaintiffs' counsel then proposed to prove a usage of trade among shipbrokers by which an "introducing broker" was entitled to share the commission on all renewals by the same parties of charters effected through his introduction. The learned Judge was of opinion that evidence of the custom was inadmissible, since it was inconsistent with the agreement, and thereupon the plaintiffs elected to be nonsuited.

Karslake, in the following term, obtained a rule nisi to set aside the nonsuit on the ground of misdirection, and the rejection of the evidence, against which

Bovill, Lush and Watkin Williams shewed cause (April 29th). The evidence as to the custom was properly rejected; for it is inconsistent with the written agreement of the 10th November, 1854. The plaintiffs can have no claim beyond the amount to which Lamont was entitled under the agreement, and that has been paid. [Wilde, B. The sharing commission among brokers is not usually a matter of custom, but depends on special agreement.] The custom would import a new term into the agreement. [Martin, B. The difficulty I have is whether the plaintiffs were not entitled to have the evidence submitted to the jury; whether or no it would have enabled them to recover the [128] amount claimed is another matter.] There is no ground for saying that there was any other contract than that contained in the letter of the 10th November, 1854; and, if the custom be annexed to it, a share of the commission would be payable

on all renewals of the charter, however numerous. [Pollock, C. B. Without the custom the plaintiffs certainly had no case.]

Karslake and Milward, in support of the rule. Evidence of the custom was admissible. There is nothing in the agreement inconsistent with the custom. As regards the "New York," the defendants, in consideration of Lamont having assisted them in procuring a charter for that vessel, engaged to pay him a percentage out of their commission. But when that agreement was entered into, there was a custom among brokers that the "introducing broker" should receive from the "working broker" a share of the renewed commission upon every renewal of the charter, and there is nothing in the agreement which necessarily excludes such a custom. The circumstance that a contract is reduced to writing does not prevent a custom from attaching, if it be not repugnant to or inconsistent with the agreement: *Humfrey v. Dale* (7 E. & B. 266; in error; 1 E. B. & E. 1004), *Field v. Lelean* (6 H. & N. 617), *Brown v. Byrne* (3 E. & B. 703). The claim for commission in respect of the "Glasgow" stands on a different footing, because that vessel is not mentioned in the agreement of the 10th November, but there was evidence, which ought to have been submitted to the jury, of an agreement to pay a share of the commission on the charter of that vessel also.

Cur. adv. vult.

BRAMWELL, B. I am of opinion that the rule ought to [129] be absolute. There are two questions, both of which I shall briefly advert to. One arose thus:—The bankrupt, Lamont, said, "I introduced you, the defendants, to certain shipowners, and you procured a charter for them from the French Government; and part of the bargain between us was that I was to receive a portion of your commission;" viz. 2l. 10s. per cent., which, I believe, is the ordinary commission allowed to "introducing brokers," as Lamont was called. Lamont also said: "The French Government has renewed the charter with the shipowners, and you, the defendants, have received a repetition or renewal of your commission upon this renewed charter, and I claim from you a repetition or renewal of my commission, and I will prove there is a custom which entitles me to make that claim." Evidence to that effect was tendered, and rejected by my Lord: I think erroneously.

There is no doubt about the principle. A custom may be annexed to documents with which it is not inconsistent. The question then is, whether this custom is inconsistent with the written agreement between Lamont and the defendants. If inconsistent or incoherent with the agreement, it cannot be annexed to it. It seems to me it would be coherent with it, because, as I understand the bargain between Lamont and the defendants, it was this: "I will receive from you 2l. 10s. per cent., as my share of your commission." To my mind there would have been nothing inconsistent, if, that being in writing, the writing had gone on to say, "not only upon the first charter, but upon any renewed charter in respect of which you may get any commission from the shipowners." Whether the evidence, if admitted, would have proved that agreement it is not necessary to say. I think such a custom ought to be narrowly watched; but, nevertheless, I think that, according to law, the evidence was admissible.

[130] The other point was this:—It was said by Mr. Karslake that, independently of any custom, it was a question for the jury whether the bargain between Lamont and the defendants did not extend to the "Glasgow" as much as to the "New York." I think there was evidence to that effect, which ought to have been submitted to the jury. In my opinion, therefore, on both points, the plaintiffs are entitled to have the rule made absolute.

MARTIN, B. I am of the same opinion. The facts of the case are these:—The bankrupt, Lamont, who formerly carried on business as a ship-broker at Liverpool, was examined on behalf of the plaintiffs, his assignees, and his evidence was, that, in November, 1854, he came to London, and had an interview with Duncan, one of the partners in the defendant's house, and he then communicated to Duncan that he knew of two vessels, the "New York" and the "Glasgow," which might be chartered by the French Government (for whom the defendants were authorized to act by Messrs. Pastrie, the agents of that Government), and that Duncan agreed that he should share the commission with the defendants in respect of those two vessels. That was what Lamont proposed; and he persevered in stating that he was to have one half of the commission. There was, therefore, his positive evidence to that effect,

but there was also a variety of letters and communications between him and the defendants and the Glasgow and New York Steam-ship Company, which were to a great degree inconsistent with it; and I should not have been surprised, if the cause had gone to the jury, nor shall I be surprised should the case be again tried, if the jury find they do not believe parts of Lamont's evidence, and rather give credit to his writings. However, the question whether the evidence of Lamont was true or false is for the jury, not for the Court.

[131] With respect to the "New York," his claim was this:—That he was a party to the employment of the defendants in the sense I have stated; and he swore to an express agreement to divide the commission with them. I entertain no doubt that an "introducing broker" is entitled to receive, and does receive, from the "working broker" a portion of his commission. That is a common practice in London and other places where ships are chartered. As regards the "New York," the plaintiffs admit that Lamont has received all he is entitled to in respect of the first charter; and they proposed to prove a custom that, on a charter of this kind being renewed, the "introducing broker" was entitled to receive a portion of the commission payable on the subsequent charter. Whether the evidence would have established the custom, or whether the custom, when proved, would have entitled the plaintiffs to recover, I do not know; but it seems to me they were entitled to give evidence what the custom was, and that it was not competent to the Judge to reject it.

With respect to the "Glasgow," the claim depends on a different principle. The first communication between Duncan and Lamont took place on the 7th of November, 1854, and on the 10th a written agreement was entered into. A letter was written, stating the precise terms of the agreement between Lamont and the defendants with respect to the "New York;" but there was no writing with respect to the "Glasgow." Now I agree that if two persons, negotiating a contract, consent to reduce it to writing, that writing is conclusively the contract. But, for the purpose of bringing that rule to bear, it must be established that the parties meant to reduce the entire contract into writing; and if it be established that only a portion of it is reduced to writing, there is nothing in law to prevent evidence being given to shew what the real bargain was. [132] I am clearly of opinion that the letter of the 10th of November, 1854, does not refer to the "Glasgow" (assuming the parol evidence given by Lamont to be true), and that it was intended to refer to the "New York" only; consequently, putting aside the custom altogether, the plaintiffs have a right to have it submitted to the jury whether they are entitled to recover in respect of the first charter of the "Glasgow." That having been withdrawn from them, in my opinion there ought to be a new trial. I am of this opinion simply upon the facts of the case. There are letters in which a vast deal is inconsistent with Lamont's statement. The jury are the proper tribunal to try that; and in my opinion it was not competent for the Judge to withdraw it from them.

POLLOCK, C. B. I agree with my brother Bramwell that a custom such as this, which controls the written contract of the parties, and makes them agree to something which they have not expressed, ought to be carefully watched, and restrained within reasonable limits. And I own I think that, where one broker introduces a vessel to another, a custom to share the commission so long as the vessel shall be chartered by the same party, or indeed by any other party through the same broker, is of extremely doubtful legality. But I am not influenced in my decision by that consideration. A custom may, by evidence, be attached to any ordinary course of business, so as to introduce a term not inconsistent with that course of business; and undoubtedly, where one broker introduces a vessel to another, a custom may be shewn that the broker so introducing it, is entitled to a share of the commission, on that particular charter; but I think such a custom cannot be extended to a special agreement between the parties, entirely independently of the usual course of business. If the relation of the parties is settled by an agreement not corresponding with the usual course of business, I think the custom ought not to be received in evidence. The case, as before me, certainly presented that aspect. The agreement with respect to the commission was entirely out of the ordinary course of business; the parties professing to act, not according to the ordinary course of business, but by their special agreement. For that reason I rejected the evidence that was offered, not as evidence of a custom controlling every agreement, but as evidence of what the custom was in the

ordinary course of business. It is clear that this agreement was not in the ordinary course of business, and therefore the custom does not apply.

Of course I express this opinion with some doubt, after hearing that my brothers Martin and Bramwell are of a different opinion, but I still think that what I did at Nisi Prius was correct.

WILDE, B. As I did not hear the whole of the argument on both sides, I take no part in the judgment; but, so far as I heard the argument upon the question of the admissibility of evidence of the custom, I think that the Lord Chief Baron was right in rejecting it, and I agree in the reasons he has given.

Rule absolute.

[134] LACHARME v. THE QUARTZ ROCK MARIPOSA GOLD MINING COMPANY. May 13, June 17, 1862.—In an action against a joint stock Company, the Court or a Judge has power, under the 14 & 15 Vict. c. 99, s. 6, and the 17 & 18 Vict. c. 125, s. 50, to order a director of the company to allow inspection of their documents in his possession.—An affidavit of a director, in answer to an attachment for disobedience of such an order, stated that he had not on the day the order was made, or at any time since, the documents in his possession, custody, or power, and that ever since the order was made it had been out of his power to comply with it: Held that the affidavit was insufficient; and the Court ordered the director to be examined *vivâ voce* before a Master, under the provisions of the 46th section of the Common Law Procedure Act, 1854.

[S. C. 31 L. J. Ex. 508; 10 W. R. 799. Distinguished, *Dickson v. Neath and Brecon Railway*, 1869, L. R. 4 Ex. 91.]

This was an action against a joint stock Company, incorporated under the 7 & 8 Vict. c. 110, to recover twenty-one months' rent of a mine in California, held by them under a lease from the plaintiff, dated the 20th of July, 1855.

On the 3rd February, 1862, an order was made by Bramwell, B., at Chambers, "That the plaintiff or his attorney be at liberty to inspect, at the office of the defendants' attorney, the minute book of the directors of the defendants' Company, and also the shareholders' minute book, and take copies of such parts thereof as relate to the plaintiff's case; and also of the lease from the plaintiff to the defendants, dated the 20th July, 1855," &c. Inspection having been applied for and refused, on the 27th March, another order was made by Bramwell, B., "That Mr. John Carter, one of the directors of the defendants' Company, forthwith give the plaintiff's attorney or agent inspection, pursuant to the order of the 3rd February, 1862, of the documents mentioned in such order." The affidavit in support of the latter order stated, "That the defendants' Company had ceased to carry on business for some time; and deponent believed there were not any funds or property belonging to defendants against which a sequestration could be issued for the purpose of enforcing the said order." Carter made no affidavit.

[135] J. Brown, in the present term, obtained a rule calling on the plaintiff to shew cause why the order of the 27th of March should not be rescinded; against which

Field and Murray now shewed cause. The 14 & 15 Vict. c. 99, s. 6, empowers the superior Courts of common law, and each of the Judges thereof, to "compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party, &c., and if necessary to take examined copies of the same, &c., in all cases in which, previous to the passing of this Act, a discovery might have been obtained by filing a bill, or by any other proceeding in a Court of equity at the instance of the party so making application." Therefore, if in this case a discovery could have been obtained by filing a bill against Carter in a Court of equity, the plaintiff is entitled to the inspection which has been ordered. The practice of Courts of equity in this respect dates as far back as the year 1682. *Anonymous* (1 Vern. 117): "A bill against a Corporation to discover writings. The defendants answer under the common seal; and so, being not sworn, will answer nothing in their own prejudice. Ordered that the clerk of the Company, and such principal members as the plaintiff shall think fit, answer on oath, and that a Master settle the oath." So, in a bill against the East India Company, one of the

officers of the Company was made a defendant, in order to discover some entries and orders in the books of the Company: *Wych v. Meal* (3 P. Wms. 310). Lord Talbot, C., there said: "It has been an usual thing for a plaintiff, in order to have a discovery, to make the secretary, book-keeper, or other officers of a Company defendants." Those authorities were re-[136]-cognised and adopted by Lord Eldon in *Dummer v. The Corporation of Chippenham* (14 Ves. 245), where a demurrer to a bill of discovery filed against some individual member of a Corporation was overruled. Unless the Court will enforce an order of this kind, there is no means of obtaining an inspection of documents where the defendants are a Corporation. In this case the Company has no funds which can be sequestered. [Bramwell, B. If a Corporation refuses to obey an order of the Court, may not the individual members be attached?] There are cases of indictments against corporations and of mandamus directed to them, but there is authority that the members may be attached. The subject was discussed in *Mackenzie v. The Sligo and Shannon Railway Company* (9 C. B. 250), where it was held that an attachment would not lie against an incorporated railway Company for the nonperformance of an award.

Lush (J. Brown with him), in support of the rule. The learned Judge had no power to make the order on Carter. Whatever may be the practice of Courts of equity, the 14 & 15 Vict. c. 99, s. 6, has defined the parties who may be compelled to allow an inspection of documents. Before that statute Courts of common law had only a limited power to order inspection. The 6th section enables them, on application by "either of the litigants, to compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party, &c., in all cases in which, previous to the passing of that Act, a discovery might have been obtained." In the case of a corporation, the individual members are not the litigant parties, but the corporate body. The documents of which inspection is to be given are those in respect [137] of which a discovery might, before the 14 & 15 Vict. c. 99, have been obtained; but by the 50th section of the 17 & 18 Vict. c. 125, if the party against whom the application for a discovery is made is a body corporate, the Court or a Judge may order "that some officer to be named of such body corporate shall answer on affidavit," stating what documents they have in their possession or power. Therefore the Court is not at liberty to adopt the practice of Courts of equity, but must proceed in the manner prescribed by that enactment. [Martin, B. If it appears that a director has the documents in his possession, the more convenient course is to make an order on him.] It is not a question of convenience, but whether the statute has authorized it. [Pollock, C. B. It is the province of the Court so to construe a remedial statute as to carry out the intention of the legislature. If it appears that a member of the Corporation has possession of a document of which inspection is required, we have as much power to order him, as a party connected with the Corporation, to allow an inspection as we have to order the attorney, secretary or other officer.]

POLLOCK, C. B. We are all of opinion that the rule ought to be discharged. I think that the order of my brother Bramwell was quite correct. The power to make such an order upon a director of a corporate body is not only within the intention of the legislature but absolutely necessary, if the jurisdiction is to be exercised. A director, as a member of the Company, is substantially a party to the suit. The words of the 50th section of the Common Law Procedure Act, 1854, are: "Or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit." The words "to be named" should be read as if in a parenthesis. Then the question is, by whom [138] is the officer to be named? Clearly by the Court or Judge, not by the body corporate.

MARTIN, B. The question depends on the construction of two acts of parliament, the 14 & 15 Vict. c. 99, s. 6, and the 17 & 18 Vict. c. 125, s. 50; and in construing them we ought, as far as we can, to give effect to the intention of the legislature. The real object of the legislature was to save litigant parties the expense of a bill of discovery in a Court of equity, and therefore we ought in a case of this kind to do what a Court of equity would do. Now the 14 & 15 Vict. c. 99, s. 6, enacts that the Court or a Judge may, "on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding." Then who are substantially the litigants in an

action against this corporation? The directors; for they are the acting parties. The section goes on to say, "in all cases in which, previous to the passing of this Act, a discovery might have been obtained by filing a bill or by any other proceeding in a Court of equity at the instance of the party so making application as aforesaid to the said Court or Judge." I think it would be giving an extremely narrow construction to the Act not to allow a Court of common law the same power in this respect as a Court of equity. The 50th section of the Common Law Procedure Act, 1854, goes further than the other statute. It enables the Court or Judge "to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit stating what documents he or they has or have in his or their possession or power relating to the [139] matters in dispute." It seems to me, that was intended to aid and carry out the former practice; and, in actions against a corporation, to confer on us the power of naming the officer most competent to give the information. It is no straining of the Act to hold that if a Company permits one of its directors to have the custody of its documents, such director is an "officer" for the purposes of discovery. In my opinion we only effectuate the intention of the legislature by granting the plaintiff that which he is clearly entitled to.

CHANNELL, B. I am also of opinion that the rule ought to be discharged. The question is whether the order of my brother Bramwell is void for want of jurisdiction. That depends upon the construction of the 6th section of the 14 & 15 Vict. c. 99, and the 50th section of the Common Law Procedure Act, 1854. I think that those two sections should be read together. The 50th section of the latter Act provides for the case where the party against whom the application is made is a body corporate, which was omitted in the 6th section of the former Act. Then, reading the two sections together, Mr. Lush admitted that an order might have been made against an officer of the corporation if such officer was named by the corporation. But the language of the 50th section is, "or if such party is a body corporate, that some officer to be named of such body corporate shall answer." It seems to me that a director of a Company having the possession of documents in respect of which a discovery is sought, is an "officer" within the meaning of that enactment.

BRAMWELL, B. I am glad that the Court is of opinion that my order was right, because it would be unreasonable [140] that an order should be made against a corporation which could not be enforced. I think that this is a convenient mode of proceeding, and in accordance with the intention of the legislature.

Rule discharged.

On the 31st of May the orders of Bramwell, B., were made rules of Court, and were afterwards personally served on Carter and an inspection of the documents demanded. On the 12th of June the plaintiff's attorney made an appointment for such inspection at the office of the defendants' attorney. The plaintiff's attorney attended pursuant to the appointment, but was informed by the defendants' attorney that he had no documents for inspection.

Murray, in Trinity Term, obtained a rule calling on John Carter to shew cause why an attachment should not issue against him for his contempt in not giving inspection of the documents, pursuant to the said rules of the 3rd and 27th February; against which

Lush shewed cause (June 17) upon the following affidavit made by John Carter:—"That I had not on the 3rd day of February last, nor have I at any time since had in my possession, custody or power any of the documents mentioned in the order of Bramwell, B., of that date; and that it is, and ever since the said 3rd day of February has been, out of my power to comply with such order, or the two several rules made in the cause of the 31st day of May last, by giving inspection of the documents, or any of them." It was submitted that this affidavit was an answer to the application.

Field and Murray, in support of the rule. The affidavit [141] is insufficient. It merely states that Carter had not the documents in his possession, custody or power on the day when the first order was made or at any time since; but it gives no information as to where the documents are. It can scarcely be credited that a director of the Company should not know what has become of the documents belonging to the Company. [Martin, B. The affidavit is certainly most unsatisfactory. The proper course would have been for Mr. Carter to have stated all he knew as to the custody of the documents. Bramwell, B. I think the affidavit is insufficient,

because Mr. Carter swears that it is out of his power to comply with the order without stating the facts upon which that conclusion is founded. It may be that he is swearing to the truth of his attorney's notion of the law.] The Court has the option either to issue the attachment or to direct a *vivâ voce* examination of Carter, under the 46th section of the Common Law Procedure Act, 1854. By adopting the latter course, all the information which the plaintiff requires might be elicited.

POLLOCK, C. B. We are all of opinion that the affidavit is insufficient. It gives no information whatever as to the custody of the documents. The best course will be to order Mr. Carter to be examined *vivâ voce* before the Master, and the rule must be enlarged for that purpose.

MARTIN, B., and BRAMWELL, B., concurred.

Rule accordingly.

[142] GIBSON AND ANOTHER v. CRICK AND ANOTHER. April 17, 1862.—The defendant, a shipowner, being desirous of chartering a vessel, the plaintiff, a ship-broker, introduced him to S., another broker, who introduced the defendant to L., who mentioned to B. that the charter was wanted, and through the negotiations of B. with the defendant, D. chartered the vessel. The plaintiff sued for commission, alleging that an "introducing broker" was entitled by custom to a share of the commission. The plaintiffs' counsel proposed to ask a witness the following question: "What is the custom with regard to payment of broker's commission, when a broker introduces another broker to a shipowner, who subsequently negotiates with the broker introduced?" Held, that the evidence was properly rejected.—*Semble*, that such a custom would be bad in law.

[S. C. 31 L. J. Ex. 304; 10 W. R. 525; 6 L. T. 392.]

Declaration for work done by the plaintiffs for the defendants, &c.

Plea: Never indebted.

At the trial, before Martin, B., at the London Sittings after last Hilary Term, it appeared that the action was brought to recover the sum of 60l. 18s. 4d., claimed by the plaintiffs for commission in respect of procuring for the defendants a charter of their ship, the "Indus," under the following circumstances:—The plaintiffs were shipbrokers, and the defendants were the owners of five ships, called the "Indus," "Hubertus," "Oscar," "Llangollen" and "Plantagenet." In February, 1861, the defendants applied to the plaintiffs to raise money for them on a mortgage of the "Indus," stating that they were in want of charters for the ships. The plaintiffs said that they could procure charters for three of the ships, with cargoes of coals, from Wales to France. They attempted to obtain for the defendants a loan of 1100l., but were unsuccessful. One of the plaintiffs introduced the defendant Crick to Messrs. Spicer and Fysh, brokers, in London, who acted on behalf of a coal company in Wales. Messrs. Spicer and Fysh introduced the defendant Crick to a Captain Lay, with whom negotiations were opened for chartering the "Hubertus," "Oscar" and "Llangollen." These negotiations however failed. Messrs. Spicer and Fysh then mentioned to one Bowan, a member of another firm of ship-[143]-brokers in London, that charters were wanted for these ships, and on the 12th of October Bowan chartered the "Oscar" and "Hubertus" on the part of the Dynover Coal Company. The plaintiffs were paid commission on the charters of these ships. Lay subsequently mentioned to one De Mattos that a charter was wanted for the "Indus," whereupon De Mattos applied to Bowan, who negotiated with the defendant Crick, and on the 30th of October the "Indus" was chartered by De Mattos for a period of twelve months, to carry coals between Newport and Bordeaux. The plaintiff Gibson, who was a witness, stated that he had heard that the "Indus" was chartered by De Mattos, and that the firm of which Bowan was a member and Messrs. Spicer and Fysh intended to share the commission; and that he had told the defendant Crick that he should expect a share of the commission, but Crick refused to recognise him in the transaction.

The plaintiffs' counsel proposed to ask a ship-broker the following question:—"What is the custom with regard to payment of broker's commission when a broker introduces another broker to a shipowner who subsequently negotiates with the broker introduced?" This question was objected to, and the learned Judge refused to allow it to be put at that stage of the cause, being of opinion that there was no evidence

that the charter of the "Indus" by De Mattos had been procured through the introduction of the plaintiffs. No further evidence having been offered, the learned Judge directed a verdict for the defendants.

Kenealy now moved for a rule nisi for a new trial, on the ground of misdirection and rejection of evidence. First, there was evidence in support of the plaintiffs' claim which ought to have been submitted to the jury. The plaintiffs have been paid their commission on the charters of the [144] "Hubertus" and "Oscar," and they are equally entitled to it on the charter of the "Indus," for all the charters were procured through the introduction of the plaintiffs. The repudiation by the defendants of the plaintiffs' claim to commission in respect of the "Indus" cannot deprive them of their rights. It was a question for the jury whether the defendants did not introduce the two principals, and if so, according to the custom of brokers, the plaintiffs are entitled to a share of the commission. [Wilde, B. The plaintiffs never brought the two principals together, they had no communication with De Mattos.] The plaintiffs introduced the broker who introduced De Mattos. The broker entitled to commission is that one through whose introduction the vessel is ultimately chartered, not the broker by whom the charter-party is prepared: *Burnett v. Bouch* (9 C. & P. 620). In *Cunard v. Van Oppen* (1 F. & F. 716), Erle, J., said: "The law is clear that the broker who first introduces the purchaser, although the negotiation is completed between the principals, is entitled to commission." Secondly, evidence of the custom was improperly rejected. [Pollock, C. B. In my opinion, such a custom as the plaintiffs rely on, if it does exist, is bad in law. The share which the plaintiffs had in the transaction is far too remote.] Whether the custom is good or bad, the evidence ought to have been received, and it should have been left to the jury to say whether in point of fact such a custom existed.

POLLOCK, C. B. We are all of opinion that there ought to be no rule. This is an attempt to go one step beyond any extravagant claim ever made by a broker, A custom for one broker to be paid for another broker's work may be good where there is a direct communication between the introducing broker and the principals, but if a shipowner [145] in want of a charter applies to a broker who gives the name of another broker, and he mentions a third broker whom the principal employs, it is simply preposterous that the broker originally applied to should have any claim on the principal. A custom is alleged in support of it, but no usage can make such a custom good. The facts shew that the plaintiff's claim cannot be supported, even if the question rejected had been allowed to be put and the answer given which it was intended to elicit. But I think the question was properly rejected. When it was tendered, the facts did not warrant its being put. No connection between the introducing broker and the charterer was shewn. Even if such a custom could have been proved, I should have been inclined to hold it bad. The case of *Cunard v. Van Oppen* (1 F. & F. 716) is no authority for the proposition contended for. It appears by the report that the evidence varied as to the custom. If that were so, there was no such custom as that attempted to be proved.

BRAMWELL, B. I am of the same opinion. There was no evidence for the jury in support of the plaintiffs' case, if the question objected to was properly rejected. The plaintiffs' case was that they had done the work and ought to be paid for it; but it is clear to my mind that they had not, for they were not the persons who negotiated the charter.

Then was the proposed evidence properly rejected? I think it was, on two grounds: first, because the custom, if proved, would be unreasonable; and secondly, because it would not apply to this case. The plaintiffs having been employed as brokers to obtain charters for the defendants' ships, went to other brokers who attempted to negotiate with one Lay for the charter of three of the ships. These [146] negotiations failed, but, by means of them, Lay knew that the defendants had ships which they wished to charter, and went to De Mattos and got him to charter the ship called the "Indus." In short the plaintiffs spoke to their broker, who spoke to Lay, who spoke to De Mattos, who chartered the ship. Now the question proposed was, "What is the custom with regard to payment of brokers' commission, when a broker introduces another broker to a shipowner, who subsequently negotiates with the broker introduced?" But the plaintiffs did not introduce Lay, who procured the charterer, De Mattos, for the defendants. Therefore the question falls short of what it was necessary to prove in order to shew a custom to support the plaintiffs'

case. Under these circumstances, it seems to me monstrous that the defendants should be liable to the plaintiffs. Where is it to stop? It is a hardship on parties affected by a custom, that it should be proved by persons interested in establishing it, and some restraint ought to be placed upon them. It is unreasonable that the defendants, who are liable to the broker who effected the charter, should also be liable to the plaintiffs. There is some reason for saying that if the two principals think fit to disregard the middle man, the introducing broker is entitled to be paid. But that does not apply to this case. I think that if such a custom as that attempted to be proved could have been established, it would have been bad; and therefore on both grounds there ought to be no rule.

WILDE, B. I am of the same opinion. The facts are somewhat complicated, and I at first was under the impression that Lay, who ultimately procured the charter of the "Indus," was interested in it, so that he was in effect a charterer. If so, though the plaintiffs did not negotiate the charter, if they first introduced the principals, they would [147] be entitled to commission. It is immaterial whether the introducing broker conducts the negotiation, or the principals employ another broker; the broker who has first brought them together is entitled to some commission. If Lay had been a charterer of the vessel, the plaintiffs would have established their case; but he was not. The plaintiffs entered into a negotiation with him, which failed. Lay having thereby become acquainted with the fact that the defendants wanted a charter for the "Indus," obtained one from De Mattos. I think that the share the plaintiffs had in the transaction is too remote. One broker might speak to another, he to a third, he to a fourth, and so on through a dozen people,—is the first person who set in motion the news that a charterer was wanted entitled to commission from the shipowner? I think not.

With respect to the custom, I think, as a matter of law, the plaintiffs were not entitled to put the question. If it is necessary to prove a custom, the party seeking to establish it must begin by shewing the existence of the custom, not by asking what the custom is.

MARTIN, B. I also think that the rule ought to be discharged, and I am of that opinion for the reasons already given, viz., that the plaintiffs' connexion with these transactions was too remote to entitle them to commission from the defendants. The facts of the case have been stated by my brothers Bramwell and Wilde too favourably for the plaintiffs. The defendants applied to the plaintiffs to obtain a loan on mortgage of the "Indus," when the plaintiffs consented to raise for them 1100*l*. Negotiations for that purpose were entered into between the plaintiffs, the defendants, and Lay, which ultimately failed, but in consequence of them Lay became acquainted with the fact that a charter was wanted for the "Indus." Lay then communicated, through [148] Bowan, with De Mattos, and proposed to him to charter the "Indus." De Mattos agreed, and communicated with the defendants through Bowan. Lay was introduced by the plaintiffs to the defendants at the office of Spicer and Fysh. This is all the plaintiffs had to do with the matter, so far as the "Indus" is concerned. I think that the connection of the plaintiffs with the chartering of the "Indus" by De Mattos, was too remote to entitle them to claim commission. In such a state of things, no such custom could have been proved as that relied on by Mr. Kenealy. In my opinion, the cases as to claims of this kind have gone far enough, and ought not to be extended.

Rule refused.(a)

MAYALL v. HIGBEY. May 2, 6, 1862.—The plaintiff lent some photograph portraits to a person who became insolvent, and his assignees having offered the photographs for sale by auction, the defendant purchased them, and by photographically printing from negatives he obtained reduced copies which he published and sold. The plaintiff brought an action against him and recovered nominal damages on a count for the infringement of the plaintiff's right: Held, that the plaintiff was entitled to a writ of injunction to restrain the defendant from taking or selling any more copies of the photographs, and also to recover them or their value under a count in detinue.

(a) See *Allan v. Sundius*, ante, p. 123.

[S. C. 31 L. J. Ex. 329 ; 8 Jur. (N. S.) 622 ; 10 W. R. 631 ; 6 L. T. 362. Applied, *Mansell v. Valley Printing Company*, [1908] 1 Ch. 574.]

The first count of the declaration stated that the defendant wrongfully and unlawfully took and kept possession of the plaintiff's goods, that is to say, photographic portraits, and while the said goods continued to be the property of the plaintiff, and were not the property of the defendant, and were wrongfully and improperly in his possession, and while the plaintiff was of right entitled to prevent, by writ of injunction thereafter claimed, the defendant from using the same by making therefrom, and photographically printing from negatives obtained therefrom, reduced or other copies of such portraits, and from selling such copies, [149] wrongfully and unlawfully used the same by making therefrom, or photographically printing from negatives obtained therefrom, reduced and other copies of such portraits ; and thereby the said portraits of the plaintiff have become less valuable to him, and he has been deprived of the profits which he would have derived by selling copies or duplicates of such portraits or of the photographic negatives from which the said portraits had been obtained. Second count : that the defendant detains from the plaintiff his goods, to wit, photographic portraits and photographic negatives. And the plaintiff claims a return of the goods mentioned in the last count, or their value, and 10l. for their detention, and 1000l. for the causes of action in the first count mentioned. And the plaintiff has sustained damage by the defendant unlawfully using the plaintiff's said portraits, as in the first count mentioned, and would sustain further damage by the repetition and continuance of such user, and has requested the defendant, who has refused, to desist from such user ; and the plaintiff claims a writ of injunction to restrain the defendant from using the plaintiff's said photographs, in manner in the first count mentioned, and from committing of injuries of the like kind relating to the same right therein mentioned.

Pleas (inter alia). First : not guilty. Secondly, to the first count : that the goods were not the plaintiff's. Thirdly, to the same count and to the claim of writ of injunction : that the goods were not wrongfully and improperly in the possession of the defendant. Fourthly, to the same count : that the plaintiff was not of right entitled as therein by him alleged. Fifthly, to the second count : that the defendant did not detain the goods. Sixthly, to the second count : that the goods were not the plaintiff's. Issues thereon.

At the trial, before Pollock, C. B., at the London Sittings after last Hilary Term, the following facts appeared :—The [150] plaintiff, who was a photographer, had lent to one Tallis, the proprietor of a newspaper called the *Illustrated News of the World*, a number of photographic portraits of eminent individuals, for the purpose of being engraved and published in that newspaper. Tallis having become insolvent, assigned all his estate and effects to trustees for the benefit of his creditors. The trustees sold the newspaper and stock in trade by auction, together with about ninety photographic portraits belonging to the plaintiff. The defendant bought these portraits, and by photographically printing from negatives he obtained reduced copies, which he published and sold. On application to a Judge at Chambers, an order for an injunction had been obtained to restrain the defendant from using the portraits, by making therefrom, and photographically printing from negatives obtained therefrom, reduced or other copies of the photographs, and from selling such copies.

A verdict was found for the plaintiff on the first count, with 40s. damages, and on the second count with 25l. damages : leave being reserved to the defendant to move to enter the verdict for him on the first count, if the Court should be of opinion that the right alleged and the right to an injunction were not proved.

Montague Smith, in the present term, obtained a rule nisi accordingly, against which

Vaughan Williams (Leith with him) now shewed cause. The property in these photographs being in the plaintiff, the defendant had no right to make use of them. The only question then is, whether the plaintiff has sustained any damage by reason of the defendant's wrongful act. The value of the plaintiff's property is depreciated by reason of the multiplication and sale of copies. No question of copyright arises here, but the doctrine laid down in *Jefferys* [151] v. *Boosey* (4 H. L. Cas. 815, 867), with respect to literary works, applies equally to artistic works. Erle, J., there said : "The nature of the right of an author in his works is analogous to the rights of

ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation, and which is the right of an author to which the statute of Anne relates. Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained." This case is analogous to that of *Prince Albert v. Strange* (1 Mac. & G. 25), where all the authorities are reviewed by Lord Cottenham.

The Court then called on

Montague Smith and Aspland, to support the rule. Unless the plaintiff has some right in the nature of copyright, the first count cannot be supported. The right to an injunction depends on the 79th section of the Common Law Procedure Act, 1854, which provides that where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the repetition or continuance of such injury. That enactment confers on Courts of law a new remedy by injunction where there is a legal right, but it does not create any new equitable right. Then what legal right has the plaintiff apart from his right to maintain detinue? He is entitled to a return of the goods, or their value; and if he recovers damages, he can maintain no further proceeding. But by claiming an injunction the plaintiff is in effect attempting to obtain two [152] causes of action out of one transaction. [Pollock, C. B. Suppose the owner of a celebrated statue lent it to a friend, would the latter have a right to copy it? It is an injury so to deal with the property of another as to lessen its value.] If the defendant pays the damages the photographs become his property; therefore the claim to the injunction is too large, for it seeks to restrain the defendant from selling his own property. [Pollock, C. B. It is essential not only that the defendant should not make copies, but also that he should not sell them. If a person surreptitiously copied a picture, a Court of equity would interfere to prevent him from availing himself of it in any manner whatever. The right of a person as against another who has surreptitiously copied his work is distinct from the right of copyright, which is the creation of the statutes.] The plaintiff has no copyright in these photographs; *Reede v. Conquest* (9 C. B. N. S. 755). [Bramwell, B. The wrongful act of which the plaintiff complains is a compound one, namely, copying the plaintiff's works and selling the copies. The plaintiff claims damages for the injury done to him by taking the copies, and an injunction to restrain the defendant from doing further injury by selling them. If the plaintiff had recovered substantial damages on the first count, we might, as in the case of a penalty, in our discretion have refused an injunction.(b)]

POLLOCK, C. B. The damages on the first count were merely nominal, and only in respect of the infringement of the plaintiff's right. The question of copyright does not arise. The rule ought to be discharged, and the injunction must issue.

MARTIN, B., and BRAMWELL, B., concurred.

Rule discharged.

[153] PARKINS AND MATILDA his Wife v. SCOTT AND SARAH his Wife. May 8, 1862.—Where slanderous words are not actionable per se, no action will lie against the original utterer of the slander for damage resulting from a repetition of it unauthorized by him.—Therefore where the defendant imputed adultery to the plaintiff's wife in his absence, and she voluntarily repeated the slander to her husband, whereby he refused to cohabit with her: Held, that no action was maintainable against the defendant.—Quære, whether the loss of consortium is ground of special damages.

[S. C. 31 L. J. Ex. 331; 8 Jur. (N. S.) 593; 10 W. R. 562; 6 L. T. 394. Referred to, *Riding v. Smith*, 1876, 1 Ex. D. 96. Followed, *Clarke v. Morgan*, 1877, 38 L. T. 355.]

Slander. The declaration stated that the defendant, Sarah, falsely and maliciously spoke and published of the plaintiff, Matilda, the following words:—"Go in, you nasty

(b) See *Carnes v. Nesbitt*, 7 H. & N. 778.

slut, and I'll tell you what you are ; you have been a whore from your cradle " (meaning thereby that the plaintiff, Matilda, had been and was then an unchaste woman, and had after her intermarriage been guilty of adultery). Whereby the plaintiff, Matilda, was not only greatly injured in her credit and reputation, but by reason of the premises also her husband refused any further to cohabit or live with her, and ceased therefrom any longer so to do, and thence hitherto has ceased to live, reside, or cohabit with her ; whereby the plaintiff, Matilda, was deprived of the fellowship, comfort, and support of her said husband, which she had heretofore enjoyed, and is still deprived thereof.

Plea. Not guilty.

At the trial, before Williams, J., at the last Leicestershire Spring Assizes, it was proved that the slanderous words set out in the declaration were addressed by the defendant, Sarah, to the plaintiff, Matilda, in the presence of her mother and other persons, but in the absence of her husband, he being then from home. On his return, the plaintiff, Matilda, repeated to him the slanderous words, as well as some language of a similar description which had been addressed to her by other persons. The husband gave evidence as follows :—"I was so much hurt that after consideration I thought they would not have dared to charge her with such foul abuse, that I determined to leave her till the matter was cleared up." On cross-examination he said, "I left her [154] in consequence of the bad language used by all, more particularly by Mrs. Scott."

It was submitted, on behalf of the defendant, that the words were not actionable without proof of special damage, and that the damage alleged was not sufficient legal damage : that it was not the wife's duty to tell her husband of the slander, and as he only knew it by her repetition without any authority from the slanderer, the action was not maintainable : *Ward v. Weeks* (7 Bing. 211).

The learned Judge reserved leave to move to enter a verdict for the defendant or a nonsuit ; and directed the jury that in order to find a verdict for the plaintiff they must be satisfied that the husband refused to live with his wife in consequence of the slander uttered by the female defendant. The jury found a verdict for the plaintiff, with 40s. damages.

Hayes, Serjt., in the following term, obtained a rule nisi accordingly, on the ground that the alleged special damage did not arise from the speaking of the words by the female defendant, but from the voluntary communication by the female plaintiff to her husband of those words, and of other abusive language ; or why the judgment should not be arrested, on the ground that the action was not maintainable, the words not being actionable in themselves, and the alleged special damage not being sufficient legal damage to render the words actionable.

O'Brien and Cockle now shewed cause. The authority of *Ward v. Weeks* is not disputed. That case decided that the original utterer of slander is not responsible for damage resulting from an unauthorized repetition of it by a third person. But here the slander was addressed to a person whose duty it was to inform her husband of it. The case there-[155]-fore falls within the principle of *Kendillon v. Maltby* (Car. & Marsh. 402), where a police officer was dismissed by the Commissioners, in consequence of a report duly made to them of a censure uttered on him by a magistrate acting in his judicial capacity ; and it was held that, in the absence of malice, no action would lie against the magistrate, for it was his duty to express his opinion of the conduct of police officers. [Wilde, B. Is it the duty of a wife to communicate to her husband any vulgar abuse addressed to her ?] Here there was an imputation of adultery, which it was the duty of the wife to communicate to her husband, for it affected not only her reputation but himself also ; and therefore he had an interest in ascertaining whether it was true. The consequences might have been more serious if the slander had reached him from another source. [Martin, B. The question is whether the alleged damage was the natural consequence of the slander. No legal wrong was done at the time when the words were spoken.] Secondly, there was sufficient special damage to render the action maintainable. In consequence of the slander the husband refused to cohabit with his wife. [Martin, B. This question was lately before the House of Lords in a case of *Lynch v. Knight* (Dom. Proc. July 17, 1861).] There no actual adultery was imputed to the wife, and on that ground it was held that the loss of the husband's consortium was too remote a damage to support the action. [Martin, B. Was the husband justified in refusing to cohabit with his

wife?] That is immaterial: it is sufficient if the special damage is the natural and probable consequence of the slander. [Bramwell, B. Suppose a person said something to a master about his servant, in consequence of which the master dismissed him, would an action lie against that person?] According to *Lumley v. Gye* (2 E. & B. 216), wherever, either from the relation between the parties or by express contract, [156] a right accrues to one party and a duty is imposed on the other, any wrongful act which prevents the performance of that duty affords a ground of action. Upon that principle actions for criminal conversation and seduction were founded; because a husband has a right to the consortium of his wife and a master to the servitium of his servant. *Wilton v. Webster* (7 C. & P. 198) shews the nature of the loss of consortium which affords ground of damage. [Bramwell, B. In *Hall v. Wright* (E. B. & E. 746), Lord Campbell considered that supervening bodily infirmity did not put an end to a contract of marriage. Martin, B. In *Moore v. Meagher* (1 Taunt. 39) it was held that the loss of hospitality of friends was a sufficient temporal damage whereon to maintain an action.] It is conceded that a wife has no right of action for the false imprisonment of her husband, whereby she lost his consortium, but there a wrong is done to the husband for which he may recover damages. Where slanderous words are spoken of a wife a damage ensues to her. [Wilde, B. If words are spoken of a person which injure his character, is he bound to communicate them to all his friends; and could he recover damages for every friend he lost? With regard to a servant, the wrongful act prevents the performance of a duty. Martin, B. In the case of a servant, the foundation of the action is that the master is deprived of that species of property which he has in the service of his servant.] If the slander came to the knowledge of the husband from some other source, the wife's condition would be worse from having refrained to communicate it. They also referred to *Lynch v. Knight* (Dom. Proc. July 17, 1861).

Hayes, Serjt., and Field, in support of the rule. If this action is maintainable, any slanderous words spoken to a sister, a brother, or any other relation, though not actionable [157] in themselves might be rendered actionable by reason of their repetition of them. A woman, in a quarrel with a neighbour, might have offensive language addressed to her, and upon repeating it to her husband, he might refuse to cohabit with her, and so create a cause of action. If it is the duty of a wife to communicate to her husband slander uttered against her, it is equally the duty of a husband to communicate to his wife slander uttered against him. By exercising this supposed moral duty actions for slander might be indefinitely multiplied. If a person said of a tradesman that he used false weights and he told that to a customer, who in consequence ceased to deal with him, could the tradesman maintain an action? The true principle is thus stated by Tindal, C. J., in *Ward v. Weeks* (7 Bing. 211, 215): "Every man must be taken to be answerable for the necessary consequences of his own wrongful acts; but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words." Moreover, the special damage was not the necessary and legal consequence of the slander. *Allsop v. Allsop* (5 H. & N. 534) was an action by husband and wife for slander imputing incontinency to the wife, by reason whereof she became ill, and was unable to attend to her necessary affairs and business, and her husband was put to expense in endeavouring to cure her; and it was held that the action was not maintainable. Pollock, C. B., there said: "We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it." In *Lynch v. Knight*, Lord Wensleydale was of opinion that a wife has no right of action for the loss of the consortium of her husband, in consequence of the slander of her character. They also referred to *Vicars v. Wilcocks* (8 East, 1).

[158] POLLOCK, C. B. I am of opinion that the rule ought to be absolute to enter a nonsuit. I cannot help expressing regret that we should have to discuss such a matter where the words can scarcely be called slander, but are rather mere vulgar abuse, the result of ill-temper and bad manners. The point, however, having been reserved for our consideration, we must dispose of it. The authority of *Ward v. Weeks* (7 Bing. 211) is not disputed; and I am not disposed to say more than is necessary to get a safe resting place for a decision. *Ward v. Weeks* decided that where the words are not actionable per se the original utterer of the slander is not liable, unless either the person who was influenced by them was present and heard them spoken, or the

utterer authorized their repetition. It is said that in consequence of the slander the husband deprived the wife of his consortium. I do not stop to inquire whether he was justified in so doing, because the slander was not uttered in his presence, nor was it communicated to him by authority of the defendant. Therefore on the authority of *Ward v. Weeks* the rule must be absolute.

MARTIN, B. I am of the same opinion. We could not discharge this rule without acting contrary to the law as laid down in *Ward v. Weeks*; and if that decision is to be overruled it must be done by a Court of error. I agree with the observation of Lord Campbell in *Lynch v. Knight*,^(b) that the law on this subject is in a very unsatisfactory state; and if the matter were de novo, I might express a different opinion, but I think we are bound by the authority of *Ward v. Weeks*.

BRAMWELL, B. I am also of opinion that the rule ought to be absolute. I rest my judgment entirely on the case of [159] *Ward v. Weeks*. If a man makes a slanderous statement to another, and he thinks fit to communicate it to a third person, it is not reasonable to hold that the first speaker is responsible for the ultimate consequences. If I make a slanderous statement to a man, and do not desire nor authorize him to repeat it, but nevertheless he does so, he ought to do it upon his own responsibility, and I ought not to be liable for the consequences of his wrongful act. Mr. O'Brien contends that the repetition of the slander to the husband was the natural and inevitable consequence of uttering it; and that it was the duty of the wife to communicate it to her husband. I think not; and, without going more fully into the matter, it seems to me that *Ward v. Weeks* is an authority in point.

WILDE, B. I am of the same opinion. It seems to me that the rule laid down in *Ward v. Weeks* is the true rule. It is attempted to distinguish that case from the present, on the ground that there the person who heard the slander was under no obligation to repeat it. But the Court decided that case on this principle, that the person who brings an action of slander must be the person who heard it uttered, or to whom it has been communicated by the authority of the original utterer. It would be a dangerous innovation if the doctrine contended for were introduced, and it would be difficult to say where the action for slander would stop. The case has been put on the high moral duty of a wife to communicate to her husband any imputations upon her character; but in my opinion there is no obligation whatever on a wife to repeat to her husband whatever is said of her in his absence. In this case the words used were nothing more than a missile in the course of the vulgar abuse of one woman by another.

Rule absolute to enter a nonsuit.

[160] NASH v. ASH.^(a) Jan. 31, 1862. In 1802, by indenture, reciting an intended marriage between L. and M., and that after the death of certain relations L. was entitled under the will of his uncle to five messuages; in consideration of the intended marriage, and of 5s. paid, L. granted, bargained, sold, assigned, and set over unto R. and J. the reversion, or such other estate as he was entitled to under the will of his uncle, "upon the trusts and to and for the uses" thereafter declared, i.e. upon trust to "permit and suffer M." and her assigns, during her life, to receive the issues and profits for her sole use, her receipts alone to be sufficient discharges for the same; and after her death in trust for L.; and after the decease of the survivor, in trust for such one or more of the children of L. and M. as they should by deed jointly appoint. In 1829, L. and M., by deed, executed the power, and granted, bargained, sold, and released the reversion in the messuages to such uses as P., their son, should by deed appoint. In 1839, P., by deed, conveyed the reversion to N. M. received the rents during her life, and L. after her death. No rent was received by P. or N. In ejectment by N.: Held: First, that the deed of 1802 was admissible in evidence against the defendant, although neither P. nor the plaintiff had been in receipt of the rents. —Secondly, that the trusts of the deed of 1802 were executed by the statute (with the exception, perhaps, of that for the wife), and therefore P. took a legal estate by the appointment under the deed of 1829. —Thirdly, that the deed of 1802 was not a bargain and sale properly so called, but a conveyance to uses.

(b) The judgment of the late Lord Campbell was read by Lord Brougham.

(a) Decided in Hilary Term.

[S. C. 32 L. J. Ex. 165 ; 8 Jur. (N. S.) 998.]

Ejectment to recover three messuages, situate at Stoke-upon-Trent, in the county of Stafford.

At the trial, before Hill, J., at the Stafford Summer Assizes, 1861, the following facts appeared :—By indenture of the 5th May, 1802, between Philip Francis Lycett of the first part, Mary Jenks of the second part, and Richard Lane and John Lycett of the third part : after reciting that a marriage was intended between Philip Francis Lycett and Mary Jenks, &c., and that Philip Francis Lycett was entitled, after the decease of his aunt Sarah Lycett, deceased, his uncle John Lycett, and his cousin Mary Lycett, now Mary Walker, as the nephew and devisee named in the last will and testament of his uncle Philip Lycett, deceased, to five messuages situate near Milford Gate, Stoke-upon-Trent : It was witnessed that, in consideration of the intended marriage, &c., and of 5s. paid by Richard Lane and John Lycett to Philip Francis Lycett, &c., Philip Francis Lycett doth grant, bargain, sell, assign and set over unto the said Richard and John Lycett, their heirs, executors, administrators and assigns, all that the reversion or remainder, or [161] such other estate, right and interest to which he the said Francis Lycett is entitled under and by virtue of the will of the said Philip Lycett, deceased, of, in and to all those five messuages, &c., upon the trusts and for the uses, ends, intents and purposes hereinafter mentioned, expressed and declared, that is to say, in trust for Philip Francis Lycett, his heirs, &c., until the marriage, and then in trust to permit and suffer the said Mary, his intended wife, and her assigns, during her natural life, and notwithstanding her coverture, to receive and take the issues and profits thereof to and for her and their own sole and separate use, free from the debts, control, or engagements of Philip Francis Lycett, and her receipts alone, notwithstanding her coverture, to be good and sufficient discharges for the same : and after her decease, in trust for Philip Francis Lycett and his assigns for life, without impeachment of waste : and after the decease of the survivor, in trust for all and every, or such one or more of the child or children, whether sons or daughters, of the said Philip Francis Lycett on the body of the said Mary his wife lawfully to be gotten, for such estates and in such parts and proportions, and charged with such annual sums, and in such manner as they the said Philip Francis Lycett and Mary his intended wife, during their joint lives, should by any deed appoint. (Then followed limitations in default of such appointment.)

By indenture of the 22nd of April, 1829, between Philip Francis Lycett and Mary, his wife (formerly Mary Jenks), of the first part, Francis Lycett (one of the sons of the said Philip Francis Lycett and Mary, his wife), of the second part, and John Lycett of the third part : after reciting the indenture of the 5th May, 1802, and that by it the reversion, remainder, or such other estate, right, or interest which Philip Francis Lycett has in the said messuages, was granted and assured to the said Richard Lane and John Lycett upon [162] the trusts and for the ends, intents, and purposes therein mentioned : also reciting that Philip Francis Lycett and Mary, his wife, had issue three children, and were desirous of exercising the power of appointment vested in them by the settlement, &c., in favour of their son Francis Lycett : It was witnessed that Philip Francis Lycett and Mary, his wife, for good causes and considerations, and by virtue and in exercise and execution of the power and authority jointly limited to them by the recited indenture, and every other power, have, and each of them hath, directed, limited, and appointed, and do and doth irrevocably direct, limit, and appoint that after the decease of the survivor of them, the said Philip Francis Lycett and Mary, his wife, the said messuages, &c., shall be and enure to and for the uses, intents, and purposes hereinafter declared. And the said Philip Francis Lycett and Mary, his wife, do hereby grant, bargain, sell, and release unto the said Francis Lycett, his heirs, &c., the said five messuages, &c., and all other hereditaments and premises mentioned in the indenture of the 5th May, 1802, and the reversion and reversions thereof, and all the estate, &c. : Habendum, to Francis Lycett, his heirs and assigns, in remainder immediately expectant upon the decease of the survivor of them, the said Philip Francis Lycett and Mary, his wife. Declaration : that the limitation, appointment, grant, and release aforesaid shall remain, and the indenture of the 5th May, 1802, shall operate and enure, and every person seised of the said messuages shall be seised thereof (after the death of the survivor of them, the said Philip Francis Lycett and Mary, his wife), to such uses and for such trusts and

purposes, and subject to such powers as the said Francis Lycett by deed shall appoint; and in the meantime, and in default thereof, to the use of Francis Lycett and his assigns for life; and on the determination of that estate in his lifetime, to the use of John Lycett, his executors, &c., during the life of Francis Lycett, in trust for [163] Francis Lycett and his assigns; and after the determination of the estate of the said John Lycett, to the only use of Francis Lycett in fee.

By indenture of the 15th January, 1839, between Francis Lycett of the first part, Goodwin Nash of the second part, and George Vernon of the third part: after reciting the indenture of the 22nd April, 1829, and a contract for the absolute sale by Francis Lycett to G. Nash of the said five messuages, subject to the life estate of Philip Francis Lycett and Mary, his wife: It was witnessed that, in consideration of 150l., Francis Lycett (in execution of the power contained in the indenture of the 22nd April 1829) appoints, that the said five messuages, &c., and all other messuages and other hereditaments and premises mentioned in the indenture of the 22nd April, 1829, and the reversion, &c., and all deeds concerning the same, &c., shall operate and enure (subject to the estate of Philip Francis Lycett and Mary, his wife, therein) to such uses as G. Nash by deed shall appoint, and in default of such appointment, to the use of G. Nash for life, and on the determination of that estate in his lifetime, to the use of G. Vernon during the life of G. Nash, and on the determination of that estate, to the use of G. Nash, his heirs and assigns.

The plaintiff proved the receipt of rent by the wife of Philip Francis Lycett in her lifetime, and the receipt of rent by him after her death. Philip Francis Lycett died in 1841, and there was no evidence of the receipt of rent by Francis Lycett or the plaintiff. The will of Philip Lycett, the uncle of Philip Francis Lycett, was not in evidence, nor was it proved that the life estates had expired.

It was objected, on behalf of the defendant, first, that the indenture of the 5th May, 1803, was not admissible in evidence against the defendant, because there was no proof of the possession of Philip Lycett or the plaintiff under it, and [164] that, even if it was admissible, it did not shew the nature of the reversion, and therefore the will of Philip Lycett should have been given in evidence. Secondly, that under that indenture, the legal estate in the reversion vested in the trustees, so that the plaintiff had an equitable interest only. Thirdly, that the indenture was a bargain of sale, and void for want of enrolment.

The learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

Matthews, in the following term, obtained a rule nisi accordingly, on the grounds that there was no sufficient evidence to support the verdict for the plaintiff, and that the several deeds, and the evidence given for the plaintiff, failed to shew the legal estate in him.

Pigott, Serjt., and Gray now shewed cause. First, the indenture of the 5th May, 1802, was admissible in evidence against the defendant. Philip Francis Lycett and his wife had received the rents of the premises in question under that deed. It is not necessary that the plaintiff should shew possession by him; as soon as it appeared that some parties through whom he claimed had possession under the deed, it became evidence against all persons.

Secondly, the legal estate in the reversion in fee vested in the plaintiff. Under the indenture of the 5th May, 1802, the uses were executed in the *cestui que trusts*. The reversion is not conveyed to the trustees and their heirs to the use of the trustees and their heirs, but to the trustees and their heirs upon the trusts and for the uses thereafter mentioned: Hayes on Conveyancing, p. 53, 5th ed., *Williams v. Waters* (14 M. & W. 166). Therefore Francis Lycett had a legal estate in the reversion under the appointment of the 22nd [165] April, 1829; and he conveyed it to the plaintiff by the indenture of the 15th January, 1839.

Thirdly, the indenture of the 5th May, 1802, was not a bargain and sale, but a conveyance to uses. The words "bargain and sell," do not render it a bargain and sale properly so called. It is clear, upon the face of it, that the parties never intended that it should operate as a bargain and sale. If it can operate in either way, the Court will put that construction upon it which will support it.

Matthews, in support of the rule. To entitle the plaintiff to recover, he must establish that he had a legal estate in the reversion in fee. For that purpose he relied on the three indentures of the 5th May, 1802, the 22nd April, 1829, and the

15th January, 1839. The indenture of the 5th May, 1802, recites that Philip Francis Lycett was entitled after the decease of certain of his relatives, as devisee under the will of his uncle, to five messuages, but it does not state the nature of his interest. It was not proved that the life estates had expired, nor was the will of the uncle produced; so that there was no evidence to shew what the reversion was. It might be for a limited estate, viz., for life or years, or an equitable reversion. It was contended, however, that the receipt of the rents and profits by Philip Francis Lycett and his wife, coupled with the deed, shewed the nature of the reversion. But the deed was not admissible in evidence against the defendant who was a stranger to it. In order to render it admissible, evidence should have been given of the plaintiff's possession under it. Possession is *prima facie* evidence of seisin in fee, and therefore a deed which shews that a person in possession has a life estate, is a declaration against his own interest, and on that ground is admissible in evidence against a stranger: Taylor on Evidence, ss. 617, [166] 618; *Doe d. Welsh v. Langfield* (16 M. & W. 497, 514), *Crease v. Barrett* (1 C. M. & R. 919, 931), *Doe d. Daniel v. Coulthred* (7 A. & E. 235, 239). The party making the declaration must be in possession at the time he makes it, otherwise it is not a declaration against his interest. Here it was not shewn that the plaintiff was ever in possession, and therefore the principle on which a deed is evidence against strangers does not apply. [Pollock, C. B. If there was at any time a possession consistent with the deed, it is evidence against all persons.]

Secondly, the plaintiff has not a legal estate in the reversion, but an equitable interest only. By the indenture of the 5th May, 1802, the legal estate in the reversion was conveyed to the trustees. In order to carry out the trust for the benefit of the wife of Philip Francis Lycett, free from the control of her husband, it is essentially necessary that the use should be executed in the trustees: *Harton v. Harton* (7 T. R. 652), *Doe d. Stevens v. Scott* (4 Bing. 505). Where an estate in fee is limited to trustees by deed, it is not cut down by subsequent limitations: *Colmore v. Tyndall* (2 Y. & J. 605), *Wykham v. Wykham* (11 East, 458). The indenture of the 22nd April, 1829, does not purport to appoint a reversion in fee, but an equitable estate only; for it recites that by the indenture of the 5th May, 1802, the messuages were granted to the trustees upon the trusts therein mentioned. The parties, without pecuniary consideration, "grant, bargain, sell and release" the premises, which only conveys an equitable estate in possession. In order to raise a use which the statute will turn into possession, "it is necessary there should be first one person seised to the use of another in esse; and secondly, a use in esse;" Sugden on Powers, p. 9, 8th ed. The [167] use being executed in the trustees under the indenture of 1802, the uses created by the indenture of 1829 are trusts only.

Thirdly, the indenture of 1802 is not a conveyance to uses, but a bargain and sale, inasmuch as the operative words are "bargain," "sell," and it is founded on a pecuniary consideration. A bargain and sale raises a use in the bargainee, and therefore the uses which are declared cannot take effect, otherwise there would be a use upon a use. A bargain and sale is void for want of enrolment.

MARTIN, B. I am of opinion that the rule ought to be discharged. Three objections have been made. First, it is said that the indenture of the 5th May, 1802, is not admissible in evidence against the defendant. I am at a loss to see why it is not. When a title to land is required to be proved, it is necessary to shew possession on the part of some one, but when that is done, a deed may be given in evidence for the purpose of shewing what interests are carved out of the estate in fee. Indeed, it is essential, for the law requires that conveyances of lands shall be in writing.

Secondly, it was argued that a legal estate in the reversion in fee did not pass to the plaintiff, but an equitable interest only. No doubt, if that could have been established, it would have been a fatal objection to the plaintiff recovering. But what Mr. Gray has said is correct. The indenture of 1802 is a conveyance to trustees for the use of certain persons, and the use is executed in those persons. There might be a legal estate in the trustees during the life of the wife, (a) if it were necessary, to secure the profits for her sole and separate use, that she should have an equitable [168] interest only; but the other uses would nevertheless be executed.

Thirdly, it was argued that the indenture of 1802 is a bargain and sale, and therefore void for want of enrolment. But it is not a bargain and sale in this sense. At

(a) See 2 Wms. Saund. 11 b., note (o); 11 g., note (s).

common law a reversion might have been granted by deed without livery of seisin. A bargain and sale of freehold land is a conveyance of a peculiar character, which operates by virtue of the Statute of Uses. Upon a bargain and sale, properly so called, uses cannot be limited upon the legal estate of the bargainee except in the case of a rent charge, for the reason given by Lord Coke (Co. Lit. 272 a.), viz., that upon a bargain and sale there is a use executed by the statute in the bargainee, and there cannot be a use upon a use. But where there is a conveyance of a reversion at common law, there is no reason, because the words "bargain and sell" are introduced, why there should not be a limitation to uses; and as observed in *Gilbertson v. Richards* (4 H. & N. 277, 296), "in order to create a use no technical words are necessary; and it is only essential to shew that the intention was that the party should have the interest or estate; that regard is to be had to the mind and intention of the parties; and whatever may be the words, the interest will operate according to the effect which the parties intend to give it." In my opinion, therefore, the legal estate in the reversion passed under the limitations in the deed of 1802, with the exception, perhaps, of that to the wife. I should have been very sorry if it were otherwise, and that the plain intention of the parties should have been defeated by a technical objection.

CHANNELL, B. I am also of opinion that the rule should [169] be discharged. The defendant is in possession of the land, and this action is brought to recover from him that possession. The question then is, whether the documentary title of the plaintiff will operate against the defendant's possession. That depends on whether the plaintiff has shewn a legal estate in himself. I am of opinion that the legal estate in fee in the reversion passed to the plaintiff. I think that the deed of 1802 operated by way of grant, not as a bargain and sale, and that under the deed of 1829 the legal estate in the reversion in fee was appointed to such uses as Francis Lycett should appoint, and by the deed of 1839 he conveyed it to the plaintiff.

It is said that the deed of 1802 was not admissible in evidence against the defendant, who is a stranger; but I think that where there is a long deduction of title, it is not necessary to shew a receipt of rent by each individual who was entitled under a deed. It is enough to shew a possession by some person through whom the party claims. Then was there in this case at any time such a possession of the land or receipt of rent as would give the plaintiff a title under these deeds? I think there was not only evidence to go to the jury sufficient to let in the deed of 1802, but also to create a title against the defendant.

WILDE, B., concurred.

POLLOCK, C. B. So far as I heard the argument, I think the rule ought to be discharged.

Rule discharged.

[170] ATKINSON v. WOODHALL. May 3, 1862.—No action at law can be maintained by a seaman for his share of salvage awarded by two justices under the 17 & 18 Vict. c. 104, s. 460, and paid to the owner of the salvor vessel.—The owner of a vessel, to whom the aggregate amount of salvage had been paid, offered a seaman less than he claimed as his share, which the seaman refused: Held, no evidence of money received to the seaman's use, or of an account stated.

[S. C. 31 L. J. M. C. 174; 8 Jur. (N. S.) 720; 10 W. R. 671; 6 L. T. 361.]

Declaration. For money had and received; and on accounts stated.

Plea. Never indebted.

At the trial, before the Secondary of London, it appeared that the plaintiff, who was a seaman, had been engaged as mate on board a ship of which the defendant was owner, and that in consequence of one of the men being dismissed, he did extra work as a seaman. During the time of the plaintiff's engagement a disabled vessel was towed into harbour by the defendant's ship, and two justices awarded (under the 17 & 18 Vict. c. 104, s. 460,) to the owner, captain, and crew, 60l. as salvage, to be paid to the owner. The costs were apportioned and paid, but the proportions in which the 60l. salvage was to be divided were not fixed by the justices. The plaintiff claimed 17l. as his share of the salvage. The plaintiff gave in evidence a letter from the defendant in which he admitted that he had received the 60l.

salvage money, and offered 6l. 13s. 4d. to the plaintiff as his share, which the plaintiff refused.

It was submitted, on behalf of the defendant, that an action for a share of salvage money was not maintainable in a Court of common law. The Secondary was of that opinion, and directed a verdict for the defendant.

Joyce now moved for a new trial on the ground of misdirection. It should have been left to the jury to say how much the plaintiff was entitled to recover. The letter of [171] the defendant is evidence that he has received the plaintiff's share of the salvage money as his agent and for his use. [Pollock, C. B. How can an action by one of the crew for his share of salvage money be maintained in a Court of law? One seaman might obtain from one jury one sum, and another might obtain from another jury a totally different sum. Wilde, B. I never heard of an action in a Court of law for a share of salvage money. What is the principle which the Judge is to lay down and by which the jury are to be guided?] The money having been paid to the owner, it is no longer salvage money, but money received by him for the use of the persons entitled to it. [Pollock, C. B. In the case of *The Columbine* (2 W. Rob. Adm. Rep. 186), where a tender of 600l. had been accepted by the salvors, the Court of Admiralty directed the proportion to be paid to each vessel, and the precise sum to be paid to each of the crew.] Here the salvage money is less than 200l., and therefore the claim must be referred to the arbitration of two justices, under the 460th section of the 17 & 18 Vict. c. 104; but that Act contains no provision enabling them to apportion the amount among the crew. Where the salvage money exceeds 200l., the 498th section requires it to be apportioned by a Court of Admiralty. [Wilde, B. The justices have not performed the whole of the functions which belonged to them. It was, no doubt, intended that they should have the same power of apportionment as a Court of Admiralty where the salvage money exceeds 200l. It is true the Act does not say so in express terms, but the 462nd section enables them to apportion the costs of the arbitration. How is it that 17l. is claimed as the plaintiff's proportion of the salvage money?] He acted both as mate and man. [Wilde, B. The 466th section provides that whenever the aggregate amount of salvage has been finally ascertained, either by agreement or the award [172] of justices, but a dispute arises as to the apportionment thereof among the claimants, if the amount does not exceed 200l., the party liable to pay it may pay it to the receiver of the district. Then, by the 467th section, the receiver is required to distribute it among the persons entitled thereto, in such shares and proportions as he thinks fit.] If the money was in the hands of the receiver the plaintiff might avail himself of that enactment, but it cannot apply to this case, because the party liable to pay the salvage has paid it to the defendant. [Wilde, B. Taking the 466th, 467th and 468th sections, together with the instructions issued by the Board of Trade to the receivers of wrecks with reference to the apportionment of salvage (which will be found in Maude and Pollock's Law of Merchant Shipping, p. 433, note (k), 2nd ed.), it is evident that this case is provided for.]

POLLOCK, C. B. There ought to be no rule. Looking at the act of parliament, I am clearly of opinion that this case is provided for, and that no action at law can be maintained which calls upon a jury to apportion salvage money among the several members of a crew.

Mr. Joyce relied upon a letter of the defendant as evidence which entitled the plaintiff to recover. But it turned out that the offer contained in that letter was not accepted by the plaintiff, so that if the case had been left to the jury and they had found a verdict for him, they would have come to a different conclusion from himself as to what he was entitled to for salvage. If the plaintiff had agreed to accept the sum offered, it may be that he might have recovered it as money had and received for his use or on an account stated.

WILDE, B. I am of the same opinion. The apportionment of salvage is essentially a matter of admiralty juris-[173]-diction. Mr. Joyce had cited no text book or authority in support of his proposition, that an action at law can be maintained by a seaman for his share of salvage. Great mischief would ensue if such questions were withdrawn from the rules adopted by Courts of Admiralty and submitted to a jury. It is not true that there are no provisions in the 17 & 18 Vict. c. 104 for the division of salvage money where it does not exceed 200l. The sections of the Act to which I have referred, taken in connection with the instructions issued by the Board of Trade,

are sufficient to meet every case. But whatever difficulty the plaintiff might have in enforcing his claim, I should require some authority for holding that such an action could be maintained in a Court of law.

As to the defendant's offer to pay the plaintiff 6l. 13s. 4d., my Lord has already pointed out that it was not accepted; if it had been, the case might have been different.

Rule refused.(a)

[174] EASTER VACATION, 25 VICT., IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

DURRELL v. EVANS AND OTHERS. May 17, 1862.—The plaintiff, a hop grower, having sent samples of his hops to his factor, the defendant went to the factor and offered to buy some at 16l. 16s. a cwt. After some negotiation between the defendant, the factor and the plaintiff, the latter agreed to sell the hops at that price, and the factor wrote in his book, in the presence of the plaintiff and defendant, a memorandum of the bargain in duplicate, one part of which he headed with the name of the defendant and the other part with the name of the plaintiff. The defendant requested that the date might be altered, so that by the custom of the hop trade he would have a week's more time for payment. The plaintiff consented, and the alteration was made by the factor, who tore from his book the part of the memorandum headed with the name of the defendant and delivered it to him, and kept the counterfoil in his possession: Held, that there was evidence for the jury that the factor was the agent of both parties for the purpose of drawing a record of the contract binding on them; and that, if he were, the name of the defendant at the head of that part of the memorandum delivered to him was a sufficient signature by his agent within the 17th section of the Statute of Frauds.

[S. C. 31 L. J. Ex. 337; 9 Jur. (N. S.) 104; 10 W. R. 665; 7 L. T. 97.

Distinguished, *Murphy v. Boese*, 1875, L. R. 10 Ex. 128.]

This was an appeal from the decision of the Court of Exchequer in setting aside a verdict for the plaintiff and entering a nonsuit. (Reported 6 H. & N. 660.)

The case on appeal (so far as material) was as follows:—

The first count of the declaration stated that, by an agreement between the plaintiff and the defendants, the plaintiff agreed to sell and deliver to the defendants, and the defendants agreed to buy, accept, and pay the plaintiff for thirty-three pockets of hops at the price of 16l. 16s. a cwt., to be paid on the 3rd November, 1860. Averment: that the plaintiff did all things necessary, &c., to entitle him to have the defendants buy, accept, and pay for the said hops as agreed. Breach: that the defendants would not buy, accept, or pay for the same. The second count was for money payable by the defendants to the plaintiff for goods bargained and sold, &c.

[175] Pleas (inter alia): to first count. That the defendants did not agree as in that count alleged.

To the residue of the declaration—Never indebted. Issues thereon.

The cause was tried before the Lord Chief Baron at the London Sittings after Michaelmas Term, 1860, when a verdict was found for the plaintiff, with 420l. damages, leave being reserved to the defendants to enter a verdict for them, or a nonsuit.

The plaintiff is a hop grower in Kent. The defendants are hop merchants carrying on business in the borough of Southwark.

Previous to the 19th October, 1860, the plaintiff had sent samples of the hops, forming the subject of this action, to Mr. J. T. and W. Noakes, who carry on business as hop factors in the said borough of Southwark, with instructions to sell the same for the plaintiff, but not under 18l. per cwt. On Friday (October 19) the defendant J. C. Evans, called on Messrs. Noakes and asked to see samples of the plaintiff's hops, which were shewn to him. Upon asking the price, Mr. J. T. Noakes replied

(a) Martin, B., and Channell, B., were not present.

that he was instructed by the plaintiff not to sell under 18l. per cwt. The defendant, J. C. Evans, said that was too high a price for them, and he should not give so high a price for them. He then left Messrs. Noakes' premises. On the afternoon of the same day, Friday (October 19), the plaintiff happened to be in the borough and met the defendant, J. C. Evans; a conversation took place between them with reference to the plaintiff's hops. Mr. J. C. Evans offered the plaintiff 16l. 16s. per cwt., which the plaintiff refused, but ultimately both parties went to Messrs. Noakes' counting-house and saw Mr. J. T. Noakes on the subject. Some further conversation took place as to the purchase of the hops, which ended in Mr. J. C. [176] Evans refusing to give any more than 16l. 16s. per cwt. The plaintiff (in the presence and hearing of Mr. Evans) asked Mr. J. T. Noakes whether he would recommend him (the plaintiff) to accept Mr. Evans' offer. Mr. Noakes advised him to do so, and the plaintiff agreed to sell the hops at that price. Mr. Noakes then wrote out a sale note in duplicate.

By the custom of the hop trade hops are payable on the Saturday week following the day of the sale. This transaction took place on Friday the 19th day of October, and the money would consequently have become payable in due course on Saturday, October the 27th.

The said Mr. Noakes therefore drew out the following memorandum, and dated it the 19th day of October. Whereupon Mr. Evans requested him to alter the date to the 20th, in order that he might have another week's time for payment. The plaintiff and Mr. Noakes consented to this, and the alteration was accordingly made by Mr. Noakes, who then gave the said memorandum so altered to Mr. J. C. Evans who took the same away with him, and he has never yet returned it. The said memorandum was torn from a book which contained a counterfoil, and which was filled up in the following form and retained by Messrs. Noakes.

The following is a copy of the memorandum first referred to :—

“Messrs. Evans.

“Bought of J. T. and W. Noakes.

“Bags, Pocks. T. Durrell,
33. Ryarsh & Addington, } £16, 16s.

20th

Octr. ~~19th~~, 1860.”

[177] The following is a copy of the counterfoil above referred to :—

“Sold to Messrs. Evans.

“Bags, Pocks. T. Durrell,
33. Ryarsh & Addington, } £16, 16s.

20th

Octr. ~~19th~~, 1860.”

No note or memorandum (except as aforesaid) was signed or given by the defendants or any person on their behalf; nor was there any writing relating to the said contract except as above set out, and the invoice after mentioned.

A sample of each of the pockets of hops was sent by Messrs. Noakes to the defendants the same evening, and the defendants have ever since retained them and still keep them. In the usual course of business, after the purchase is completed by the factor, an appointment is made between the vendor and the purchaser for the hops to be weighed, for which purpose they are sent by the vendor to his factor's warehouse. In this instance the appointment was made for the following Friday, October the 23rd, and on that morning the hops were sent to Messrs. Noakes' warehouse. The warehouseman of the factor generally weighs on behalf of the vendor, and the purchaser either comes himself or sends some one to see them weighed on his behalf. In this case the plaintiff came up to see his hops weighed, and the defendants sent one of their men (James Wenn) to see them weighed for them. Each weigher has a book in which he records the weight of each pocket, and also the excise weight with the number or figure with which each pocket is marked or distinguished. On this occasion the weighing proceeded in the usual course until five pockets had been weighed, when a dispute took place between the weighers, and ultimately the defen-

dants' weigher refused to weigh any [178] more. The defendant, Robert Percival Evans, came into the warehouse at this time and went to the scale and saw weighed the pocket that was therein. Having done so he cut it open and took out a portion of the hops and said they were damp. The plaintiff denied that they were damp, but the defendant persisted in his statement and finally said he should not take the hops at all, and left the warehouse with his man.

After the defendant and his weigher left the warehouse, and after such refusal, the plaintiff's weigher completed the weighing, which amounted in the whole to 50 cwt. 0 qrs. 13 lbs. On the 9th day of November, 1860, Messrs. Noakes sent to the defendants an invoice of which the following is a copy:—

				"Borough.	
"1860.	"Messrs. Evans & Co.	To J. T. & W. Noakes.			
		cwt.		£	s. d.
Octr. 20th.	Durrell.	Bt. 33 Po.	50 0 13 @ 16 16/	841	19 0"

It was stated by Mr. J. Noakes, at the trial, that a day or two after the difference relative to the weighing he had an interview with the defendant, Robert Mendham Evans, at which he requested the said Robert Mendham Evans to send and have the weighing completed, when the defendant Robert Mendham Evans, promised the said Mr. J. Noakes that he would do so and accept the hops and complete the purchase; but the defendants subsequently refused to do so, and thereupon the plaintiff instructed his attorneys to write and send a letter (of which the following is a copy) to the defendants, which was done.

"37 King William Street,
"London Bridge, 9th November, 1860.

"Sirs,—We have been consulted by Mr. Durrell of Banstead with reference to your refusal to complete your contract for [179] the purchase of 33 pockets of hops sold to you by Messrs. Noakes on behalf of our client on the 20th October last.

"We beg to enclose you the delivery order, and are instructed to inform you that the goods remain in Messrs. Noakes' warehouse awaiting your order or disposal, and at your risk and costs; and further, that unless the sum of 841l. 19s., being the amount of the invoice already sent you for these hops, be paid to us by 11 o'clock on Monday morning, we shall take immediate proceedings against you for its recovery.

"In the event of your deciding to resist this claim we have to request a reference to your solicitors.—We are, Sirs, yours obediently,

"INGLE & GOODY.

"Messrs. R. M. Evans & Co.,

"George Yard, Borough."

The invoice above referred to has ever since been retained by the defendants.

On the 9th day of November the plaintiff's attorney sent to the defendants in the last mentioned letter a delivery order.

This delivery order the defendants refused to receive, and it was taken back by the clerk who brought it, and on the same day the defendants returned it.

No part of the said hops (except the samples) has ever been delivered to the defendants.

T. Jones (Waddy with him) now argued for the plaintiff.^(a) There was a sufficient note in writing of the bargain, signed by the agent of the parties to be charged, within the meaning of the 17th section of the Statute of [180] Frauds. The defendants adopted the act of Noakes, the factor, so as to make him their agent for the purpose of signing the contract. An authority may be presumed from subsequent acts of assent or acquiescence, and a small matter will be evidence of such assent: Paley on Principal and Agent, p. 171, 3rd ed., *Kennitz v. Surry*.^(a) [Blackburn, J. That case is differently reported in *Espinasse*.^(b) If, as there stated, the jury found for the defendant because the bulk did not correspond with the sample, the question upon the statute never could have arisen.] The question of ratification does not arise,

^(a)¹ Before Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J., and Mellor, J.

^(a)² Cited in Paley on Principal and Agent, 171, note, 3rd ed.

^(b) 5 Esp. 266, nom. *Klinitz v. Surry*.

because all the acts were cotemporaneous. If the party to be charged recognises his signature made on the note by another person, intending that it shall be his assent to the contract, it is binding on him: *Schneider v. Norris* (2 M. & Sel. 286). [Blackburn, J. There the name of the defendant was printed, and he sent the paper with his printed name upon it to the plaintiffs.] Here there was evidence that the defendants intended that the note, with their name upon it, should be a memorandum of the bargain binding on both parties. [Byles, J. The note, with the defendants' name upon it, was delivered immediately after the bargain, the defendants knowing that without a signature by themselves or their agent they would not be bound.] In *Saunderson v. Jackson* (2 Bos. & P. 238) it was held that a subsequent letter written and signed by the vendor, referring to the order, might be connected with a bill of parcels, in which the vendor's name was printed, so as to render it a sufficient note of the bargain within the statute. *Macleay v. Dunn* (4 Bing. 722) is also an authority that a subsequent recogni-[181]-tion of a contract made by an unauthorized agent will render it binding within the statute. [Willes, J. Might not the jury have found that the conduct of the parties amounted to this: "Put that which is our bargain into a note in writing, which will bind us?" If the jury had so found, would it have been a perverse verdict? Mellor, J. Why should the defendants ask to have the date altered if it was not their note?] In *Johnson v. Dodgson* (2 M. & W. 653), the buyer merely wrote his name and the terms of the contract in his own book which he kept, and which he got the seller's agent to sign on their behalf, and that was held a sufficient memorandum within the statute. [Crompton, J. There the defendant wrote his own name. In *Graham v. Musson* (5 Bing. N. C. 603), where the buyer requested the agent of the seller to write a note of the contract in the buyer's book, which the agent did and signed his own name to it, that was held not a sufficient note of the contract to bind the buyer.] *Graham v. Fretwell* (3 Man. & G. 368) is an authority to the same effect; but in those cases the name of the party to be charged did not appear on the contract, and there was no evidence that the agent of the seller had authority to act as agent of the buyer. This case falls within the principle of the decision in *Bird v. Boulter* (4 B. & Adol. 443), where an auctioneer's clerk, as each lot was knocked down, named the purchaser aloud, and on a sign of assent from him made an entry accordingly in a book, and that was held a sufficient memorandum within the statute.

Lush, for the defendants. This is not the case of a sale by a broker who acts as agent of both parties; Messrs. Noakes were the agents of the plaintiff alone. Moreover, Messrs. Noakes were factors, not brokers. The document which they wrote out was merely an invoice debiting the [182] buyers. [Blackburn, J. The document was a cotemporaneous note of the bargain. An invoice was afterwards sent to the defendants.] It was never intended that the counterfoil should be handed to the sellers; all that was done by Messrs. Noakes was done as factors of the sellers. There is no evidence that Messrs. Noakes acted as agents of the defendants. The question is, not whether the defendants accepted the document as a true record of the contract, but whether their name was written by a person authorized to bind them. [Crompton, J. This was a cotemporaneous memorandum which both parties meant to be the contract.] There may be a writing containing the terms of the bargain which is not a note or memorandum within the statute. For instance (as in the case put by Wilde, B., in the Court below), if a person went into a shop and purchased goods above the value of 10l., and said to the shopman, "Make an invoice of the goods," and he did it, and signed the purchaser's name to it, that would not bind him as a memorandum of the contract signed by his agent. In *Graham v. Musson* (5 Bing. N. C. 603), there was every essential of a contract. It is true that the defendant's name did not appear on the note, but there were the names of the plaintiff and the agent; and it is clear that a signature by an agent, on behalf of his principal, will satisfy the statute. The ground of that decision applies to this case, viz. that there was no evidence that the seller's agent had authority to act as agent of the buyer. [Byles, J. There the buyer merely said to the agent, "Write in my book a note of the contract which will bind your principal." What was wanting in that case is supplied in this. There are cross documents, and the defendant takes one knowing that it binds the plaintiff, and also knowing the law, as he must be taken to do, that the signature of himself or his agent is necessary in order to bind him.] If [183] the factor, instead of writing the contract in his own book, had written it in the defendant's book, that would not have made him the agent of the defendants for the

purpose of binding them by his signature. At what point did he become their agent? [Blackburn, J. In *Graham v. Musson*, the judgment of Coltman, J., proceeds on the ground that the name of the buyer did not appear on the note; here the defendant's name was written on the note.] It was not written by themselves, nor was it the signature of an agent authorized to bind them by signing their name; but it was a mere designation at the head of an invoice of the party who bought the goods. *Graham v. Fretwell* (3 Man. & G. 368) is a strong authority in the defendants' favour. There the buyer made an entry of the contract in his book, and the seller's agent, at the request and in the presence of the buyer, signed the entry so made. Here the transaction was nothing more than writing out an invoice and delivering it to the buyer. *Saunderson v. Jackson* (2 Bos. & P. 238) and *Schneider v. Norris* (2 M. & Sel. 286) are very different from the present case. In both those cases the name of the seller was printed on the bill of parcels which was delivered to the buyer at the time of the sale, and it was considered that the seller, by filling up the bill of parcels, adopted the printed name as his signature. In *Saunderson v. Jackson*, Lord Eldon said: "The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as his written name." And in *Schneider v. Norris*, Lord Ellenborough said: "Here there is a signing by the party to be charged by words recognising the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written Norris & Co. with [184] his own hand." In *Johnson v. Dodgson* (2 M. & W. 653), the memorandum was in the defendant's handwriting and contained his name, and he meant to be bound by it as a complete contract. In *Bird v. Boulter* (4 B. & Adol. 443), the signature was by the clerk of an auctioneer, who is the recognised agent of both parties. In *Farebrother v. Simmons* (5 B. & Ald. 333), the auctioneer, by suing on the contract, placed himself in the position of a contracting party, and therefore could not use his signature. [Crompton, J. The signature of an auctioneer or broker is sufficient because they are persons deputed by the parties to make a contract for them; then the question is whether Messrs. Noakes were not requested by the plaintiff and defendants to make a good contract between them.] Auctioneers and brokers make the contract for the principals, who do not come together; and they have an implied authority to make it binding on both parties by signing their names; but here the defendants were present and making the contract on their own behalf, while Messrs. Noakes acted for the plaintiff. If this paper had been intended to be a binding note of the contract, it would not have been handed to the defendants. [Blackburn, J. In *Johnson v. Dobson*, the memorandum of the bargain was in the buyer's book, which he kept.] The asking for an alteration in the date was merely asking for an extension of credit, and would not constitute the factor the agent of the buyer for the purpose of signing his name. It is merely the case of a person going into a shop and purchasing goods, and upon an invoice being handed to him with one month's credit he asks for two, and the invoice is altered accordingly. In that case, the purchaser could not be said to have made the shopman his agent to contract on his behalf.

Jones replied.

[185] CROMPTON, J. This case comes before us on an appeal against a rule to enter a nonsuit; and we have to see whether there was evidence for the jury sufficient to sustain a verdict for the plaintiff. If there was no evidence for the jury, the nonsuit must stand.

I confess that I was, at first, much struck with the observation of my brother Wilde, as reported in the Court below, in which he likened this case to an invoice and a purchaser's asking to have the invoice altered. But, on more mature consideration, I cannot agree with that view. I think there was abundant evidence for the jury that the writing was not intended to be an invoice, and I think there was some evidence from which the jury might have found that Noakes was an agent for the purpose of making a record of a contract binding on both parties.

The facts are these: The plaintiff having sent samples of hops to Messrs. Noakes, his hop factors, with instructions to sell them for him, but not under a certain price, the defendant J. Evans called at Noakes' office and looked at them, but declined to give the price which they asked. Subsequently, on the same day, he saw the plaintiff and offered him a reduced price for his hops, which the plaintiff refused, and ultimately

both parties went together to Noakes' office, and there a dealing for the hops ensued, in the course of which the plaintiff, in the presence and hearing of the defendant, J. Evans, asked Noakes whether he would recommend him (the plaintiff) to accept Evans' offer. Noakes advised him to do so, to which the plaintiff agreed, and there upon Noakes proceeded to make out a contract, in duplicate, the one part being in the nature of a "bought note" and the other part a "sold note." One part was handed to the defendant J. Evans, at all events he saw it, and a jury might say, upon the facts, that he adopted it, for, finding the date of the note to be Friday, the 19th October, and [186] that according to the custom of the hop trade the purchase money for the hops would be payable, on the succeeding Saturday week, the 27th, the defendant J. Evans, in order to have an additional week's time for the payment of the money, requested Noakes to alter the date to the 20th October. This alteration was accordingly made by Noakes in the defendant's presence, and the sold note, so altered, was then delivered by Noakes to J. Evans, who took it away with him. These facts shew that the defendant J. Evans really intended that a binding record of the contract between the defendants and the plaintiff should be made by Noakes; and, if so, Noakes was the agent of both parties for the purpose of making it.

Then comes the question whether Noakes did make a binding contract, and whether this document is right in form. And here, again, what are the facts? Noakes drew out a note of the contract with the names of both buyer and seller upon it, but it contained nothing which could ordinarily be called a signature, for the defendant's name was written at the head of the document; and, if this had been the first case on the subject, I should have doubted whether the placing a name at the top of a document could fairly be called a signature; but that is now past discussion, for the cases have decided that it does not signify where the name is placed, if it is put there by the party sought to be charged or some person deputed by him. It may be at the head, in the middle, at the end, or in any part of the document. In *Schneider v. Norris* the putting the name on the note was the act of the party himself, and it is the same when it is the act of his agent. The present case, however, seems to me to range itself rather within that of *Johnson v. Dodgson*, and the class of cases there cited. Parke, B., there said: "I think this was a sufficient memorandum in writing. The [187] defendant's name was contained in it in his own handwriting, and it was signed by the plaintiffs. The point is in effect decided by the cases of *Saunderson v. Jackson* and *Schneider v. Norris*. There the bills of parcels were held to be a sufficient memorandum in writing, it being proved that they were recognised by being handed over to the other party. That is amply sufficient to shew he meant it to be a memorandum of the contract between the parties." That seems to me identical with this case, assuming the agency to be proved. In that case the party never signed his name, meaning that it should be a signature within the Statute of Frauds, any more than, according to Mr. Lush, the defendants did in this case, but it was held to be his signature, since he intended his name to be there. In *Johnson v. Dodgson* Lord Abinger said: "But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being the note in writing shewing the terms of the contract, and recognised by him." That expressly applies to the present case. If the parties meant the writing to be a memorandum of their contract, it is binding on them. Here is a document on which the name "Messrs. Evans and Co." is written by a factor who was appointed to make a binding contract between the parties, and he makes a memorandum containing the names of the buyer and seller, and the terms of the contract. It is true that the words "Messrs. Evans" were not written by the defendant J. Evans, but he saw the document with "Messrs. Evans" on it, and he requested that an alteration might be made, and thereby recognised it as a record of the contract. Therefore the case is not different in principle from *Johnson v. Dodgson*, for, assuming there was evidence that Noakes was the party intended to make a binding contract on behalf of both buyer and seller, he would have authority to put the defendants' signature.

[188] I do not agree with Mr. Lush that the person signing must put the signature, intending to make a binding contract within the Statute of Frauds. When once it is established that he is a party deputed to make a binding contract, any signature by him is sufficient. If Noakes had formally signed one part of the memorandum with the name of "Evans & Co." and the other with the name of "Durrell," he would have

had authority to do so; and it is sufficient if the party signing is agent to make the signature, although there was no express idea at the time that it should be a signature within the Statute of Frauds.

Graham v. Musson had some weight with me at first, but it is not so like the present case as *Johnson v. Dodgson*. *Graham v. Musson* turned upon the nature of the signature. The seller's agent made in the buyer's book an entry of the contract, in which the seller's name was at the top, and the agent signed his own name at the bottom. He was not the agent of the buyer; and in signing his own name he only bound his principal. If he had signed the buyer's name, at his request, the case might have fallen within the authority of *Bird v. Boulter*. I should have thought that there was some evidence to go to the jury as to what his authority was. *Bird v. Boulter* is in the plaintiff's favour. There it was held that the auctioneer's clerk was impliedly authorized by both parties to make a binding contract for them, merely from the surrounding circumstances, and that the writing by him of the name of the purchaser was a sufficient signature, although the purchaser never intended to give him a distinct authority to make a signature binding under the statute. The cases of an auctioneer and a broker shew the principle. When a person is in such a situation that, by the usage of trade or the necessity of the case, he has an implied authority to make a binding contract, a signature by him is sufficient, [189] and that applies to the case of third persons deputed to make a contract; as, in the well known case of a broker, it may be shewn by parol that the parties intended to make such a contract. It may be, that I should not have been dissatisfied if the jury had taken another view, and found that this document was an invoice; and I am not sure that, if I were on the jury, I should find a verdict for the plaintiff; but the question now is, whether there was any evidence for the jury, and that is the only matter on which we differ from the Court below. I think there was some evidence that Noakes was intended by the buyer and seller to make a record of a binding contract between them. The result is that the judgment of the Court below must be reversed, and the verdict will stand for the plaintiff.

I may add that my brother Willes, who heard a great part of the argument, entertains a strong view the same way. Indeed, I believe he is of opinion not only that there was evidence to go to the jury, but that the verdict ought to be for the plaintiff.

BYLES, J. My brother Crompton has gone so fully into the case that I do not propose considering it at any length, but I cannot help stating how it presents itself to my mind.

I think there was evidence for the jury to sustain the verdict for the plaintiff. It appears by the cases that a signature, though not at the foot but at the head of the document, is abundantly sufficient. Then, was Noakes an agent to bind both parties? It is true that he was the factor of the plaintiff, but the defendant knew that. The document was written by Noakes in the plaintiff's presence, so that without doubt he was bound. Then what does the defendant do? He sees a duplicate written by the hand of the agent, and he knows what was written: he suggests to the agent to make an alteration, and he receives from him one [190] part so altered, knowing that there is a counterpart of the contract binding on the plaintiff; and the case finds that what was delivered to him was a note in duplicate. Then the only question is, whether Noakes was authorized to write the defendants' name in the way he did. There is no doubt he was, for the defendant, J. Evans, recognised and adopted it. The document not having been regularly signed at the first, it was a question for the jury whether the parties meant to be bound by it as it stood; and I say no more than that there was evidence for the jury that they did.

BLACKBURN, J. I am also of opinion that there was evidence for the jury that the memorandum was signed, on behalf of the defendants, in such a way as to bind them. I do not read the case as if Noakes were a broker, who from the nature of his employment was authorized to register contracts between parties, and I do not understand from the case that the counterfoil was a bought note, so that if there had been a variance in the terms of that and the sold note, there would have been no contract between the parties: *Thornton v. Kempster* (5 Taunt. 786). I cannot think that the note handed to the defendants, and the copy which Noakes kept in his book, were ever intended to be bought and sold notes. But, taking the case as it stands, I think there was evidence from which a jury might infer that this was a memorandum signed by the defendants, so as to bind them.

The statute requires a note or memorandum signed by the parties to be charged, or their agents thereunto authorized. It is not necessary that the parties should sign, but it is essential that there should be a signature either by them or their agents thereunto authorized. Then the first question is, whether Noakes was authorized or requested by the defendants to write their name for the purpose of signing the note. If [191] the matter were *res integra*, I should doubt whether a name printed or written at the head of a bill of parcels was such a signature as the statute contemplated; but it is now too late to discuss that question. If the name of the party to be charged is printed or written on a document, intended to be a memorandum of the contract, either by himself or his authorized agent, according to *Schneider v. Norris* and *Saunderson v. Jackson* it is his signature, whether it is at the beginning, or middle, or foot of the document. In *Johnson v. Dodgson* the memorandum was retained by the defendant in his own possession, but as it contained his name, and was intended to be a note of the contract, it was held binding on him, although the fact of his keeping it was a clear indication that he never intended it as voucher of his being bound, but only to bind the other party. That is important to observe, because here the note handed to the buyers was never intended to be a voucher that the sellers were bound, but to be kept by the buyers as a memorandum of a contract binding on them.

The judgments in this case in the Court below proceeded mainly on the observation of Wilde, B., in the course of the argument, that this document was merely an invoice or bill of parcels and not a contract binding on the defendants. So far I agree, that if an invoice or bill of parcels is made out and delivered by the vendor to the vendee, which is not intended to be a memorandum of the contract but merely the account of the vendor, that cannot be considered as a contract binding the vendee, for the vendor would have no authority to make it. But on the other point I differ. I cannot look upon this document as an invoice or bill of parcels in the sense that it was only intended to be the vendor's account of the contract. If the facts are looked at, it is impossible to deny that there is [192] evidence from which a jury might draw the inference that it was written by the defendants' authority as a record of a contract by which both parties meant to be bound (his lordship read the statement in the case as to the drawing up and alteration of the memorandum). That is evidence for the jury that Noakes was requested to alter this writing, not merely as the seller's account, but as a record of the contract binding on both parties. The document so altered was given to the defendants and kept by them. Therefore, the name of the defendants being written by an authorized agent on a document intended by them to be a memorandum of the contract, the case is identical with that of *Johnson v. Dodgson*, except that there the buyer wrote the terms of the contract and his name with his own hand; here Noakes wrote the buyers' name. That circumstance however affords no solid distinction except as to the weight of evidence; and I do not see why we should be called upon to overrule that case which is productive of no evil. There is the decision of two eminent Judges that, where a document contains the name of the party to be charged, and he intended it to be a binding memorandum of the contract, that is sufficient. *Graham v. Musson* differs in this respect, that there the name of Musson, the buyer, did not appear on the document. At the request of Musson, Dyson, the seller's agent, signed it with his own name in order to bind the seller; and unless the name "Dyson" be read as "Musson," there was no signature by the buyer. But Dyson was the agent of North and Co. the sellers; and it is the same as if he had written "per proc. North and Co., J. Dyson." On that ground the case is consistent with *Johnson v. Dodgson*.

KEATING, J. I am also of opinion that the judgment of [193] the Court below cannot be upheld, because there was evidence for the jury that the memorandum was written by the authority of the defendants. That being so, it is the same as if it was written by the defendants themselves; and if it had been written by them, there is abundant authority, from *Lemayne v. Stanley* (3 Lev. 1) downwards, that a name appearing where this name does is sufficient to satisfy the requisites of the statute.

MELLOR, J. I am also of opinion that the judgment of the Court below ought to be reversed. I confess, that when I first read the case I thought that there was not a sufficient memorandum of the contract, but I came to that conclusion without considering whether there was evidence for the jury that, when the memorandum was signed by Noakes, the circumstances of the case clothed him with an authority to

make a contract binding on both parties. Looking at the facts I think there was evidence of such an authority. The circumstance of the plaintiff's appeal to Noakes shews that he was in the confidence of both parties; and at their request he drew up the memorandum, not as an invoice but a binding record of what they had agreed upon. *Graham v. Musson* does not conflict with *Johnson v. Dodgson*; for in the former case there was no evidence of that on which we proceed in this decision.

Judgment reversed.

[194] IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

CUMBERLAND v. COPELAND. May 20, 1862.—Held, in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that an assignment of copyright made after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, need not be attested.

[S. C. 31 L. J. Ex. 19, 353; 9 Jur. (N. S.) 253; 10 W. R. 581; 7 L. T. 334.]

This was an appeal from the decision of the Court of Exchequer in discharging a rule to increase the damages, if the Court should be of opinion that an assignment of copyright in a dramatic piece, made after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, and attested by one witness only, was valid.

Lush (C. Pollock with him) argued for the plaintiff. This assignment was made in the year 1835, after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, which repealed the former Acts. The 8 Anne, c. 19, required that an assignment of copyright should be in writing, but neither that Act nor the 54 Geo. 3, c. 156, in terms required that the assignment should be attested by two witnesses. The 8 Anne, c. 19, s. 1, conferred on the author of any book a copyright for fourteen years, and imposed a penalty on any person who should within that time print and publish it "without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses." The 41 Geo. 3, c. 107, which extended the copyright to another term of fourteen years if the author were then living, contained a similar prohibition against printing and publishing any book without the consent of the proprietor. Both the 8 Anne, c. 19, and 41 Geo. 3, c. 107, required a consent to be in writing and [195] attested by two witnesses; but the 54 Geo. 3, c. 156, though it requires the consent to be in writing, omits the words "signed in the presence of two or more credible witnesses." In *Power v. Walker* (3 M. & Sel. 7) the assignment was not in writing, and Lord Ellenborough said, "that the statute (8 Anne, c. 19), having required that the consent of the proprietor, in order to authorize the printing or reprinting of any book by any other person, shall be in writing, the conclusion from it seemed almost irresistible that the assignment must also be in writing; for if the licence which is the lesser thing, must be in writing, a fortiori the assignment, which is the greater thing, must be also." That case was decided on the 13th June, 1814, and on the 29th July, in the same year, the 54 Geo. 3, c. 156, passed, so that it would seem that the legislature studiously omitted the requisition, contained in the two former Acts, of an attestation by two witnesses. The 54 Geo. 3, c. 156, has by implication repealed the 8 Anne, c. 19. The 4th section of the 54 Geo. 3, c. 156, recites the two former Acts and extends the copyright to twenty-eight years and for the life of the author. It then repeats, in the same language as in the former Act, the prohibition against printing and publishing any book without the consent of the proprietor in writing, but omits all mention of attestation. That is inconsistent with the statute of Anne, and therefore impliedly repeals it. An author, having acquired a new right under the 54 Geo. 3, c. 156, cannot render an assignee liable to the penalty because his written assignment is not attested. The 2nd section of the 8 Anne, c. 19, is also inconsistent with the 5th section of the 54 Geo. 3, c. 156; for by the former Act a person is not subject to any penalty for printing a book without the consent of the proprietor, unless it is entered in the register book of the Company of Stationers; while by the latter Act the only [196] effect of the omission to register is to subject the publisher of the book to a penalty of 5l. There is no authority against this view. *Davidson v. Bohm* (6 C. B.

456) was decided after the 54 Geo. 3, c. 156, but in that case the date of the assignment does not appear, and this point was not raised. In *Jefferys v. Boosey* (4 H. L. Cas. 815) the point incidentally arose, and a majority of the Judges were of opinion that the 8 Anne, c. 19, impliedly repealed the 54 Geo. 3, c. 156. [Crompton, J. Lord St. Leonards is really the only authority against the plaintiff, as Alderson, B., attached too much weight to *Davidson v. Bohn*.] In *Kyle v. Jeffreys* (3 Macq. 611, 617), Lord Wensleydale said: "I think that the opinion of the six Judges in the case of *Jefferys v. Boosey* was correct; that, since the statute of 54 Geo. 3, there is no occasion to have an assignment in writing of a copyright executed in the presence of two witnesses, and I think that in this case the receipt in writing of the 14th May, 1841, would operate as an effectual assignment."

Murray, for the defendant. The doctrine laid down in *Power v. Walker* (3 M. & Sel. 7) has never been questioned in a Court of error; and for more than forty years has been considered as settled law. It was expressly recognised by Lord Eldon in *Morris v. Kelly* (1 Jac. & W. 481). The same doctrine prevails in the case of patent right. Every patent contains a clause prohibiting any person from using the invention without the consent in writing of the patentee under his hand and seal; and therefore an assignment must be made in the same manner. [Blackburn, J. It may be doubtful whether the Crown has power to alter the common law right of assignment. Crompton, J. Assuming that an assignment is only [197] a perpetual licence, when the legislature, by the 54 Geo. 3, c. 156, s. 4, provides for the case of a licence it also provides for the case of an assignment, and if the reasoning of Lord Ellenborough be carried out, as that Act does not require that a licence should be attested, so neither is it necessary that an assignment should be attested.] The 8 Anne, c. 16, s. 1, should be read as if it contained an express enactment that an assignment shall be in writing attested by two witnesses; and that is not repealed by the 54 Geo. 3, c. 156. In *Jefferys v. Boosey* (4 H. L. Cas. 815), even the Judges who dissented on the main point agreed that the construction put upon the statute of Anne in *Power v. Walker* ought not to be disturbed. The 8th section of the 54 Geo. 3, c. 156, conferred on authors new rights. If provided that if the author of any book not published fourteen years at the time that Act passed, should afterwards die before the expiration of the fourteen years, his personal representative should have the sole right of printing and publishing the book for the further term of fourteen years after the expiration of the first fourteen years. Now, the right to the original term of fourteen years was under the 8 Anne, c. 19, but if that statute was repealed by the 54 Geo. 3, c. 156, the term would cease and the provisions of the 8th section of the latter Act would fail of effect. The 54 Geo. 3, c. 156, was never intended to interfere with the decision in *Power v. Walker*. That bill was introduced into the House of Commons on the 10th May, 1814, and *Power v. Walker* was decided on the 13th June, 1814. The 8 Anne, c. 19, contained, in effect, two distinct provisions, viz., that a consent shall be in writing attested by two witnesses, and that an assignment shall be in writing attested by two witnesses; and though the 54 Geo. 3, c. 156, has dispensed with the necessity for two witnesses in the case of a consent, it does [198] not follow that it has altered the law with respect to an assignment. As observed by Lord St. Leonards in *Jefferys v. Boosey* (4 H. L. Cas. 995), "it would rather seem, after such a tenor of determination, after the law had been so settled, that the legislature, by being silent with regard to the assignment, meant that to remain although it altered the law with respect to the consent." The 54 Geo. 3, c. 156, does not in express terms repeal the 8 Anne, c. 19, and there is no reason why it should be considered as doing so by intendment; for the two Acts may well stand together.

Lush was not called upon to reply.

ERLE, C. J. I am of opinion that the judgment of the Court below ought to be reversed.

The question is, whether an assignment of copyright, after the 54 Geo. 3, c. 156, and before the 5 & 6 Vict. c. 45, attested by one witness only, is valid. The contention is that no such assignment can be valid unless it is attested by two witnesses. The reasoning upon which that is founded is that the 8 Anne, c. 19, which was passed to protect authors, contains stringent provisions against the infringement of copyright, and provides that the consent of an author to the publication of his book shall not be proved except by a writing attested by two witnesses; and therefore the law was clearly established, that the proprietor of a book could not give his consent to its

publication by another person except by a writing attested by two witnesses. The question having arisen in 1814, in *Power v. Walker* (3 M. & Sel. 7), whether a copy-right could be assigned without writing, the Court of King's Bench held that an assignment was in the nature of a perpetual licence, and if a licence, which is a less thing, must be in writing, a fortiori an assignment must also be in [199] writing. Whether or no an assignment must be attested by two witnesses was not the question before the Court. In *Davidson v. Bohn* (6 C. B. 456) the question was considered as if the assignment had been made before the 54 Geo. 3, c. 156, and the same reasoning was adopted, viz., that an assignment must be in writing because a licence must be in writing; an assignment must be attested by two witnesses because a licence must be attested by two witnesses. However, the 54 Geo. 3, c. 156, passed, which enacted that after that statute the consent must be in writing; so that a consent in writing would be a defence to a suit for the infringement of copyright. An enactment that a consent in writing shall be valid is, by implication, an enactment that a consent in writing shall be valid without being attested by two witnesses. It is clear to my mind that, after the 54 Geo. 3, c. 156 passed, the plaintiff could not, without infringing the express words of the statute, say that a consent in writing did not bind him unless attested by two witnesses; and if a consent in writing is valid without being attested by two witnesses, it seems to me, as a matter of reasoning, to follow that an assignment is valid without being attested by two witnesses; for if, as was argued, prior to the 54 Geo. 3, c. 156, because a consent in writing was not valid unless attested by two witnesses so neither was an assignment, as a consent in writing is now valid without being attested by two witnesses so also is an assignment.

The case of *Davidson v. Bohn* seems to me beside the question, which is, what is the effect of the 54 Geo. 3, c. 156; and in *Jefferys v. Boosey* there were six Judges, including Chief Justice Jervis and my brother Crompton on one side, and Baron Alderson and Lord St. Leonards on the other side. Baron Alderson, however, was by implication in favour of the view we now take, because [200] he considered that *Davidson v. Bohn* was decisive of the question, without adverting to the fact that it did not proceed upon the construction of the 54 Geo. 3, c. 156. In truth, that case does not touch this point, since the 54 Geo. 3, c. 156, destroyed the force of the reasoning on which the judgment of Lord Ellenborough in *Power v. Walker* was founded.

In *Jefferys v. Boosey*, Lord Wensleydale said that, after much consideration, he thought that the 54 Geo. 3, c. 156, had impliedly repealed the 8 Anne, c. 19; and having had time to mature his judgment, in the interval between *Jefferys v. Boosey* and *Kyle v. Jeffreys* (3 Macq. 61), in the latter case he states his present opinion, that since the 54 Geo. 3, c. 156, an assignment in writing of a copyright need not be attested by two witnesses. Lord St. Leonards in *Jefferys v. Boosey* expressed a contrary opinion. He seems to have considered that by the construction put upon the 8 Anne, c. 19, a consent and an assignment have been impliedly declared to be void unless in writing attested by two witnesses, and that though the 54 Geo. 3, c. 156, repealed the provision as to the consent, it did not repeal it as to the assignment. That is an extended construction of a statute which, according to our opinion, is repealed; and with great deference to Lord St. Leonards, I cannot help thinking that the statutes afford strong ground for that opinion.

It seems to me that where there is a conflict of opinion the result of the legislation is worthy of the attention of the Court; and if we put the construction contended for on these Acts we should enable the vendor to keep the price and defeat the sale, because he has not complied with a technical formality. The assignment must be in writing, but it seems to me that the legislature has purposely omitted, in the 54 Geo. 3, c. 156, that it shall be attested by two witnesses. In the case of wills it may well [201] be that greater form and ceremony is required in order to avoid all doubt as to the intention of deceased persons, but that cannot apply to ordinary contracts between living persons. For these reasons I am of opinion that the judgment of the Court below must be reversed.

CROMPTON, J. I am of the same opinion. I will not repeat the reasons which have been so fully stated by the Lord Chief Justice, and in which I entirely concur; but will only make an observation on one of the ways in which the case was put by Mr. Murray, viz., that the 8 Anne, c. 19, s. 1, must be read as if it contained two distinct clauses, the one relating to a consent, the other to an assignment. But that

is not the meaning of the statute. Supposing the legislature, when they treated of a consent or licence, in effect included an assignment as a kind of perpetual licence, which is the groundwork of Lord St. Leonards' reasoning, I cannot think his reasoning satisfactory. He says that, although the legislature has dispensed with the necessity of two witnesses to a consent, it does not follow that two witnesses are no longer necessary to an assignment. Lord Ellenborough merely said that a licence included an assignment, (not as if there were two separate clauses, the one relating to a consent, the other to an assignment); therefore, when the clause as to the consent was repealed, it would follow that, as that clause governed the assignment, the necessity for two witnesses in that case also no longer existed.

WILLES, J., BLACKBURN, J., KEATING, J., and MELLOR, J., concurred.

Judgment reversed, and rule absolute to increase the damages.

[202] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

WAKE, Executor of T. Wilkinson v. T. W. HARROP AND J. C. HARROP. May 17, 1862.—To a declaration on a charter-party, alleging as a breach a refusal by the defendants to load a cargo, the defendants pleaded as an equitable defence that they entered into the charter-party solely as agents for A. D. and Co., and that when the defendants signed the charter-party it was agreed and understood between the plaintiff and the defendants that the defendants were only to sign the charter as such agents, so as to bind A. D. and Co., and were not to make themselves liable as principals for the performance of the charter: that they signed as follows:—"For A. D. and Co., of Messina, H. and Co., agents,"—the defendants and the plaintiff bona fide believing at the time the charter was made, that the defendants having so signed would not be liable to be sued on the charter, notwithstanding the charter in the body thereof professed to be made between the plaintiff as owner of the one part and the defendants as freighters on the other: that the defendants had power to bind A. D. and Co., and that the plaintiff was inequitably taking advantage of the mistake in drawing the charter: Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plea shewed a good equitable answer to the action. And per Willes, J.: Semble, that the plea was a good answer at law.

[S. C. 31 L. J. Ex. 451; 8 Jur. (N. S.) 845; 10 W. R. 626; 7 L. T. 96. Applied: *Guardhouse v. Blackburn*, 1866, L. R. 1 P. & D. 115; *Nicoll v. Bell*, 1875, 32 L. T. 816; *Cleaver v. Kirkman*, 1875, 33 L. T. 674. Discussed, *Druiff v. Parker*, 1868, L. R. 5 Eq. 137. Followed, *Cowie v. Witt*, 1874, 23 W. R. 76.]

This was a proceeding in error on the judgment of the Court of Exchequer for the defendants on demurrer to a plea on equitable grounds. The pleadings fully appear in the report of the case in the Court below. (6 H. & N. 768.)

Manisty (with whom was Lewers) argued for the plaintiff. (a) First, it is not competent to the defendants to give parol evidence to discharge themselves from an obligation which they have contracted by a written instrument. This does not differ from the ordinary case of an agent who signs as principal and then seeks to exonerate himself by evidence that he was an agent. But parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to shew, if allowed, that he mentioned his principal at the time of [203] entering into it: *Smith's Lead. Cas.*, vol. 2, p. 331, 5th ed.; *Thomson v. Davenport* (9 B. & C. 78). Secondly, the question as to the defendants' liability is one of construction, and parol evidence is not admissible for the purpose of putting a construction on the agreement. The intention of the parties must be collected from the instrument itself, which is the sole evidence of the contract, and it is immaterial what took place at the time

(a) Before Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J., and Mellor, J.

the agreement was signed: *Fawkes v. Lamb* (31 L. J. Q. B. 98). The result of the authorities is thus stated in Smith's Lead. Cas., vol. 2, p. 326, 5th ed.:—"In all these cases the question whether the person actually signing the contract is to be deemed to be contracting personally, or as agent only, depends upon the intention of the parties as discoverable from the contract itself; and it may be laid down as a general rule, that where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal." In *Hollier v. Eyre* (9 Cl. & F. 1, 45), Lord Cottenham laid down that "the question whether the plaintiff, as between himself and the grantees, was a principal in the grant of the annuity, or only a surety for payment of it by another, must be ascertained by the terms of the instruments themselves, and that no extraneous evidence is admissible for that purpose." It is not denied that an equity may arise, *dehors* the instrument, from the relation of principal and surety *inter se*, if known to the creditor. Upon that principle *Greenough v. McClelland* (2 El. & El. 424) proceeded. [Crompton, J. In *Davies v. Stainbank* (6 De Gex, M. & G. 679), Lord Justice Turner states that a Court of equity considers it a fraud in [204] a creditor to proceed at law against a surety after he has agreed with principal debtor to enlarge the time for payment of the debt. In *Pooley v. Harradine* (7 E. & B. 431) the plaintiff received the promissory note upon an express agreement that the defendant should be liable as surety only, and the plaintiff, without the knowledge or consent of the defendant, gave time to the principal debtor; so that an equity arose, *dehors* the instrument, from the relation of principal and surety and the knowledge by the creditor of the existence of that relation. But in this case there is nothing to create such an equity, for the defendants are described in the charter-party as the contracting parties. Thirdly, it will be contended that the plea discloses a mistake in drawing up the charter-party for which a Court of equity would afford relief. But it is too late to reform the contract, for the defendants have acted under it and committed a breach of it. [Willes, J. I do not see the distinction in principle between a mistake as to the legal effect of the words used, and a mistake in the words themselves. If a stranger, in drawing up a contract, either inserted or omitted terms, contrary to the intention of the parties, or used words capable of a meaning different from that which the parties intended, equity would relieve. So if an attorney innocently misled the parties as to the legal effect of a document, and they were induced to sign it under a misapprehension of its meaning, would not a Court of equity give relief?] In *Lewis v. Jones*,^(b) Bayley, J., said that every man is supposed to know the legal effect of an instrument which he signs, and therefore a misrepresentation as to its meaning will not avoid it. This is a mistake, not in matter [205] of fact, but in law, and a Court of equity will not set aside a contract, because there is a mistake in law, where there is no fraud: *Marshall v. Collett* (1 Y. & Col. Exch. 232, 238). *The Midland Great Western Railway of Ireland v. Johnson* (6 H. L. Cas. 798) affirmed these two propositions, that a mistake in matter of law affords no ground for relief in equity; and that a mistake as to the construction of a contract is a mistake in matter of law. *Pym v. Campbell* (6 E. & B. 370) only decided that parol evidence was admissible to shew that a memorandum of the terms of a sale, signed by the parties, was not to be an agreement unless approved of by a third person. There it was not sought to alter the writing itself, but merely to shew that it was not an agreement. [Byles, J., referred to *Wallis v. Littell* (11 C. B. N. S. 369).] If the defendants are not liable on this charter-party, there is no contract. The plaintiffs could not sue Davidson and Co., for where an agent enters into a written contract disclosing the name of his principal, and notwithstanding he signs as agent, by the terms of the instrument makes himself personally responsible as the contracting party, the principal is not liable. [Willes, J. In *Humble v. Hunter* (12 Q. B. 310), where a charter-party was executed, not by the plaintiff, but by a third person who in the contract described himself as "owner" of the ship, it was held that evidence was not admissible to shew that such person contracted merely as the plaintiff's agent.] In that case the terms

(b) 4 B. & C. 506, 512. Willes, J., stated that he had the best authority for saying that the note at the end of that case, which has been attributed to Holroyd, J. (see *Kearsley v. Cole*, 16 M. & W. 136), was written by Sir C. Cresswell.

of the charter-party do not appear; here the defendants have personally contracted that the ship shall be loaded. [Crompton, J. Whether Davidson and Co. are liable or not, how can that affect the defendants' right to be relieved from a contract by which neither party intended they should be bound?] If the plea merely discloses equitable ground for reforming the contract, a Court of law cannot give relief: *Perez v. [206] Oleaga* (11 Exch. 506); *Wodehouse v. Farebrother* (5 E. & B. 277); *Teede v. Johnson* (11 Exch. 840). The doctrine laid down in Story's Equity Jurisprudence, ss. 115, 152, 155, has reference to mistake of fact, that is, mistake in the instrument itself. [Willes, J., referred to *Vorley v. Barrett* (1 C. B. N. S. 225).] That was the case of a mistake of fact. A person could not be heard in a Court of equity to say: "True I have become a party to an instrument by which I personally contracted, but I did not intend to make myself responsible."

Mellish (with whom was Leofric Temple) appeared for the defendants, but was not called upon to argue.

CROMPTON, J. I am of opinion that the judgment of the Court below ought to be affirmed. It seems to me that the plea raises a good equitable defence. The reasons for so holding are sufficiently expressed in the opinions of the learned Barons in the Court below, and I think the plea good on the ground stated by them. This is not a case in which a contracting party says that he had no intention to be personally bound, but a case in which there was an express agreement between the parties that the defendants should not be liable as principal, and that when they signed the agreement both parties thought that they were making the real principal and not the defendants liable. Therefore the plea discloses an equity similar to that in *Davies v. Stainback* (6 De Gex, M. & G. 679), for it is in equity a fraud to sue the defendants when it was agreed that they should not be personally bound. Moreover this is not the case of a party seeking to put a different construction upon an agreement than that which its language imports, and saying "that is not the [207] agreement I entered into;" but merely "I agree to sign in this way as the best way of making my principal liable, and upon the express understanding that I was not to be personally responsible." Under these circumstances it is inequitable to sue him. My brother Willes, in the course of the argument, put the case of an attorney who, without fraud, misrepresented the effect of an agreement whereby the parties were induced to sign it; or suppose that, before this agreement was signed, there had been a written correspondence to the effect set out in the plea, and upon the faith of it the defendants had signed the agreement, the instrument itself would not prevail, but there would be relief in equity. It is said that there is no case in which equity has interfered when the parties have misunderstood and acted upon a misapprehension of their rights under an agreement, and it would be strange if there was; but on the other hand no case goes the length of saying that the doctrine laid down by Mr. Justice Story in his work on Equitable Jurisprudence (cap. 5, tit. Mistake, ss. 115, 152, 155) is not correct, and that equity will not interfere where, by mutual mistake, a document has been signed which operates in law directly contrary to the express agreement and intention of both parties.

It is argued that the defendants are not entitled to relief by equitable plea because Davidson and Co., their principals, are not liable under the agreement, and therefore the only relief which the plaintiff can obtain is by applying to a Court of equity to reform the agreement. But I think that the right answer to that argument has been given by the Court below; we are not bound to find out who is liable, it is enough that the intention was that the defendants should not be personally liable. I do not give any opinion upon the point whether the principal can be sued where the agent has made himself personally liable. It may be that some [208] nice questions may arise on that point; but here the plea avers that the defendants by signing the charter did make Davidson and Co. liable. But, even if they were not liable, that is no reason for suing the defendants in violation of the express agreement between the parties that they should not be personally responsible.

Then it was said that a Court of equity would not grant an unqualified restraint against suing the defendants. I do not agree with that, as it would be inequitable that the plaintiff should sue the persons whom it was never intended should be liable. Neither do I think that the defendants' remedy is by reforming the contract, for the very ground of defence is that there was no contract between the parties. If, indeed, the plaintiff could call on the defendants to make a fresh contract there might be some difficulty. But that is answered in two ways; first, there is no reason to suppose that

Davidson and Co. are not liable, and on these pleadings they must be taken to be; secondly, the defendants could not now make an agreement to bind their principals, because their office as agent has been performed. Therefore the argument for the plaintiff not only fails in point of law but of fact, because, if Davidson and Co. are not liable under the agreement, they cannot now be made liable, and if they are liable the plaintiff cannot break his agreement and sue the defendants.

WILLES, J. I wish to add that I offer no opinion conflicting with that entertained by my brother Bramwell in the Court below, as to this alleged fraud being a fraud with which a Court of law is capable of dealing without the exercise of the power conferred by the 83rd section of the Common Law Procedure Act, 1854. Where there is a written contract, and one party attempts to take advantage of a mistake in it, I am disposed to think that might be dealt with by a Court of [209] law. For instance, suppose a vessel was loaded with a box of glass beads marked 99, and also with a box of diamonds marked 100, belonging to the same person, and he sold the beads, but by mistake they were described in the written contract as the contents of the box marked 100, so that it would seem that the diamonds were sold. When the vessel arrived and the mistake was discovered could any lawyer say that the purchaser of the beads could enforce the contract against the seller for the diamonds, because they were described on paper as the subject-matter of the sale? That would be a case of error on both sides, and it would be a fraud to attempt to enforce the contract in a sense in which neither party understood it or intended. Therefore, as at present advised, I do not dissent from the opinion of my brother Bramwell, that a Court of common law is capable of dealing with a fraud of this description. I agree, however, with my brother Crompton, that at all events the plea affords a good equitable defence.

BYLES, B. I should not have added a word if my brother Willes had not intimated an opinion that this plea was a good defence at law. I feel bound to say that I think the plea affords no defence at law. Parol evidence may be given to charge an unauthorized agent as principal, but parol evidence cannot be admitted to discharge an agent who signs an instrument so as to make himself personally liable. Therefore the defendants must rely upon their equitable plea, as shewing what was the intention of the parties at the time the agreement was entered into. Here there has been a mutual mistake, in one sense a mistake in law, but in another it is not, for there is no misconception of legal rights; but the mistake is in the effect of the instrument, by including in it, as a contracting party, a person who was never intended to be included. For the reasons already [210] given I think that is ground for relief by equitable plea. It is in the nature of fraud on the part of the plaintiff; and it would be monstrous to suppose that the defendants could not obtain relief.

KEATING, J. I am of opinion that the judgment of the Court below ought to be affirmed, on the ground that the plea discloses a good equitable defence.

MELLOR, J. I concur in opinion with my brother Crompton, and will only add that I am inclined to think that this is not a good plea at law; though I should have some hesitation in expressing a formal judgment to that effect after the opinion of my brothers Willes and Bramwell.

Judgment affirmed.

MEMORANDUM.

In this vacation Michael O'Brien, of Lincoln's Inn, Esquire, and Frederic Lowten Spinks, of the Inner Temple, Esquire, were respectively called to the degree of the coif, and gave rings, with the motto "*Aliud nobis est agendum.*"

[211] EXCHEQUER REPORTS. TRINITY TERM, 25 VICT.

BOTTOMLEY v. FISHER. May 27, 1862.—The defendant, the secretary of a benefit building society, signed a promissory note in the following form:—"Midland Counties Building Society, No. 3. Birmingham, 1st Sept. 1856. One month after demand, we jointly and severally promise to pay J. B. the sum of one hundred and twenty pounds, with interest thereon after the rate of six pounds per cent. per annum (payable half yearly), for value received.—W. H., S. B., Directors. W. F. Secretary: Held, that the defendant was personally liable on the note.

[S. C. 31 L. J. Ex. 417; 8 Jur. (N. S.) 895; 10 W. R. 669; 6 L. T. 688.]

Declaration on a promissory note, dated the 1st of September, 1856, and made by the defendant for payment of 120l., with interest at 6l. per cent., one month after demand.

Plea. That the defendant did not make the note.

At the trial, before Cockburn C. J., at the last Warwick Spring Assizes, it appeared that the promissory note was in the following form:—

“Midland Counties Building Society, No. 3.

“Birmingham, 1st Sept., 1856.

“One month after demand, we jointly and severally promise to pay Mr. John Bottomley the sum of one hundred and twenty pounds, with interest thereon after the rate of six pounds per cent. per annum (payable half yearly), for value received.

“W. R. HEATH,
“S. B. SMITH, } Directors.
“W. D. FISHER, Secretary.”

It was proved that, at the time the note was made, W. R. Heath and S. B. Smith were directors of a benefit building Society, called “The Midland Counties Building Society, No. 3,” of which the defendant was secretary. The plaintiff had been a member of another Society, called “The Midland Counties Building Society, No. 1,” and on the dissolution of that Society was entitled to receive 120l. [212] as the value of his share. The plaintiff agreed that this sum should be passed from the credit of Society No. 1 to that of Society No. 3, and he received as a security the promissory note on which this action was brought. The Society No. 3 was duly enrolled under the 10 Geo. 4, c. 56, and the 6 & 7 Wm. 4, c. 32. The following was amongst the rules of the Society:—

“Rule 5. The trustees shall pay all sums of money ordered by the committee to be paid on behalf of this Society by cheques on the appointed bankers, and these cheques shall be signed by two of the trustees, and countersigned by the secretary.

“All deeds, writings and securities to and from this Society shall be made and taken in the names of the trustees for the time being, and all the property, whether real or personal, belonging to this Society shall be vested in them.”

“The trustees shall (with the consent of the committee) be empowered to borrow or take up at interest any money from the bankers of this society, or from any member or other person, to secure which the trustees may give their own personal or other security, and they shall be indemnified by the members,” &c.

It was submitted, on behalf of the defendant, that he was not liable on the note, inasmuch as he had only signed it in his capacity of secretary. The learned Judge directed a verdict for the plaintiff for the amount of the note and interest, reserving leave to the defendant to move to enter the verdict for him.

Field, in last Easter Term, obtained a rule nisi accordingly, on the ground that the defendant was not the maker of the note.

Wills now shewed cause. It is said that the defendant [213] is not personally liable on the note because he has signed it only in his capacity of secretary. But the fact of the word “secretary” being placed after his name does not exempt him from liability. In *Thomas v. Bishop* (2 Stra. 955), a bill of exchange was addressed to the defendant as “cashier” of a Company; and, he having accepted it generally, it was held that he was personally liable, though the order was to place it to the account of the Company. In *Leadbitter v. Farrow* (5 M. & Sel. 345), an agent to a country bank to whom the plaintiff sent a sum of money, in order to procure a bill upon London, drew in his own name for the amount upon the firm in London, the two firms being the same; and it was held that the agent was liable as drawer, although the plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank to which the agent paid over the money. Lord Ellenborough there said: “Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are the words of exclusion? Unless he says plainly ‘I am the mere scribe,’ he becomes liable.” [Channell, B., referred to *Lindus v. Melrose* (3 H. & N. 177).] There the note was in the following form:—“Three months after date we jointly promise to pay Mr. F. Shaw or order six hundred pounds for

value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited." The Court of Exchequer Chamber considered that if the words "for value received in stock" were read as if in a parenthesis, there would then be a promise to pay expressly on account of the Company. The Court also adverted to the absence of the word "severally"; and said, "if, as in one or [214] two of the cases cited on the argument, the expression had been 'jointly and severally,' it would have been difficult to resist the conclusion that the promise was a personal one, for in what other character would the directors promise severally?" Here the word "secretary" is mere matter of description. By the 10 Geo. 4, c. 56, which was extended to benefit building Societies by the 6 & 7 Wm. 4, c. 32, s. 4, those Societies are empowered to make rules which, when entered in a book kept by an officer of the Society and confirmed by the justices at quarter sessions, become binding on the members, officers and contributors of the Society: sect. 8. Then, supposing there was anything in the rules to exempt the defendant from liability, the plaintiff is not a member of the Society, and therefore the rules are not binding on him. But the 5th rule empowers the trustees to borrow money and give their personal security; and it provides that they shall be indemnified by the members. It was no part of the secretary's duty to sign this promissory note, and there is nothing on the face of it to shew that it was made on behalf of the Society. In *Price v. Taylor* (5 H. & N. 540) the promissory note, which was signed by the trustees and secretary of this Society, was in the same form as this note, except that the words "jointly and severally" were there omitted; and it was held that the parties who signed the note were personally liable upon it, and that the right of the holder to sue them was not affected by the 6 & 7 Wm. 4, c. 32, and 10 Geo. 4, c. 56, s. 21. There *Martin, B.*, referred to *Bayley on Bills*, ch. 2, s. 8, where it is said: "Where a bill or note is drawn by an agent, executor, or trustee, he should take care, if he mean to exempt himself from personal responsibility, to use clear and explicit words to shew that intention." In *Healey v. Story* (3 Exch. 3) it was held that the words "jointly and severally" were equivalent to [215] "jointly and personally;" and that the defendants, who signed as directors of a joint stock Company, were personally liable to the plaintiff. That decision was recognised and adopted in *MacLae v. Sunderland* (3 E. & B. 1).

Field, in support of the rule. The defendant is not liable on this promissory note. The money was lent by the plaintiff to the Society No. 3, upon the security of the note, signed by two directors of the Company and countersigned by the secretary, under the 5th rule, which empowers the trustees to borrow money at interest and give their personal security, and provides that they shall be indemnified by the members. In *Thomas v. Bishop* (2 Str. 955) there was nothing to indicate that the defendant accepted the bill in his capacity of cashier, or that he did not intend to be personally bound; and it was only from the direction on the bill that any limitation of his liability could be inferred. There the instrument could have had no effect unless the defendant was personally bound; here the instrument operates against the trustees, under the 5th rule. Again, in *Leadbitter v. Farrow* (5 M. & Sel. 345), the acceptance was general, and without any words excluding a personal liability. Here the defendant has written the word "Secretary" after his name, thereby indicating that he merely countersigned as an officer of the Society. In *Butt v. Morrell* (12 A. & E. 745) the bill was drawn on the directors of a joint stock Company, and accepted by three of them, and above their acceptance one of the defendants, who was a shareholder, signed his name, "Richard Parker, manager." The jury found that Richard Parker, as a manager, was not an acceptor; and it was held that he was not liable, either by his having actually signed his name [216] with those of the directors, or by their having accepted the bill as directors of a Company in which he held shares. *Lindus v. Melrose* (3 H. & N. 177) is an authority in favour of the defendant. There the promissory note was signed by three directors of a joint stock Company, and was countersigned by the secretary of the Company, and it was held that the directors were not personally liable. In *Price v. Taylor* (5 H. & N. 540) it did not appear that by a rule of the Company the trustees were empowered to borrow money, and therefore there was nothing to exclude the personal liability of the party who signed as secretary. *Healey v. Story* (3 Exch. 3) does not govern this case, because here the words "jointly and severally" are applicable to the directors.

POLLOCK, C. B. I am of opinion that the rule ought to be discharged. Any person reading this promissory note would come to the conclusion that there is nothing on the face of it to exempt from personal liability any of the parties who have signed it. The signature of the secretary is not different in form from that of the directors; and all the persons whose names appear upon the note have signed it in their individual capacity. The case of *Bult v. Morrell* (12 A. & E. 745) turned mainly on the fact that the jury found that the manager did not sign the bill as acceptor, but merely put his name on it as an officer of the Company. This rule was granted rather from the circumstance of the point having been reserved than from any doubt we entertained about it.

BRAMWELL, B. I am also of opinion that the rule ought to be discharged. The only evidence, other than the note, [217] was, first, that the plaintiff lent his money to the Society, and, secondly, that the Society was governed by certain rules, which are obviously only binding on the members inter se. Though the directors may have given the note as a security for money lent to the Society, in considering whether they are individually liable we must decide upon what appears on the face of the instrument. Now, we have the authority of *Price v. Taylor* (5 H. & N. 540) that a note signed in this way binds the directors. Then the case is reduced to this, is not the defendant equally bound? It is true that he is secretary; but they are directors, and that does not prevent them from being personally liable. Suppose the words "directors" and "secretary" had been left out of the note, could there have been any difficulty? None whatever. But it is said that the addition of the word "secretary" exempts the defendant from liability. I cannot think that the circumstances of the defendant adding "secretary" to his name makes any difference.

This case is distinguishable from *Bult v. Morrell* (12 A. & E. 745). There the bill was addressed to the directors of the Company, and therefore the drawees were the directors. The three directors who accepted it treated it as a bill addressed to the Company, and they state that they accepted it for the Company, so that they accepted per procuration. The defendant Parker, not being a director, was not a drawee, and therefore he did not make himself liable as acceptor by putting his name on the bill. In *Lindus v. Melrose* (3 H. & N. 177) the point decided was not whether, some of the parties who signed the note being personally liable, others were also liable, but whether any of them were liable. *Price v. Taylor* is a distinct authority that the two directors who signed this note are personally liable; then is there any reason why the [218] defendant should not also be liable? It is possible that he did not mean to make himself personally responsible; on the other hand, it is probable that he had no objection to sign his name as an additional security to the plaintiff; but however that may be, he has made himself personally liable by the mode in which he has signed the note.

CHANNELL, B. I am also of opinion that the rule ought to be discharged. Looking at the evidence apart from the note itself, I am of opinion that the defendant is liable. The plaintiff is a stranger to the Society, and it may well be that he was content to lend his money upon getting the security of the secretary as well as the directors. Then, looking at the note itself, is there anything with reference to the signature, or the part of the note in which it is found, to exclude a personal liability? I think not. The defendant has signed the note in such a way as to make himself jointly and severally liable with the two other persons who signed it. This case is distinguishable from *Bult v. Morrell*, for there the question was whether Parker, the manager of the Company, was jointly liable with the directors as an acceptor of the bill, and the jury found that he did not sign his name as acceptor, but only as an officer of the Company.

Rule discharged.

[219] SCOTT v. LORD SEYMOUR. May 28, 1862.—A British subject may maintain, in the Courts of this country, an action against another British subject for an assault committed in a foreign country, notwithstanding proceedings have been taken at his instance, and are pending, in a Court of that country in respect of the same assault and battery.—To an action for assault and false imprisonment the defendant pleaded:—First: (except as to the imprisonment), that the trespasses were committed at Naples, and that the plaintiff and defendant resided there and

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were amenable to the laws there in force : that proceedings were taken, at the instance of the plaintiff, before the Judge of a certain Court at Naples, according to the articles of the penal procedure laws of that country ; and that according to the law of that country the defendant was not liable to be sued by the plaintiff in any civil action, or other proceedings, to recover damages for the alleged trespasses, nor liable to any other proceedings in respect of the trespasses except those taken and instituted under the laws aforesaid, and which were still pending and undetermined in the said Court at Naples. Secondly : (except as to the imprisonment), that according to the law of Naples the defendant was not liable to be sued by the plaintiff, and he could not recover any damages in a civil action, or other proceeding, for the alleged trespasses until the defendant had been condemned and found guilty of those trespasses, or some part thereof, in the said penal proceedings which were still pending and undetermined. Thirdly : (as to the imprisonment), that according to the law of Naples the defendant was liable to certain penal proceedings for the said imprisonment, if not authorized by the law of the country ; and that, according to the law of the country, no civil action, or other proceedings, could be maintained to recover damages for the imprisonment, if illegal, until after the defendant had been condemned and found guilty of the illegal imprisonment in such penal proceeding ; and that the defendant had not been condemned in such penal proceedings, nor had the plaintiff taken any such penal proceedings against the defendant, or endeavoured to procure him to be condemned or found guilty of the said imprisonment. Held, that the meaning of the first plea was that proceedings had been taken and were pending, at the instance of the plaintiff, in the Neapolitan Court, and that except those proceedings none could there be taken ; and if so, the plea did not negative that those were proceedings in which a compensation or damages might be recovered, and therefore the plea was bad.—Held, that the second and third pleas were also bad, for they disclosed mere matter of procedure, to be governed by the *lex fori* ; since they assumed that the acts complained of were the subject of civil proceedings in Naples to recover damages ; but that as a preliminary there must be a penal proceeding and conviction.—Held also, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the first plea did not contain any averment that damages might not be recovered by the law of Naples for the alleged trespasses, and without such an averment it must be taken as against the defendant that they might ; and if so, the question was one of procedure merely, and governed by the *lex fori* ; and there was nothing to oust the jurisdiction of the English Courts to entertain an action to recover damages.—Held, also, that a British subject may maintain an action in this country against another British subject to recover damages for an assault and battery committed in a foreign country ; although by the law of that country no damages are recoverable for such trespasses : Per Wightman, J.—Held also, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the second and third pleas were bad, since they merely disclosed an objection to procedure which must be determined by the *lex fori*, not the *lex loci* ; that in effect the second plea amounted to no more than *auter action pendant* in a foreign country.

[S. C. 32 L. J. Ex. 61 ; 9 Jur. (N. S.) 522 ; 11 W. R. 169 ; 8 L. T. 511. Observed upon, *Phillips v. Eyre*, 1869, L. R. 4 Q. B. 240 : affirmed 1870, L. R. 6 Q. B. 1. Applied, *Hart v. Gumpach*, 1873, L. R. 4 P. C. 464 ; 9 Moore, P. C. (N. S.) 276. Referred to, *Companhia de Moçambique v. British South Africa Company*, [1892] 2 Q. B. 372.]

Declaration. That the defendant assaulted and beat the plaintiff, and with a certain instrument struck him [220] on the head and on other parts of his body, and then dragged and pulled him about and ill-treated him, and threw him on the ground and imprisoned him and caused him to be imprisoned, whereby the plaintiff sustained concussion of the brain and fracture of the hip and other grievous injuries, &c.

Pleas, (inter alia). First (except as to the imprisonment of the plaintiff). That the said alleged trespasses were and every part thereof was, committed out of the jurisdiction and dominion of the Queen of England, and out of the jurisdiction of this

Court, to wit, at Naples, and not elsewhere. And that, at the time of the committing of the said trespasses, and every part thereof, the plaintiff and the defendant respectively resided and were out of the jurisdiction and dominion aforesaid, to wit, at Naples aforesaid, and were then subject and amenable to the laws then and there in force. And that, under and by virtue of the laws of that country, proceedings were afterwards, and before the commencement of this suit, and whilst the plaintiff and defendant were resident at Naples aforesaid, and out of the jurisdiction and dominion aforesaid, and subject and amenable to the laws then and there in force, duly taken by and at the instance of the plaintiff before Ferdinando Boccia, then and there being Royal Judge of the Court of the circuit of the Chiaja in Naples, then and there sitting as correctional Judge according to the articles of the penal procedure laws of that country then and there in force, and having jurisdiction in that behalf for the said trespasses in the declaration mentioned, except as aforesaid. And that, according to the laws of the said country and place where the said alleged trespasses were committed, and where the said proceedings were taken as aforesaid, the defendant was not, at the time of the commencement of this suit, nor at the time when the said trespasses were committed, nor [221] at any time thereafter, liable to be sued by the plaintiff in any civil action or other proceedings to recover damages for the alleged trespasses to which this plea is pleaded, nor liable to any other proceedings in respect of the said trespasses to which this plea is pleaded, except those taken and instituted as aforesaid under the laws aforesaid, and which are still pending and undetermined in the said Court at Naples aforesaid.

Second: (except as to the imprisonment of the plaintiff). That the said alleged trespasses were, and every part thereof was, committed out of the jurisdiction and dominion of the Queen of England, and out of the jurisdiction of this Court, to wit, at Naples, and not elsewhere. And that, at the time of the committing of the said trespasses and every part thereof, the plaintiff and the defendant respectively resided and were out of the jurisdiction and dominion aforesaid, to wit, at Naples aforesaid, and were then subject and amenable to the laws then and there in force. And that, under and by virtue of the laws of that country, proceedings were afterwards, and before the commencement of this suit, and whilst the plaintiff and the defendant were resident at Naples aforesaid, and out of the jurisdiction and dominion aforesaid, and subject and amenable to the laws then and there in force, duly taken before Ferdinando Boccia, then and there being Judge of the Court of the circuit of the Chiaja in Naples, then and there sitting as correctional Judge, according to the articles of the penal procedure laws of that country then and there in force, and having jurisdiction in that behalf for the said trespasses in the declaration mentioned (except as aforesaid). And that, according to the laws of the said country and place where the said alleged trespasses were committed, and where the said proceedings were so taken as aforesaid, the defendant was not, at the time of the commencement of this suit [222] nor at the time when the said trespasses were committed, nor at any time thereafter, liable to be sued by the said plaintiff. And that he could not recover any damages in a civil action or other proceeding for the alleged trespasses to which this plea is pleaded until the defendant had been condemned and found guilty of those trespasses, or some part thereof, in the said penal proceedings, and which said penal proceedings, before and at the time of the commencement of this suit, were and still are pending and undetermined; and the defendant has not been condemned or found guilty of the offences and trespasses, or any part thereof, charged by such penal proceeding.

Third: as to the imprisonment of the plaintiff. That the said alleged trespasses were committed out of the jurisdiction and dominion of the Queen of England and out of the jurisdiction of this Court, to wit, at Naples and not elsewhere. And that, at the time of the committing the said trespasses, the plaintiff and the defendant resided and were out of the jurisdiction and dominion aforesaid, to wit, at Naples aforesaid, and were then subject and amenable to the laws then and there in force. And that, according to the law of the said country and place where the said alleged trespasses were committed, the defendant was liable to certain penal proceedings for the said imprisonment, if not authorized by the law of the country where the same took place. And that, according to the law of that country, no civil action or other proceedings could or can be maintained to recover damages for the alleged imprisonment, if illegal, until after the defendant had or has been condemned and found guilty of the illegal imprisonment in such penal proceedings as aforesaid. And that the

defendant had not, before the commencement of this suit, nor has he yet, been condemned in such penal proceedings as last aforesaid, nor hath the plaintiff hitherto instituted or taken any such penal [223] proceedings against the defendant, or endeavoured to procure him to be condemned or found guilty of the said alleged imprisonment.

Replication to first plea. That the plaintiff and the defendant respectively, at the times of the committing of the said trespasses to which that plea is pleaded, were and still are liege subjects of our Sovereign lady the Queen Victoria, and subjects of Great Britain.

There were similar replications to the second and third pleas.

The plaintiff also demurred to the pleas.

Honyman (with whom was Lush and H. T. Jenkins) argued for the plaintiff in last Easter Term (April 30). The pleas afford no answer to the action. The first plea admits the assault, but alleges that the plaintiff is not entitled to compensation, because by the law of Naples the defendant is not liable to be sued in any civil action or other proceedings to recover damages. The validity of contracts is determined by the *lex loci contractus*, but the mode of enforcing them depends on the *lex fori*: *De la Vega v. Vianna* (1 B. & Adol. 284), *The British Linen Company v. Drummond* (10 B. & C. 903), *Don v. Lippmann* (5 Cl. & F. 1). *Mostyn v. Fabrigas* (Cowp. 161) is an express authority that an action of trespass will lie in this country for an assault and false imprisonment committed in a foreign country. [Pollock, C. B. Sir T. Picton, when governor of the island of Trinidad, in the West Indies, was indicted in this country and tried before Lord Ellenborough for a misdemeanor committed in Trinidad (How. St. Tr., vol. 30, p. 226).] There is a distinction in this respect between local and transitory actions. Trespass will not lie in this country for breaking into a dwelling [224] house in a foreign country, because the action *quare clausum fregit* is local in its nature: *Doulson v. Matthews* (4 T. R. 503). But an action to recover damages for an injury to the person is transitory, and may therefore be brought in this country notwithstanding the injury was committed abroad. In Story's *Conflict of Law*, chap. xiv. § 554, it is said "that by the common law personal actions, being transitory, may be brought in any place where the party defending can be found; that real actions must be brought in the *forum rei sitæ*, and that mixed actions are properly referable to the same jurisdiction." That distinction was recognised so long ago as the year 1665, in a case of *Skinner v. The East India Company* (cited in *Mostyn v. Fabrigas*, Cowp. 167, 168), where the twelve Judges certified that the Courts at Westminster could give relief for trespasses to the person and personal property notwithstanding they were committed beyond the seas, but for trespasses to the realty there was no relief in those Courts. In *Pisani v. Lawson* (6 Bing. N. S. 90, 94) Tindal, C. J., in the course of the argument, said: "Suppose an Englishman beats a Frenchman at Boulogne, and then comes to England, would not the Frenchman have a right to sue for the assault in our Courts?" In *Rafael v. Verelst* (2 W. Black. 983, 1055) it was held that trespass would lie for procuring, by awe, fear and threats, an independent native prince to imprison the plaintiff in his dominions in India. The same law prevails in America: *Smith v. Bull* (17 Wendell, 323). Formerly it was necessary to allege that the trespasses were committed "against the peace of our lady the now Queen," but that was a mere fiction of law, and need not have been proved. Nothing is disclosed by the pleas with reference to the law of Naples which prevents this action being brought. Where there is no conflict between the law of this country and a foreign [225] country, the former must prevail. It is not true that by the law of nations the right to sue in this country must be determined according to the law of the country in which the cause of action arose. Mr. Justice Story, in his *Conflict of Law*, chap. viii. § 326, cites with approbation the doctrine laid down, in *Potter v. Brown* (5 East, 124, 131), by Lord Ellenborough, who said, "We always import together with their persons the existing relations of foreigners as between themselves, according to the laws of their respective countries, except indeed where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference." Mr. Justice Story then proceeds to say that Mr. Chancellor Kent has laid down the same rule in his *Commentaries* as stated by Huberus and Lord Ellenborough, and has said "that when the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the

positive law of the land." The second and third pleas seem to proceed on some supposed analogy to the rule of law that a felony cannot be made the foundation of a civil action: *Stone v. Marsh* (6 B. & C. 551, 564); and that, before the party injured by a felonious act can seek civil redress for it, the matter must be disposed of by the proper criminal tribunal: *Crosby v. Leng* (12 East, 409). But assuming that by the law of Naples a person who has been assaulted and imprisoned cannot obtain compensation in damages, the comity of nations does not require the Courts of this country to recognise such a law. In *Cammell v. Sewell* (5 H. & N. 728), Byles, J., observed that in his opinion the comity of nations would not recognise the law of a particular country which was at variance with the general maritime law of the world. In Story's *Conflict of Law*, chap. viii. §§ 258, 259, [226] numerous instances are given of contracts against morals, religion, and public policy, which, even though they might be valid in the country in which they were made, could not be enforced in this country. On the other hand, actions have been maintained in this country for adultery committed abroad. If no action will lie until criminal proceedings have been taken in Naples, the defendant might avoid all responsibility by quitting that country. Every plea to the jurisdiction of the Court ought to give some other Court by which the matter may be tried: *Rex v. Johnson* (6 East, 583). Moreover, the first plea does not aver that by the law of Naples damages cannot be recovered for these trespasses, but only that the defendant is not liable to any proceedings except those which were then pending. It is a bad plea in abatement of the pendency of another proceeding for the same cause in a foreign Court: *Laughton v. Taylor* (6 M. & W. 695), *Cox v. Mitchell* (7 C. B. N. S. 55). [Bramwell, B., referred to *Leroux v. Brown* (12 C. B. 801).] The pleas disclose mere matter of procedure, which does not affect the plaintiff's right to sue for damages in the Courts of this country. It is a general principle that the penal laws of one country cannot be taken notice of by another: Story's *Conflict of Law*, chap. xvi. § 620.

Hawkins (with whom was Archibald), for the defendant (May 5). The doctrine laid down in *Mostyn v. Fabrigas* (Cowp. 161) is not disputed. The first plea states (and it is admitted by the demurrer) that, according to the law of Naples, the defendant never was liable to be sued by the plaintiff in any civil action or other proceeding to recover damages. Contracts made in a foreign country cannot be enforced in this country unless they are conformable to the law of the foreign country. The same principle applies to torts. The [227] ground on which an action is maintainable in this country on a contract made abroad is that, by the comity of nations, this country recognises the law of the foreign country. [Pollock, C. B. Suppose, in a foreign country, there was no redress for slander, would that prevent an Englishman who was slandered from bringing an action in this country?] In the note to *Mostyn v. Fabrigas*, in Smith's *Lead. Cas.*, vol. 1, p. 640, 5th ed., it is said: "With respect to transitory causes of action which have accrued abroad, like that in the principal case of *Mostyn v. Fabrigas*, it must be remarked that, although the Courts of this country will entertain them, still they will, in adjudicating on them, be governed by the laws of the country in which they arose. The distinction laid down in all the cases of this description is between the cause of action, which is to be judged of with reference to the law of the country where it originated, and the mode of procedure, which must be adopted as it happens to exist in the country where the action is brought." Therefore, whatever is a justification where the act was committed, is a justification where the action is brought; and whatever is a bar to any action where the act was committed, is a bar where the action is brought: *The General Steam Navigation Company v. Guillou* (11 M. & W. 877). [Martin, B. It does not appear that the Judge at Naples might not have awarded damages for the assault.] The first plea expressly negatives any right in the plaintiff, by the law of Naples, to recover damages. [Martin, B. It says that the defendant was never liable to any other proceedings in respect of the said trespasses except those taken, and, consistently with that allegation, the proceedings may have been for the recovery of damages.] This case is similar to that of a person who, having been assaulted in Scotland or Ireland, has taken proceedings before a magistrate in London, in which case [228] the certificate of the magistrate that the complaint was dismissed would be a bar to any action for the same assault: *Costar v. Hetherington* (1 El. & El. 802). [Martin, B. Suppose that, by the law of France, the owner of a ship was not responsible for any act of his servant, would that afford a defence to an action against the master in this country?] There

is no authority that an action can be maintained here for a wrong done in a foreign country, for which there is no remedy by action in that country. The pleas do not disclose mere matter of procedure, but shew that the plaintiff has no remedy by action. That is no more matter of procedure than a plea of the Statute of Limitations, or a plea under the Statute of Frauds. The second and third pleas shew that it is a condition precedent to the right to maintain this action that the defendant should have been found guilty of the trespasses in penal proceedings. If a person injured by a felonious act brought an action against the person charged with committing it, would it not be a good plea in bar that the matter had not been disposed of by a criminal tribunal? If so, the second and third pleas are not pleas in abatement, but good pleas in bar of the action. He also referred to *White v. Spettigue* (13 M. & W. 603).

Honyman replied.

Cur. adv. vult.

The judgment of the Court was now delivered by.

POLLOCK, C. B. It is concluded by authority that the circumstance of the assault and battery having been committed in a foreign country is in itself no impediment to an action being maintained for it here. Then what is the meaning of the first plea? The defendant argues that it [229] means that proceedings to punish him, the defendant, have been taken in Naples, and that, except those proceedings, none can there be taken, and that therefore none can here be taken to recover damages. But we hold it means that proceedings have been taken in the Neapolitan Court, and that except those proceedings none can there be taken. If so, it does not negative that those are proceedings in which a compensation or damages may be recovered. We hold this to be the natural meaning of the words, and are confirmed in that opinion by this, that the argument of the defendant makes the substance of the plea to be, that no civil action for the wrong complained of is maintainable in Naples, and that in respect of it no damages or compensation can there be recovered. If so, it would have been easy to say so in so many words; and, applying the rule to a reasonable extent, that pleadings are to be taken most against the pleader, we put the construction we have on this plea. Then it comes to this, that this is a wrong for which an action would lie here, and for which (as it is not negated) we must assume an action will lie in Naples, but in respect of which proceedings are pending in Naples at the plaintiff's instance. This however is no defence. It cannot be a defence in bar of the action. It would be no answer, even in abatement of the writ, that an action was pending here in an inferior Court, and how in law or reason can it be, that it is pending in a foreign Court, when the action is in no sense local? The case of *Cox v. Mitchell* (7 C. B. N. S. 55) is an authority to shew that an action pending abroad for the wrong is no ground for staying proceedings in an action here. The first plea therefore is bad.

The other two pleas demurred to allege in effect this, that by the law of Naples, until the defendant has been [230] criminally condemned for the matters complained of, no action can be maintained against him for damages, and that he has not been so condemned. These pleas assume, therefore, that the acts complained of are the subject of civil proceedings in Naples to recover damages, but that, as a preliminary, there must be a penal proceeding and conviction. We think this furnishes no defence. It is a matter of procedure which is to be governed by the *lex fori*. The plaintiff's cause of action is the assault and battery. Our Statute of Limitations would run from its occurrence; and it would be strange that, if the criminal proceedings in Naples lasted for six years, the plaintiff lost his remedy here. Besides, if the defendant withdraws from the jurisdiction of the Neapolitan tribunals, we must assume he prevents the very proceeding which is, by their law, necessary to perfect the plaintiff's power to sue: he does not substitute another mode of proceeding criminally here. He would therefore, by his own act, deprive the plaintiff of a remedy for the wrong he has done. Besides, the reason of the thing ceases before our tribunals. For certain police and municipal purposes the foreign law says that, when the act complained of is of a criminal character, criminal proceedings shall be taken before civil; but that neither is nor can be a consideration with us. Suppose a man here stole a chattel and went to New York, would it be reasonable that the tribunals there should refuse to entertain a suit by the owner of the article against the thief till there had been a prosecution here? Before the extradition treaties such an objection would be obviously pre-

posterous, and is not really less so now. But this is the defence raised by the second and third pleas demurred to, and for the reasons we have given we think them bad.

WILDE, B. I heard only a part of the argument, but I [231] do not dissent from the judgment which has been delivered.

Judgment for the plaintiff.

The defendant having taken proceedings in error on the above judgment, the case was argued, in the following Michaelmas Vacation (Dec. 1), by

Archibald (with whom was C. Pollock), for the defendant. Under the circumstances stated in the pleas, this action cannot be maintained. The plaintiff's remedy for the assault must be determined by the law of Naples, and whatever is a defence there is also a defence here. *Mostyn v. Fabrigas* (Cowp. 161, 173) does not affect the present question. All that case decided was, that an action might be maintained in this country for an assault committed abroad. The difficulty which arose as to venue was obviated by a fiction of law. The only passage in the judgment in *Mostyn v. Fabrigas* (Cowp. 161, 173) which bears on this question is in favour of the defendant: "It does not follow from hence that, let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him." [Blackburn, J. The pleas do not allege that the trespasses were justified by the law of Naples, but only that there is a peculiar mode of procedure in that country in respect of them. Crompton, J. You must contend that, supposing no action could have been maintained in a foreign country for criminal conversation committed there, no such action could formerly have been maintained in this country.] If by the law of a foreign country there is no right to damages for a personal injury, none are recoverable here. The pleas shew that [232] the assault was committed at Naples, where both parties resided, and that they were subject to the law of Naples; therefore their rights and liabilities must depend on the law of that country. A justification by the law of the country in which the alleged wrong was done is a justification everywhere; but the right to compensation, the nature and extent of it, and the mode in which it is to be enforced, must be determined by the law of the country in which the injury occurred. [Crompton, J. According to that argument, the pleas ought to shew that the assault was justified by the law of Naples. The first plea merely says that the plaintiff is not entitled to recover damages except by a criminal proceeding.] It alleges in substance that the only remedy for the injury is by a penal proceeding. In Westlake's International Law, sect. 240, p. 224, it is said, "The legal character and consequences of an act must certainly depend on the jurisprudence of the country where it is done, and not on that of any spot to which its consequences may extend. The damage is not an injury, unless it results from conduct prohibited by the law which governs the agent." By the comity of nations, the Courts of this country respect the policy of the foreign law, and if that provides that no civil action shall be maintained for an assault, none is maintainable here. The obligation arising from a tort depends as much on the law of the country in which it is committed, as the validity of a contract depends on the law of the country in which it is made: Westlake's International Law, sect. 237, p. 222, *Regina v. Lesley* (Bell, C. C. 220). There is nothing contrary to natural justice in providing that there shall be no remedy for an assault except by a criminal proceeding. [Crompton, J. The pleas do not shew that by the law of Naples no compensation can be awarded in a criminal proceeding.] [233] No action can be maintained in this country for an alleged wrong committed in a foreign country, if the act was justifiable there: *Dobree v. Napier* (2 Bing. N. C. 781). Compensation for injury committed in a foreign country depends on the law of that country: *Ekins v. The East India Company* (1 P. Wms. 395; in error, 2 B. P. C. 382), *Law v. The East India Company* (4 Ves. 824). [Willes, J., referred to *Gibbs v. Fremont* (9 Exch. 25).] In *Santos v. Illidge* (8 C. B. N. S. 861) it was held by a majority of the Judges in the Exchequer Chamber that a contract might be enforced for the sale of slaves, lawfully held in a foreign country where the possession and sale of slaves was lawful. *Madrazo v. Willes* (3 B. & Ald. 353), *Buron v. Denman* (2 Exch. 167), and *Cammell v. Sewell* (5 H. & N. 728) shew that the right to maintain an action for damages in respect of a tort committed in a foreign country depends on the law of that country. Moreover, the plaintiff having resorted to the foreign tribunal, this Court will not interfere until these proceedings are determined.

Honyman appeared for the plaintiff, but was not called upon to argue.

Cur. adv. vult.

The following judgments were now delivered.

WIGHTMAN, J. We are all of opinion that the second and third pleas in this case are bad, and afford no answer to the action. They admit the right to compensation in damages for such trespasses as those in the declaration; but state that by the Neapolitan law they cannot be recovered until certain penal proceedings have been commenced and determined there. This is an objection to procedure [234] merely, which must be determined by the *lex fori*, and not the *lex loci*; and the second plea indeed in effect seems to amount to no more than *auter action pendant* in a foreign country, which is clearly not sustainable.

The main argument for the plaintiff in error, however, was founded upon the first plea, which, as Mr. Archibald contended, asserted that by the law of Naples no damages were recoverable in respect of the alleged trespasses mentioned in the declaration. My learned brothers are of opinion that the plea does not contain any averment that damages might not be recovered by the law of Naples for the alleged trespasses in some form of procedure or other; and without such an averment or equivalent expressions, it may be taken as against the defendant in the action that they might be recovered; and that, if that be so, the question is one of form merely, and governed by the *lex fori*; and there is nothing to oust the jurisdiction of the English Courts to entertain an action to recover damages in such a case.

I agree with the rest of the Court if the construction of the first plea is that which they suggest; but, speaking for myself only, I am of opinion that if Mr. Archibald's construction of the plea be correct, and that by the law of Naples, as stated in the first plea, no damages are recoverable in any form of procedure there, an action is nevertheless maintainable in England by one British subject against another British subject for the trespasses mentioned in the declaration. The construction or validity of contracts may, as a general rule, depend upon the *lex loci* where the contract was made, but the rules relating to contracts are not applicable to this case; and I am not aware of any rule of law which would disable a British subject from maintaining an action in this country for damages against another British subject for an assault and battery committed by him in a foreign country, merely because no damages for such trespasses were recoverable by the law of the foreign country; and without any allegation that such trespasses were lawful or justifiable in that country. By the law of England, an action to recover damages for an assault and battery is transitory, and whatever might be the case as between two Neapolitan subjects, or between a Neapolitan and an Englishman, I find no authority for holding that, even if the Neapolitan law gives no remedy for an assault and battery, however violent and unprovoked, by recovery of damages, that therefore a British subject is deprived of his right to damages given by the English law against another British subject.

I think the first plea bad, either upon this ground or upon that suggested by my learned brothers; and the judgment of the Court below will therefore be affirmed.

WILLIAMS, J., said,—I entirely concur with the former part of my brother Wightman's judgment. With respect to the latter part, it is not necessary to express an opinion, but I am desirous of saying that, as at present advised, I am not prepared to assent to it.

CROMPTON, J., said,—It is not necessary to decide the latter and more important question, whether the law be as my brother Wightman has propounded it. I think that is a matter of some difficulty and doubt, and I do not wish to express any opinion upon it, because this case may be decided on the other ground.

Looking at these pleas, I agree with the view of the majority of the Court that they do not aver that no compensation in damages is recoverable by the law of Naples for these trespasses. Such a state of the law can scarcely be supposed, and I do not believe it exists. It is to be lamented that such a loose mode of pleading is adopted in [236] the present day, that pleas may mean either one thing or another. But looking at the first plea, I think it does not shew that no compensation in damages is recoverable. It alleges that proceedings were taken at Naples before a judge, "having jurisdiction in that behalf, for the trespasses in the declaration mentioned." Anyone would suppose from that, that the judge had jurisdiction over the whole matter. The plea then alleges that the defendant is not "liable to be sued by the plaintiff in any civil action or other proceeding to recover damages for the alleged trespasses." Whether that means that the defendant is not liable to be sued in any civil action or

other civil proceeding may be doubtful. If it means any civil action or other proceeding in contradistinction to a criminal proceeding, it affords no answer, because it admits that the plaintiff might recover damages in the proceedings under the penal procedure laws. The plea then says, "nor liable to any other proceedings in respect of the said trespasses, except those taken and instituted as aforesaid under the laws aforesaid." If that means that a man, however assaulted, can recover no compensation in damages unless he resorts to those proceedings, it admits that he may recover it in that form.

On this construction of the plea, the question becomes one of procedure only, and on that ground I agree that the judgment of the Court below ought to be affirmed.

WILLES, J., said,—I concur with the opinion of the other members of the Court as expressed in the judgment delivered by my brother Wightman. As to what our decision would be, if the plea do not bear the construction now put upon it, I need not express an opinion. I am far from saying that I differ from any part of the judgment of my brother Wightman; but I entirely concur in thinking, that [237] as the plea does not aver that there is any positive law in Naples against the recovery of damages for an assault, we must assume that they may be recovered in some form of proceeding.

BLACKBURN, J., said,—I also agree that the judgment of the Court below ought to be affirmed. Construing the first plea as I do, it merely amounts to this, that the judge of the Court of the Circuit of Chiaja in Naples had exclusive jurisdiction over all proceeding for personal trespasses, whether civil or criminal, and that proceedings in respect of those trespasses were still pending in that Court. I construe the plea as amounting to that, and no more. Then the plea merely discloses matter of procedure, and does not shew that by the law of Naples this cause of action is no cause of action there. Viewing the first plea in that light, I think it bad.

If, indeed, the plea had averred that by the law of Naples no damages are recoverable for an assault however violent, that would have raised a question upon which I have not at present made up my mind. I doubt whether it would be a good bar, but supposing it would, I am disposed to think that the fact of the parties being British subjects would make no difference. As at present advised, I think that when two British subjects go into a foreign country, they owe local allegiance to the law of that country, and are as much governed by that law as foreigners. The point however is not now raised, and it is unnecessary to express any opinion upon it.

Judgment affirmed.

[238] AMOS AND ANOTHER v. SMITH. June 5, 1862.—In the year 1833, the plaintiffs, trustees of a marriage settlement, lent to the husband, at interest, some of the money settled to the separate use of his wife, on security of the joint bond of the husband and the defendant. No interest was paid, but, on the 31st October 1847, it was arranged between the plaintiffs and the husband and wife that she should give the plaintiffs her receipt for the interest up to that date, which she accordingly did. She afterwards from time to time gave receipts for each half-year's interest up to November, 1860. No money ever passed. Held, that the transaction amounted to a payment or satisfaction of the interest, so as to take the case out of the Statute of Limitations, 3 & 4 Wm. 4, c. 42, s. 5.

[S. C. 31 L. J. Ex. 423; 10 W. R. 759; 7 L. T. 66. Referred to, *Maber v. Maber*, 1867, L. R. 2 Ex. 155. Applied, *In re Dixon*; *Heynes v. Dixon*, [1900] 2 Ch. 561.]

Action on a bond for payment by the defendant to plaintiffs of 1636l.

Plea. That the alleged causes of action did not accrue within twenty years before the suit.

Replication. That the defendant within twenty years before the suit made and acknowledged, to wit, by part payment and part satisfaction on account of the interest then due on the said bond, that the debt in the declaration mentioned then remained unpaid and due to the plaintiffs. Issue thereon.

At the trial, before Martin, B., at the Middlesex Sittings after Easter Term, the following facts appeared:—The plaintiffs were trustees of the marriage settlement of John Woodhams and Ellen his wife. On the 1st of November, 1833, the plaintiffs lent to John Woodhams 816l. of the trust money which was settled to the separate

use of his wife, upon the security of a bond executed by him and the defendant Smith as surety; and conditioned for payment of 816l. and interest on the 1st of May then next. No interest was paid, but on the 31st of October, 1847, it was arranged between the plaintiffs and J. Woodhams and his wife that she should give the plaintiffs her receipt for the interest up to that date, and that it should be considered as paid. She accordingly signed and delivered to the plaintiffs the following receipt:—

“1st Nov. 1847.

“Received of James and Daniel Amos, the trustees of my marriage settlement, the sum of 240l. for interest due [239] on 816l., at 5 per cent. on bond given by Mr. John Woodhams and Mr. James Smith up to this date.

“HELEN WOODHAMS.”

Receipts in the same form were subsequently given, but no money was ever paid. The last receipt was dated the 1st February, 1861, for interest up to the 1st November, 1860. The marriage settlement contained the usual provision that the receipt of the wife should be a sufficient discharge to the trustees. The defendant had never been applied to for payment of interest, nor was he aware of the arrangement which had been made between the plaintiffs and J. Woodhams and his wife. J. Woodhams having become insolvent, the present action was brought.

The learned Judge was of opinion that the transaction amounted to a payment or satisfaction of the interest within the meaning of the 3 & 4 Wm. 4, c. 42, s. 5, and directed a verdict for the plaintiffs, reserving leave to the defendant to move to enter the verdict for him.

Lush, in the present term (May 30), obtained a rule nisi accordingly; against which Bovill and H. Shield now shewed cause. The question is, whether there has been any part payment or part satisfaction on account of the interest due on the bond, within the meaning of the 3 & 4 Wm. c. 42, s. 5. The arrangement between the parties was in effect a payment or satisfaction of the interest. [Bramwell, B. Suppose an action had been brought for the interest in respect of which the receipts were given, would not the transaction have been an answer under a plea of payment? Pollock, C. B. It was a payment by settlement of accounts. When two persons meet, and one says to the other “I owe you so much money and you owe me so much,” but instead of paying over the money they agree to settle the account by setting [240] off one sum against the other, that is a payment by settlement of account: *Ashby v. James* (11 M. & W. 542).]

The Court then called on

Lush and Hance, to support the rule. It is conceded that if two persons, mutually indebted to each other in the same amount, meet and agree to settle their accounts without any money passing, that would be a payment or satisfaction of their respective debts. But in this case the defendant was no party to the arrangement between the plaintiff and Woodhams and his wife. In *Bodger v. Arch* (10 Exch. 333) the agreement was founded on a good consideration; but this is not a bona fide transaction. The plaintiffs committed a breach of trust, and for their own protection requested the husband to procure his wife's receipts for the interest on the trust money. Suppose the husband had acknowledged in writing that the debt was due, that would not have rendered the defendant chargeable. An acknowledgment has no more effect under the 3 & 4 Wm. 4, c. 42, than under the 9 Geo. 4, c. 14, s. 1; and under the latter Act there is a distinction between an acknowledgment in writing and part payment by one of several joint contractors; the effect of an acknowledgment is confined to the individual who makes it, but part payment by one of several joint contractors operates against all. The reason given by Tindal, C. J., in *Wyatt v. Hodson* (8 Bing. 309, 312), is that “payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment.” Again, suppose the wife had acknowledged in writing that part of the principal had been paid, that would not have been sufficient to take the case out of the statute. There is a [241] wide difference between a deliberate act of payment and the giving a receipt when in fact no money has been paid. [Bramwell, B. The wife could not in equity recover from the trustees the interest in respect of which she gave the receipts.] Whatever may be the effect of this transaction in equity as between the wife and her trustees, it does not in law amount to payment.

MARTIN, B. I am of opinion that the rule ought to be discharged. The question, which arises upon the 3 & 4 Wm. 4, c. 42, s. 5, is whether there has been any payment which will operate as a satisfaction for the purpose of keeping alive this debt. In my opinion whatever would prove a plea of payment is sufficient for this purpose. The husband ought to have paid the trustees the interest as it became due, and the trustees ought to have handed it to the wife; and if that had been done, beyond all doubt it would have taken the case out of the Statute of Limitations. Then the question is whether what has been done is not substantially the same thing. I am of opinion that it is. If the money had been paid by the husband to the trustees, and immediately handed over by them to the wife, that would have been a mere idle ceremony. There are numerous cases which establish that there may be a payment by settlement of accounts. When two persons indebted to each other meet and agree to set off their respective debts, that is not a mere settlement of account, but is as much a payment as if the money had passed between them. *Bodger v. Arch* (10 Exch. 333) is an authority in point. It is said that case is distinguishable, on the ground that the defendant, who was liable to pay the interest, expended the money in the maintenance of the plaintiff's child; but I think it is not, and if the evidence be true this is as much a real and bonâ fide [242] transaction as that. I feel bound to say that we granted the rule because the point was reserved, and not from any doubt which we entertained as to it.

BRAMWELL, B. I am of the same opinion. It is scarcely necessary to add anything, and I will only advert to the effect of the words of the act of parliament, which are, "part payment or part satisfaction." I cannot for a moment doubt that the interest has been satisfied by the transaction which took place. I think that the wife could not maintain a suit in equity against the trustees for enforcing payment of the interest; but however that may be, I am clearly of opinion that there has been a satisfaction of the interest, so as to take the case out of the Statute of Limitations.

CHANNELL, B., concurred.

Rule discharged.(a)

HENRY FLEMING v. HENRY FLEMING. June 5, 1862.—A testator devised as follows:—"I give and bequeath to my son Edward Fleming all that dwelling-house, &c., (now in the occupation of my son John), during his natural life, and at his death to descend to my grandson Henry Fleming and his heirs for ever." The testator had two grandsons named Henry Fleming, the plaintiff, who was the son of the testator's son Edward, and the defendant who was the son of the testator's son John. Held, that the proof of that fact raised an ambiguity in the will, as to which of his two grandsons the testator meant, and that parol evidence was admissible to explain it.

[S. C. 31 L. J. Ex. 419; 8 Jur. (N. S.) 1042; 10 W. R. 778; 6 L. T. 896.]

Ejectment to recover possession of a dwelling-house and premises, situate in Boutport Street, Barnstaple, in the county of Devon. The defendant defended as landlord.

At the trial, before Byles, J., at the last Devonshire Spring Assizes, the following facts appeared:—The plaintiff claimed title to the premises in question under the will of [243] one Robert Fleming, the owner in fee. Robert Fleming had (amongst other children) two sons, John Fleming and Edward Fleming. The plaintiff was the son of Edward Fleming, and the defendant was the son of John Fleming. The will of Robert Fleming, dated the 27th November, 1823, was (so far as material to the present case) as follows:—"I give and bequeath to my son Edward Fleming all that dwelling-house, with the appurtenances, situate in Boutport Street (now in the occupation of my son John Fleming) during his natural life, and at his death to descend to my grandson, Henry Fleming, and his heirs for ever, without the power to sell or alienate the same. I give and bequeath to my daughter Ann Rew all that dwelling-house, with the appurtenances, situate in Boutport Street, now in the occupation of Joseph Herring, during her natural life, and at her death to descend to my grandson, John Fleming, and his heirs for ever, without the power to sell or alienate the same."

After the death of the testator Edward Fleming entered into possession of the

(a) See *Foster v. Dawber*, 6 Exch. 839.

premises in question. He afterwards disposed of his life interest to his brother John Fleming, who received the rents up to the time of the death of Edward Fleming, which occurred on the 9th August, 1860. Upon the death of Edward Fleming, the defendant Henry Fleming entered into possession and received the rents of the premises in question.

Upon these facts, the defendant's counsel submitted that there was a latent ambiguity on the face of the will; and he proposed to shew, by parol evidence, that the testator, when he mentioned his grandson Henry Fleming, intended the defendant Henry, the son of John, to be the object of his bounty. It was contended, on behalf of the plaintiff, that the fact of the testator having two grandsons [244] of the name of Henry Fleming did not raise such a latent ambiguity in the will as to render parol evidence admissible to explain the testator's intention.

The learned Judge was disposed to think that there was no ambiguity; but he received the evidence, which in substance was that the defendant from his childhood had resided with the testator, who had been frequently heard to say that he should give the defendant the premises in question: that the testator's son, Edward Fleming, had left Barnstaple when he was very young and had settled in London: that the testator was not aware that he had a son, nor that he was married.

The learned Judge left it to the jury to say whether the testator intended to give the premises in question to his grandson, Henry, the son of Edward, or to his grandson, Henry, the son of John. The jury found that the testator meant to give them to his grandson, Henry, the son of John. The learned Judge then directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

Collier, in last Easter Term, obtained a rule nisi accordingly, on the ground that parol evidence was admissible to shew that the testator intended to devise the property in question to the defendant.

Montague Smith and T. W. Saunders now shewed cause. There is no latent ambiguity on the face of the will; and if the intention of the testator be collected from his words, it is evident that he meant to benefit Henry, the son of Edward. The principles on which evidence is admissible to explain a will were fully investigated in the case of *Doe d. Hiscocks v. Hiscocks* (5 M. & W. 363). There the testator devised lands [245] to his son John H. for life; and on his decease to the testator's grandson John H., eldest son of the said John H., for life; and on his decease to the first son of the body of his said grandson John H. in tail male, with remainders over. At the time of making the will, the testator's son John H. had been twice married. By his first wife he had one son, Simon; by his second wife, an eldest son, John, and other younger children. It was held that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to shew which of these two grandsons was intended by the description in the will. Parol evidence is only admissible to explain a latent ambiguity, where the language of the testator applies equally to two or more persons or things. Here there are circumstances which indicate the intention of the testator. The plaintiff is the son of the testator's son Edward to whom a life estate is devised, and when the testator speaks of his grandson he must be taken to speak of the son of that son of his who was then particularly in his mind. Again, the testator uses the words, "and at his death to descend to my grandson Henry Fleming." [Bramwell, B. It is obvious from the next clause that the testator does not use the word "descend" in the sense of descending from parent to child.] The premises in question were in the occupation of the testator's son John, the father of the defendant, and the fact of the testator devising them to his son Edward leads to the conclusion that he did not intend to benefit the family of his son John. In *Doe d. Westlake v. Westlake* (4 B. & Ald. 57), the testator devised to Matthew W., his brother, and Simon W., his brother's son, a certain estate. The testator had three brothers, each of whom had a son of the name of Simon, living at the time of the testator's death. It was held, that [246] the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator as to the person intended; it being clear that the person entitled was Simon, the son of Matthew. So here, parol evidence is not admissible to raise an ambiguity, since it is apparent on the face of the will which grandson the testator meant. [Channell, B. When it appeared that the testator had two grandsons of the same name, an ambiguity was raised in the will, and then parol evidence was admissible to shew which of his grandsons the testator meant.]

Collier appeared in support of the rule, but was not called upon to argue.

POLLOCK, C. B. The rule must be absolute. It appeared by the evidence that the testator, having two grandsons of the name of Henry Fleming, mentions one of them in the same clause with his son Edward, the father of one of the grandsons, and it is contended that there is no ambiguity in the will, and parol evidence is not admissible to explain which of the two the testator meant, because he mentions his grandson Henry in the same clause with his son Edward. That circumstance raises a conjecture, but by no means disposes of the question. Inasmuch as evidence might be given that Henry, the son of Edward, was a person whom the testator never saw, and of whose existence he was not aware, how can it be said that the clause in the will conclusively shews that the testator meant by his grandson Henry the son of the person whom he mentions in that clause? The moment it appeared by the evidence that the testator had two grandsons of the name of Henry, a doubt arose which the name itself did not solve, and therefore evidence [247] was admissible to shew that the testator had no intercourse with one of them; and inasmuch as the defendant was the testator's grandson, Henry, who lived with him, and concerning whom he made the declarations, in my opinion the jury have properly found a verdict for the defendant.

BRAMWELL, B. I am of the same opinion. The argument on behalf of the plaintiff is that there is no ambiguity on the face of the will, although it appears that the testator had two grandsons of the name of Henry, and that extrinsic evidence is not admissible to shew which grandson he meant. I cannot assent to that. The argument founded on the word "descend" may be altogether disregarded, because the testator afterwards uses the same word in the sense of "go to," not in the sense of "descending" from father to son. What reason is there for saying that when the testator uses the words "my grandson Henry Fleming," it is to be presumed on the face of the will that he meant the grandson who is the son of his previously named son, Edward Fleming? If it cannot be presumed on the face of the will, as soon as it appears that there are two grandsons of the name of Henry there is an ambiguity on the face of the will, and parol evidence is admissible to explain it.

With respect to the authority relied on, *Doe d. Westlake v. Westlake* (4 B. & Ald. 57), that case is very different. There the words were, "I give, devise, and bequeath unto Matthew Westlake, my brother, and to Simon Westlake, my brother's son, all that my fee simple message," &c.; and there is good reason for believing that by the words "my brother's son," the testator meant the son of that brother whom he had previously mentioned; for, if he did not, he would have said "the son of my other brother" (naming him). If the devise had been "unto Matthew Westlake, my brother, and to Simon [248] Westlake," my nephew, I am not sure that I should have come to the same conclusion. Here the words "my grandson Henry Fleming" do not mean Edward's son, because the testator, if he had meant the plaintiff, and not his other grandson, would in some way have connected the plaintiff with his son Edward. For these reasons I am clearly of opinion that the rule ought to be absolute.

CHANNELL, B. I am also of opinion that the rule ought to be absolute. I am not dissatisfied with the verdict of the jury upon the evidence received; and the only question is, whether it was admissible. That depends on whether there is any ambiguity on the face of the will. It is said, that although it was proved that the testator had two grandsons of the name of Henry Fleming, there is no ambiguity on the face of the will, because the testator has used the words "descend to my grandson" Henry. But looking at the way in which the word "descend" is used in the subsequent clause, no importance can be attached to it. It was also argued that there was no ambiguity, because there was a devise to the testator's son Edward for life, and after his death to the testator's grandson Henry; but those are separate devises, and all that can be said is that the one follows the other. The case of *Doe d. Westlake v. Westlake* is distinguishable, for the reasons given by my brother Bramwell.

Rule absolute.

[249] BRADBURY AND OTHERS v. MORGAN AND ANOTHER, Executors of Joseph Manuel Leigh, deceased. June 4, 1862.—Guarantie as follows:—"I request you will give credit in the usual way of your business to L., and in consideration of your doing so I hereby engage to guarantee the regular payment of the running

balance of his account with you, until I give you notice to the contrary, to the extent of 100l. sterling." Held, that the guarantie was not a bare authority, but a contract, and therefore the executor of the guarantor was liable for goods supplied after his death.

[S. C. 31 L. J. Ex. 462; 8 Jur. (N. S.) 918; 10 W. R. 776; 7 L. T. 104. Dissented from, *Harriss v. Fawcett*, 1873, L. R. 15 Eq. 313. Referred to, *Harriss v. Fawcett*, 1873, L. R. 8 Ch. App. 868. Applied, *Dodd v. Whelan*, [1897] 1 Ir. R. 575.]

Declaration. That heretofore, and in the lifetime of the said J. M. Leigh, the said J. M. Leigh contracted, guaranteed, and agreed with the plaintiffs, in the guarantie hereinafter mentioned called Messrs. Bradbury, Greatorex and Co., in the words and figures following, that is to say:—

"3 George Yard, Lombard St.,
"London, May 3, 1858.

"Messrs. Bradbury, Greatorex and Co.

"Gentlemen,—I request that you will give credit in the usual way of your business to Henry Jones Leigh, of Leather Lane, Holborn; and in consideration of your doing so, I hereby engage to guarantee the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of one hundred pounds sterling.—I remain, &c.

"J. M. LEIGH.

"Limit £100."

And the plaintiffs accordingly from time to time credited the said H. J. Leigh in the usual way of their business; and the running balance of the said H. J. Leigh's account with the plaintiffs afterwards, and after the death of the said J. M. Leigh, and before the plaintiffs had any notice or knowledge of such death, and before any such notice as in the said guarantie was and is made and provided had been given to the plaintiffs, amounted to a large sum, to wit 100l., and was and is due and unpaid to the plaintiffs; and [250] all things have been done and happened, and all times have elapsed, necessary to entitle the plaintiffs to maintain this action.

Plea. That the said running balance of the said H. J. Leigh's account was and is due to the plaintiffs for goods sold and delivered by them, and credits for the same given by them in the usual way of their business, to the said H. J. Leigh, and not otherwise; and that the said goods were sold and delivered, and the credits in respect thereof given, and the debts constituting the said balance of the said account were, and each of them was, contracted and incurred after the death of the said J. M. Leigh, and not in his lifetime.

Demurrer and joinder therein.

Beresford (with whom was Hume Williams), in support of the demurrer. The defendants are liable, as executors, for goods supplied by the plaintiff after the death of the guarantor. In *Williams on Executors*, p. 1557, 5th ed., it is said: "The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other duty, that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator." Also, at page 1558, it is said: "And there is no difference between a promise to pay a debt certain, and a promise to do a collateral act which is uncertain and rests only in damages, as a promise by the testator to give such a fortune with his daughter, to deliver up a bond, &c. For wherever in those cases the testator himself is liable to an action, his executors shall be liable also." Again, at page 1559, it is said: "It is clear, also, that in many cases a liability may accrue against the executor or administrator, [251] after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein. Thus the executor is liable upon a bond which becomes due, or a note payable, subsequently to the death of the testator. So, where a man covenanted that A. should serve B. as an apprentice for seven years, and died; it was holden that if A. departs within the term, a writ of covenant lies against the executor of the covenantor, without naming him. So if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this contract." In *Siboni v. Kirkman* (1 M. & W. 418, 423), Parke, B., said: "Executors are responsible on all the

contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death; that is this, that they are not liable in those cases where personal skill or taste is required." That doctrine was acted on in *Wentworth v. Cock* (10 A. & E. 42), where the plaintiffs had agreed to supply the intestate with a quantity of slate-blocks monthly at a fixed price, and the intestate had engaged to receive any quantity not exceeding 200 tons per month; the agreement to be in force until the 1st of January, 1858; and it was held that the plaintiff might sue his administrator for refusing to receive slate sent after the death of the intestate, and before the 1st of January, 1858. Here the guarantie is to continue in force until determined by notice. There is the following passage in Williams on Executors, p. 1604, 5th ed., which is no doubt at variance with the position contended for:—"If a man enters into a continuing guaranty and dies, his executor, it seems, is not liable upon it for advances made after the testator's death, which operates as a revocation." That passage was first introduced in the 4th edition (p. 1506), and the authority cited in support of the position [252] is Smith's Mercantile Law, p. 451, 5th ed. There the position is stated in similar terms, and the authorities cited in support of it are, *Potts v. Ward* (1 Marsh. 366); *Cooper v. Johnson* (2 B. & Ald. 394); *Kinguel v. Knapman* (Cro. Eliz. 11), and *Joyner v. Vyner* (Sir T. Raym. 415). *Potts v. Ward* was not the case of a contract, but of a reference to arbitration; it merely decided that the authority of an arbitrator is determined by the death of either party before the award. *Cooper v. Johnson* is a decision to the same effect. *Kinguel v. Knapman* and *Joyner v. Vyner*, so far from supporting the position laid down, are authorities against it. *Kinguel v. Knapman* was an action of debt on the bond of the defendant for the performance of an award by a third person; and it was held no answer that such person died before the time mentioned in the award for payment of the sum awarded. *Joyner v. Vyner* was an action of debt against the defendant, as heir on the bond of his father conditioned for payment to the plaintiff of a sum of money on a day named, if the obligor failed to prove before that day that a bill of exchange, for which he had credit in his accounts with the plaintiff, had been paid. The obligor died before the day appointed for payment of the money, but the heir was nevertheless held liable on the bond.

J. Brown, in support of the plea. The position laid down in Smith's Mercantile Law, p. 451, 5th ed., is correct; and this guarantie was revoked by the death of the testator. No doubt, there are many contracts which cannot be performed by representatives, such as contracts with authors or scientific persons. This case, however, is distinguishable from others by the peculiar terms of the guarantie. It amounts to a mere request, and like every other request [523] is revocable by death. The guarantor in effect says, "I request you to go on supplying goods until I give you notice to the contrary." The notice must have reference to the future supply of goods, for it cannot determine the contract so as to exonerate the guarantor from liability in respect of goods previously supplied. The guarantie must therefore be read as a mere request or authority to go on supplying goods until that authority is revoked. It is purely personal, for the guarantor says until "I give you notice." [Pollock, C. B. That means "until you receive notice."] Where a man, who had for some years cohabited with a woman who passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad; it was held that the woman might have the same authority to bind him by her contracts for necessities as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received: *Blades v. Free* (9 B. & C. 167). Littledale, J., there said: "There was no continuing implied contract made by the deceased, but an authority to the woman with whom he cohabited to make contracts for him from time to time, and at his death that authority ceased. [Pollock, C. B. That case turned on this, that the man having held out to the world that this woman was his wife, she had an implied authority to pledge his credit for necessities supplied to her and her family, but he having died the authority was at an end. There is a wide distinction between a mere authority and a contract.] Where a man, who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad; it was held that the wife was not liable for goods supplied to her after his death but before information of it had been [254] received, she having had originally full authority to contract, and having done no

wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge relating to it; the revocation itself being the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties: *Smout v. Ilbery* (10 M. & W. 1). [Pollock, C. B. The "request" may be struck out of the guarantie. Suppose it began thus: "In consideration of your giving credit in the usual way of your business to Henry Leigh, I hereby undertake to guarantee you the regular payment of the running balance of his account with you, until I give you notice to the contrary," the legal effect would be the same.] In *Story on Agency*, sect. 488, it is said with reference to revocation of authority by death: "The doctrine seems to be a natural deduction or presumption of the actual intention of the parties. No doubt, a notice would not determine the liability of the executors for goods already supplied, because there was a duty on the part of the testator to pay for them. The distinction between a vested duty and a mere collateral act is pointed out in *Joyner v. Vyner* (Sir T. Raym. 415). In *Mason v. Pritchard* (12 East, 227), the Court construed the guarantie as continuing until determined by notice. By the Scotch law, a guarantor may determine his liability by notice; but here the guarantor has expressly reserved that right, and his death operates as a notice. [Pollock, C. B. The mere fact of insanity would not be a revocation of such a guarantie.] This case is to some extent new in its circumstances, and it is for the convenience of all parties that a continuing guarantie of this description should not operate beyond the life of the guarantor.

Beresford was not called upon to reply.

[255] POLLOCK, C. B. We are all of opinion that the plaintiff is entitled to judgment. No doubt, if this were merely an implied contract which arose from a request, it would be revoked by the death of either party. *Blades v. Free* (9 B. & C. 167) is an authority that a request is revoked, but a contract is not put an end to, by death. The language here used, "I request you will give credit," is a mere mode of civil expression, and the party using it never meant to request in that sense which Mr. Brown has suggested. Instead of saying "I will thank you to give credit;" or "you will oblige me by giving credit," he says, "I request you will give credit." Whether his death was contemplated, I do not know. The probability is, that if it had been suggested the plaintiffs would have required some notice before the guarantie was determined; but this is a contract, and the question is whether it is put an end to by the death of the guarantor. There is no direct authority to that effect; and I think that all reason and authority, such as there is, are against that proposition, and that the plaintiffs are therefore entitled to judgment.

BRAMWELL, B. I am of the same opinion. The general rule is thus stated in *Williams on Executors* (page 1559, 5th ed.):—"The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every bond, or covenant, or contract of the deceased includes them, although they are not named in the terms of it; for the executors or administrators of every person are implied in himself." The only exception is where the contract is in respect of the personal qualification of the testator or intestate, and that does not apply to the present case. If the guarantie had been in these terms:—"I request you to deliver to A. to-morrow morning goods of [256] the value of 50l., and in consideration of your so doing I will pay you," and before the morning the guarantor died, but the goods were duly delivered; I can see no reason why the personal representative of the guarantor should not be liable; and whether a guarantor says, "deliver some goods on a given day," or "deliver a quantity of goods upon any day or days," can make no difference. Very likely a tradesman, who would not trust in the first instance without a guarantie, would not deliver any goods after the death of the guarantor, but, however that may be, the executor must give some timely notice in order to put an end to the contract. Mr. Brown relied on the words "I request you will give credit," but they are of no importance; for this is not a case of authority given by the deceased.

With respect to the passage in *Williams on Executors*, p. 1604, it is certainly not supported by any authority. It is there said, if a man enters into a continuing guaranty and dies, his executor, it seems, is not liable for advances made after the testator's death, which operates as a revocation. Reference is made to *Smith's Mercantile Law*, p. 451, 5th ed., but not to the authorities there cited; and if those authorities be looked at, there is no pretence for saying that they justify the proposi-

tion laid down in that book. Therefore it seems to me that there is no authority to prevent us from deciding in favour of the plaintiff.

CHANNELL, B. I am also of opinion that the plaintiff is entitled to judgment. Whether the parties contemplated that the contract should extend beyond the life of the guarantor, is not the question. I agree with the Lord Chief Baron that the question is whether this is a case of mere authority or a contract. I am of opinion that it is a contract, and if so, it is not revoked by the death of the guarantor. A mere authority is determined by death, [257] but in the case of a contract death does not in general operate as revocation, but only in exceptional cases, and this is not within them.

Judgment for the plaintiffs.(a)

JOHN STUBS AND PETER STUBS v. ELIZABETH STUBS. June 4, 1862.—A. obtained from the Heralds' College a grant of arms, to be borne by him and the descendants of his brother. His brother had two sons, the elder of whom was heir-at-law of A., and the younger his executor with another person. A. devised all his household goods and effects to his wife, and she took possession of the grant of arms. Held, that the two nephews of A. had not such an exclusive interest in the grant of arms as to enable them to maintain an action of detinue for it against the wife of A.—Semble, that even if the executors were entitled to the grant of arms, the Court could not amend the writ, under the 19th section of the Common Law Procedure Act, 1860, so as to give judgment for the one plaintiff who was executor, since the other executor ought to have been joined.

[S. C. 31 L. J. Ex. 510. Referred to, *Hannay v. Smurthwaite*, [1893] 2 Q. B. 412.]

The declaration stated that the defendant detained from the plaintiffs a certain deed of a grant or patent of arms belonging to the plaintiffs, to wit, a patent of arms, dated the 20th day of February, 1849, and granted by Garter Principal King of Arms and Norroy King of Arms of the north part of England from the river Trent northwards, to one Joseph Stubs, deceased; and the plaintiffs' claim of return of the said deed of the said grant or patent of arms, or its value.

Pleas. First, that the defendant did not detain the said deed as above alleged. Secondly, that the said deed was not nor is the plaintiffs' as alleged.

The replications took issue on the pleas.

The case came on for trial before Martin, B., at the London Sittings after last Hilary Term, when by consent a verdict was taken for the plaintiffs, subject to the following case, the Court having power to draw such inferences of fact as a jury would have drawn:—

[258] Joseph Stubs, of Warrington, in the county of Lancaster, having by his own industry and success in trade acquired a considerable fortune, and having been placed in the commission of the peace for that county, but having no right to bear arms independently of the grant of arms hereinafter mentioned, applied to the Heralds' College for a grant of arms. Joseph Stubs had not at the time of this application any lineal descendants of his own, but there were lineal descendants then living of his deceased brother Thomas Stubs, namely, two sons, the plaintiffs in this action, and a daughter, who has since married and is now under coverture.

The following is a copy of the grant:—

To all and singular to whom these presents shall come, Sir Charles George Young, Knight, Garter Principal King of Arms, and Edward Howard Howard Gibbon, Esquire, Norroy King of Arms of the north parts of England from the river Trent northwards, send greeting: Whereas Joseph Stubs, of Warrington, in the county Palatine of Lancaster, Esquire, in the commission of the peace for the said county Palatine, hath represented unto the most noble Henry Charles Duke of Norfolk, Earl Marshal and Hereditary Marshal of England, Knight of the most noble Order of the Garter, that he is desirous of bearing armorial ensigns with unquestionable authority; and therefore requested the favour of his Grace's warrant for our granting and assigning such arms and crest as may be proper to be borne by him and his descendants, and by the descendants of his brother Thomas Stubs, late of Warrington afore-

(a) See *Offord v. Davies*, 12 C. B. N. S. 748.

said, gentleman, deceased, with due and proper differences, according to the Laws of Arms. And forasmuch as the said Earl Marshal did by warrant under his hand and seal, bearing date the 12th day of February instant, authorize and direct us to grant and assign such arms and crest [259] accordingly: Now know ye therefore, that we the said Garter and Norroy, in pursuance of his Grace's warrant and by virtue of the letters patent of our several offices to each of us respectively granted, do by these presents grant and assign unto the said Joseph Stubs the arms following, that is to say, Or three piles, two issuant from the chief and one from the base azure, each charged with a pheon of the field; and for the crest, on a wreath of the colours issuant from flames, a dexter arm embowed in armour grasping a battle axe all proper, pendant from the hand by a chain or an escocheon sable charged with a pheon, as in the arms as the same are in the margin hereof more plainly depicted, to be borne and used for ever hereafter by him the said Joseph Stubs and his descendants of his brother Thomas Stubs deceased, with due and proper differences according to the Law of Arms. In witness thereof we, the said Garter and Norroy Kings of Arms have to these presents subscribed our names and affixed the seals of our several offices this 28th day of February, in the 12th year of the reign of our sovereign lady Victoria, &c., and in the year of our Lord 1849. Charles George Young, Garter. E. H. Howard Gibbon, Norroy.

Extracted from the records of the College of Arms, London, and examined therewith this 16th day of December, 1861. Albert W. Woods, Lancaster Herald. G. E. Adams, Rouge Dragon.

The grant is made in the manner and form in which the Heralds' College (who are a body corporate by virtue of various charters from the Crown) have, on payment of certain fees, from time immemorial been accustomed to grant arms. The fees paid by Joseph Stubs for the grant amounted to 76l. 10s., besides 3l. 3s. for charges of herald painters in connection therewith.

[260] Joseph Stubs died without issue, and by his will, dated 20th July, 1860, he appointed his nephew Peter Stubs, son of his late brother Thomas Stubs, and James Marson, trustees and executors of his will, and he bequeathed (so far as material to the present case) as follows:—"I give and bequeath absolutely unto my wife Elizabeth all the household goods, wine, plate, plated articles, linen, china, books, prints, pictures, carriages, horses, farming stock and household effects whether of use or ornament, and which shall belong to me or be in or about any dwelling-house or dwelling-houses occupied by me at the time of my decease." And he gave, devised and bequeathed to his said trustees, their heirs, executors and administrators all the rest of the real and personal estate whatsoever and wheresoever of which he might be seized or possessed at the time of his decease or over which he might have any power of disposition, upon trusts for sale and conversion.

The defendant who is the testator's wife Elizabeth, mentioned in the above bequest, after the testator's death took possession of the grant of arms, which was in an iron safe in the testator's dwelling-house at Fordsham, which he occupied at the time of making his said will and until and at the time of his death, to which safe she had access with the knowledge and sanction of the testator's executors for the purpose of securing her own articles of value, and subsequently refused to deliver it up.

The executors and trustees of the will, one of whom is the plaintiff Peter Stubs, assented generally to the bequest to the defendant contained in the said will, and allowed the defendant to take possession of and sell the furniture and other articles in the said house; but, unless as a matter of law the said grant of arms is comprised in the said bequest and passes to the defendant by virtue thereof, the executors [261] are not to be taken to have assented in any way to the defendant's keeping possession of or having the same.

The plaintiffs are the only sons and male lineal descendants of the testator's brother Thomas Stubs mentioned in the grant, John Stubs being the elder and Peter Stubs the younger son of the said Thomas Stubs.

The questions for the opinion of the Court are:—

First: Whether the deed or grant of arms passed by or was comprehended in the above bequest to the defendant in the said will of her husband. If the Court should be of opinion that this question ought to be answered in the affirmative, the present verdict is to be set aside and a verdict entered for the defendant.

Secondly: Whether, if the first question ought to be answered in the negative, the defendant is still entitled to retain the deed during her life. If the Court should be of opinion that this question ought to be answered in the affirmative, the present verdict is to be set aside and a verdict entered for the defendant.

Thirdly: If the first and second questions ought to be answered in the negative, then the present verdict is to stand as a verdict for both the plaintiffs or for the plaintiff John Stubs, unless the Court shall be of opinion that the property in the grant passed to the trustees or executors under the will of the said Joseph Stubs, and in that case it is to be entered and the deed given up as the Court shall direct.

Brett (Crompton Hutton with him), for the plaintiffs. The grant of arms did not pass to the defendant under the will of her husband; neither is she entitled to retain it during her life. [Pollock, C. B. She has a right to keep it in order to support her claim to bear her husband's arms.] [262] This is the grant of an honor which descends to the heir of the grantee. Lord Coke, in his Commentary on the rule in Littleton, sect. 31, that a gift of lands or tenements to another and to his heirs, male or female, confers a fee simple, says (Co. Lit. 27 a.): "This rule extendeth but to lands or tenements, and not to the inheritance that noblemen and gentlemen have in their armories or armes. For where the nobleman or gentleman hath a fee simple in his armories or armes, yet is the same descendible to the heirs male lineal or collateral. For albeit a female be heire at the common law, yet the shield, armories, and armes descend unto them that are able to beare them (farre exceeding the nature of gavelkind, but with several differences). And all the females of that family in respect that they be of the same blood, may in a losenge or under a curtaine manifest of what family they be by expressing the armories and armes belonging to that family, and the husbands of them may impale them or quarter them with their owne, as the case shall require." Again, in his Commentary on Littleton, sect. 210, where it is said that the custom of gavelkind "standeth with some reason; for every son is as great a gentleman as the eldest son is," Lord Coke says (Co. Lit. 140 b.): "By this it appeareth, that gentry and armes is of the nature of gavelkinde; for they descend to all the sons, every son being a gentleman alike. Which gentry and armes do not descend to all the brethren alone, but to all their posterity. But yet, jure primogenituræ, the eldest shall beare, as a badge of his birthright, his father's armes without any difference, for that, as Littleton saith (section 5) he is more worthy of blood." In Com. Dig. tit. "Biens" (B), in treating of goods and chattels which go to the heir, it is said: "So, a coat-armour, pennons, tomb-stone, and monuments in a [263] church in honor of the ancestor. . . ." "An ancient horn, where the tenure of the land is by cornage:" *Pusey v. Pusey* (1 Vern. 273). The heir may maintain an action of trespass against a person who removes from a church ensigns of honor, as coat-armour: per Coke, C. J., in *May v. Gilbert* (2 Bulst. 150). This grant of arms could not pass to the defendant under any of the words of the will. It is neither "household goods" nor "household effects." Then, if it did not pass to the defendant, the plaintiff John Stubs, who is the elder son of the grantee's brother, is entitled in his own right, or if not Peter Stubs is entitled as executor. Under the 19th section of the Common Law Procedure Act, 1860, the Court may give judgment in favour of either of the plaintiffs who is entitled to recover.

Grove (Thrupp with him), for the defendant. The defendant is entitled to retain this deed during her life. It is not disputed that the right to the shield descends to the heir, but the right to bear arms is distinct from the right to the possession of this document. It is nothing more than an exemplification of a grant of arms recorded in the Heralds' College. It states that it was "extracted from the records of the College of Arms, London, and examined therewith." If the plaintiffs have any right to bear the arms they may at any time obtain a copy of this grant from the Heralds' College: Hearne's Antiquaries' Discourses, chap. xlv. xlvii. The visitation books of the Heralds' College are evidence, because they are originals: *Matthews v. Port* (Comber. 62); but this document, being a copy, would not be evidence: *King v. Foster* (Sir T. Jones, 224). If the claim is founded on the right to bear the arms, it is clear that the [264] plaintiffs are not entitled to bear them without some difference: Dugdale's Antient Usage of Arms. But assuming that this document is in the nature of a title deed, if the plaintiffs are entitled to recover it from the defendant, all the descendants of the grantee who had a right to bear the arms would have the same right to recover it. The defendant having possession of this document has a right to retain it, unless

the plaintiffs can shew a better right: *Yea v. Field* (2 T. R. 708). As a general rule, where several persons are equally entitled to a deed, the one who has possession of it is entitled to retain it: *Dixon on Title Deeds*, vol. 1, c. 3. (He was then stopped by the Court.)

POLLOCK, C. B. My brother Bramwell and myself are of opinion that this grant of arms is a sort of family document in which every member of the family is interested; and that whoever has possession of it is entitled to keep it, but may be called upon by the others to produce it. It seems to me that detainee will not lie to recover it from anyone interested in it. The defendant has a right to keep it for the purpose of justifying her use of the arms. It is not the sort of chattel which anyone can specifically claim, as a peer would the patent of his peerage; it is a right to be enjoyed by all persons mentioned in the grant or connected with the grantee by relationship. If the grant had been to the husband alone, it is clear that the defendant would have had a right to the document as against the executors; and I think that now she has such a right. If the plaintiffs think it of sufficient importance to file a bill in Chancery to prevent the defendant from defacing or parting with it, they can do so; but that is a matter with which we have no concern.

[265] BRAMWELL, B. I am of the same opinion. It is clear that this action is not maintainable by the plaintiffs, or either of them, as executors, because one of the plaintiffs is not an executor; and if he is left out, there remains the other plaintiff who is an executor, yet not the only one; and the plaintiffs by declaring in this way prevent the defendant from pleading in abatement the non-joinder of the other executor, which she would be entitled to do if the one plaintiff who is executor had sued alone. It could never have been the intention of the legislature, when they provided that one plaintiff might be struck out of a writ and judgment given for the other, that judgment should be given for one plaintiff who could not have maintained the action if he had in the first instance been the sole plaintiff.

That both the plaintiffs are entitled to recover cannot be contended for a moment. But then it is said that the eldest male representative is entitled to take possession of the document and bear these arms; but I shall content myself with saying that Mr. Brett has not satisfied me that is so. I therefore think that the plaintiffs have not in any view established their case, and that our judgment ought to be for the defendant. Judgment for the defendant.

[266] THE ATTORNEY GENERAL v. ABDY. June 13, 1862.—A., an officer of Customs subscribed to the "Customs' Annuity and Benevolent Fund" for the capital sum of 500l. This Fund, which was established by the 56 Geo. 3, c. lxxiii., is raised on the principle of life insurance by the quarterly subscriptions of the officers of Customs, a contribution of poundage deducted from their salaries, and the profits derived from the publication of the "Customs Bills of Entry." By the rules and regulations made under the authority of that Act, if an annuity be insured for the benefit of the widow of a subscriber, equal to one third of the whole insurance, the subscriber is empowered to direct by his will or instrument in writing that the capital money insured shall be applied or paid in any manner or proportion he may think proper for the benefit of his widow, children, or relatives, or his nominee if duly admitted by the directors of the Fund. Where there is no widow or nominee, the whole capital money is subject to the directions of the subscriber. If the subscriber shall not have applied it, it becomes the property of his children. If no child, it is to be appropriated to increase the widow's annuity. If no widow or child, the capital money is to be paid to the personal representatives of the subscriber, to be by them applied according to the Statute of Distributions. A., who was never married, by his will gave the capital money to his sister. Held, that she took a succession within the meaning of the 2nd section of the Succession Duty Act, 1854, and that A. was the predecessor; and consequently she was chargeable with duty on the capital money.

[S. C. 32 L. J. Ex. 9; 8 Jur. (N. S.) 798; 6 L. T. 756. Discussed, *In re Phillips' Insurance*, 1883, 23 Ch. D. 245; *Caddick v. Highton*, [1901] 2 Ch. 476, n. Distinguished, *In re Maclean's Trusts*, 1874, L. R. 19 Eq. 275. Dictum explained, *Urquhart v. Butterfield*, 1887, 36 Ch. D. 73.]

Information in equity by the Attorney General (so far as material) as follows :—

1. The object of this information is to obtain from the defendant payment of the succession duty which has become payable in respect of the succession of the defendant under the disposition made by her brother George Burlton Abdy, deceased, in a sum of 498l. 13s. 1d., being the amount of the capital money forthcoming by virtue of his insurance in the Customs' Fund, and placed at his disposal by the rules and regulations of the said Fund.

2. In the year 1816 was passed an act of parliament (56 Geo. 3, c. lxxiii.), intituled "An Act for establishing and regulating a Fund for the widows, children and relatives of officers or persons belonging to the Department of Customs in England," and by virtue of such Act, and immediately after its passing, directors and other officers, such as are mentioned in its provisions, were duly appointed, and a Fund, called "The Customs' Annuity and Benevolent Fund," was raised by means of quarterly contributions, and deductions from the salaries of officers and persons belonging to the Department of the Customs.

3. Rules, regulations and tables of rates of subscription [267] and payment for the management and regulation of the said Fund have from time to time been made, approved of, ratified and confirmed, as directed by the said Act; by the second section whereof they become and are made of the same force and effect as if they had been particularly enumerated and enacted in the Act.

4. The Fund is raised by subscription, upon the principle of life insurance, and together with the contribution of poundage granted by the Act forms a fund for the widows, children and relatives, and also the nominees of officers or persons belonging to the Department of Customs in England. Persons not relatives of subscribers may be admitted as their nominees, such admission taking place during the subscriber's lifetime, and being subject to be revoked by him at his will or annulled by the directors at their discretion when they have cause to believe that such admission has been procured in fraud of the principle and policy of the Fund. Nominees are entitled to such proportion only of the insurance as is directed by the subscriber in conformity with the regulations. The rates of annual subscriptions and payment are fixed by certain tables annexed to the rules. Insurances may be effected at the discretion of the directors on the life of any officer or clerk or other person employed in the Customs in England, and whose age is not less than sixteen years, for an annuity under Table A. (see p. 286), not exceeding 100l., and for a capital sum under Table B. (see p. 287), not exceeding 2000l., with power for any person to agree with the directors for paying up and liquidating his subscriptions in any limited number of years, the calculations for ascertaining the amount being made on the basis upon which the tables are constructed. The widow is the first object of the institution, and for her benefit an annuity may be expressly insured under Table A.; [268] and if the annuity so insured bear a certain proportion to the capital sum insured (one third, computing 10l. of annuity as equivalent to 100l. of capital money), then the subscriber may, by will or by an instrument in writing signed by him in the presence of a witness, and which, at the option of the subscriber, may be made absolutely irrevocable, direct the whole capital money to be applied in any manner or proportion he may think proper for the benefit of his widow, children, or relatives, or nominees. If an annuity or one of proper amount is not insured, then, after appropriating sufficient of the capital sum to make it good, the residue is to be applied as the subscriber shall in like manner direct. But in lieu of every 100l., so to be applied for the benefit of the widow the subscriber has the option of directing that the interest of not less than 200l. to be invested in Consols shall be paid to her, in which case, at her death the stock is to be at his disposal. In like manner, where the subscriber does not by will or other instrument direct the application of the money, it is to become the property of his children living at his death, in equal proportions, and the issue (per stirpes) then living of any that may be dead. If he leave no issue, then it is to be appropriated to increase the widow's annuity. If no widow or issue, then it is to belong to the persons entitled as next of kin according to the Statute of Distributions, and for the purpose of such application is to be paid to the subscriber's personal representatives. Where any capital money becomes the property of any infant it is to be invested in the names of the trustees of the Fund, who are to pay the interest to a trustee for the infant's benefit, and may advance to such trustee out of the capital such sums as they may think fit for the infant's maintenance or education.

5. The late George Burlton Abdy was an officer of Customs, and, as such, effected an insurance on his life for a [269] capital sum of 500l., payable out of the said Fund, upon the terms and conditions contained in the said act of parliament and the rules and regulations made pursuant thereto. And on the 16th day of July, 1855, the said George Burlton Abdy (who had not then and never had any wife or children, and who had not previously in any way directed the application or payment of the said capital sum) made his will in writing, duly signed and attested, so far as it is necessary for the purposes of this suit to state the same, in terms as follows:—"I give all that policy of assurance effected on my life with the Reliance Insurance Company, in King William Street, for the sum of 500l., and all that policy of assurance effected on my life in the Customs' Fund for the sum of 500l., and all moneys to become payable under the same policies respectively, whether now secured or by way of bonus accretion or otherwise, unto my sister Charlotte Mary Abdy absolutely, and I appoint her sole executrix of this my will."

6. On the 14th of September, 1856, the said George Burlton Abdy executed a codicil to his said will, by which he gave to his sister Charlotte Mary Abdy absolutely all his furniture and household effects, &c., and appointed Henry Pickering Clark executor of his will and codicil.

7. The said George Burlton Abdy died after the time appointed for the commencement of the Succession Duty Act, 1853, without having revoked his will; and the will with the said codicil thereto was, on the 27th day of October, 1856, duly proved by the said Henry Pickering Clark alone in the Prerogative Court of the Archbishop of Canterbury; and upon the death of the said George Burlton Abdy, his sister, the said Charlotte Mary Abdy became entitled to the capital money forthcoming by virtue of his insurance in the said Fund, as a succession derived from him under the disposition thereof made as hereinbefore [270] stated, and a duty at the rate of 3l. per cent. upon the value of succession became payable to her Majesty in respect thereof.

8. On the 18th day of December, 1856, the directors of the Customs' Annuity and Benevolent Fund paid to the said Charlotte Mary Abdy the whole of the capital money forthcoming by virtue of the insurance of the said George Burlton Abdy in the said Fund, amounting to the sum of 498l. 13s. 1d. sterling. But neither the said directors nor the said Charlotte Mary Abdy have or has ever paid any part of the duty payable in respect of the succession of the said Charlotte Mary Abdy in the said capital money, notwithstanding applications requiring them so to do.

Prayer (*inter alia*). That it may be declared that the defendant is chargeable with duty, at the rate of 3l. per cent. in respect of her succession, on the said sum of 498l. 13s. 1d.; and that the defendant may be decreed to pay such duty.

The answer of the defendant (so far as material) was as follows:—

1. I admit that George Burlton Abdy, who had been for many years an officer of Customs in England, died on the 6th day of October, 1856, after having made such will and codicil as in the said information mentioned, and that the said will with the codicil thereto was, on the 27th day of October, 1856, proved by Henry Pickering Clark, the executor in the said codicil named, in the Prerogative Court of the Archbishop of Canterbury.

2. To the best of my belief the said George Burlton Abdy was on or about the 6th day of January, 1849, admitted as a subscriber to the Customs' Annuity and Benevolent Fund for the capital sum of 500l. No policy of assurance for the said sum was ever executed or given to the said George Burlton Abdy, but having made an appli-[271]-cation upon a printed form, supplied by the secretary of the said Fund, he received a printed letter of acceptance, signed by the secretary and comptroller of the said Fund, and I have been informed and believe that his name was thereupon entered in the insurance book, kept at the office of the said Fund, as a subscriber for such capital sum as aforesaid. The said George Burlton Abdy paid the annual premiums in respect of the said sum down to the time of his death, when, as I was informed and believe, the capital money forthcoming by virtue of his insurance in the said Fund, after deducting the sum of 1l. 6s. 11d. for the premium and poundage then due thereon, amounted to 498l. 13s. 1d. sterling, and that sum was on the 18th day of December, 1856, under or by virtue of the rules and regulations then in force for the management of the said Fund, and the application of the capital moneys, forthcoming at the deaths of subscribers thereto, paid to me by order of the directors of the said Fund, without any deduction for succession duty or otherwise.

3. I admit that I have never paid any duty in respect of the said sum of 498l. 13s. 1d., because, as I am advised and submit, that under the provisions and regulations contained in the Act of Parliament (56 Geo. 3, c. lxxiii.), and the rules and regulations for the management of the said Fund, from time to time made and passed under the authority of the said Act, by virtue of which the payment aforesaid was made to me, no succession, according to the definition thereof contained in the Succession Duty Act, 1853, took place, and consequently no succession duty became payable.

4. The statements in the information respecting the said Act of Parliament (56 Geo. 3, c. lxxiii.) therein referred to, and the establishment and constitution of the Customs' Annuity and Benevolent Fund thereby authorized to be established, and the provisions for raising and maintaining the [272] said Fund, and the rules and regulations for the management thereof, and for the application and distribution of the capital moneys forthcoming from the same as alimentary provision for the widows and children of deceased officers of the Customs, or other claimants entitled thereto, are not, as I believe and submit, sufficiently or accurately set forth in the said information; and for greater certainty, I crave leave to refer to the said Act of Parliament, and to printed copies of the several rules and regulations and tables of rates of subscription and payment of the Customs' Annuity and Benevolent Fund, from time to time made and passed in pursuance of the said Act, and also to the following statements, which I am informed and believe contain a more accurate description and explanation of the objects, constitution and management of the said Fund than is contained in the said information.

5. In the year 1816 a project was set on foot, with the approval of the Board of Customs and the sanction of the Lords Commissioners of the Treasury, for the establishment of a Provident Institution or Benevolent Fund, by means of which the widows, children, and relatives of deceased officers and persons belonging to the department of Customs in England, who might not have been able out of their salaries or pay to make a sufficient or any provision for the future support of their families, might be relieved and preserved from absolute want.

6. The principal objects sought to be attained in the formation of the said institution were:—

First, to fix the annual payments or contributions to be made by the officers or other persons desirous of making a provision for their families by means of the fund, at such an amount as to bring them within the reach of all classes of officers and servants employed in the Department of Customs, whose salaries would generally be low during the [273] earlier periods of their services, and liable to considerable reduction on their final retirement or superannuation.

And secondly, to secure the absolute and entire benefit of the provision so to be made for the parties, for whose maintenance and support it was intended, free from all other claims or demands whatsoever.

7. In order to secure the first object, with a due regard to the security of the Fund, it was enacted, by the Act 56 Geo. 3, c. lxxiii., s. 4, above referred to, "that a contribution of poundage in aid of the general purposes of the Customs' Annuity and Benevolent Fund should be raised and collected in the port of London, and remitted from the outports, in the manner therein referred to, either by deduction or otherwise, out of the salaries payable to all the officers, clerks, or other persons of every rank, situation, or nomination whatsoever, who should not signify that they declined to make such contribution in manner directed by the said Act; and such contribution should be assessed for the first eight quarters, to be reckoned from the commencement thereof, or thenceforth from the first assessment of every officer, clerk, or other person, as aforesaid, appointed after the passing of the said Act to the said department of Customs, in respect of whom the said contribution of poundage is thereby declared to be and thereafter to continue to be compulsory, at the rate of twopence in every pound sterling, and in every fractional part of a pound sterling, and for every succeeding quarter the sum of one penny in every pound sterling, and in every fractional part of a pound sterling; but so that nothing in the said Act contained should authorize the taking any such contribution of poundage out of the day-pay allowance of any person employed in the Customs, or to the salary or sum awarded by way of compensation or superannuation to any officers, clerks, or other persons who might have belonged to the [274] said department; and the money which should be so collected as aforesaid should be paid over to such person or persons, or to such account,

as should be specified in the rules and regulations thereinbefore referred to in relation thereto. And therefore, all such contributions to such Fund should be raised, collected, paid over, laid out, accounted for, and applied according to such rules and regulations." And by rule 4 of the rules and regulations aforesaid, it is provided and declared, that "in order that the amount of insurance effected by subscribers may bear a proportion to the amount of contribution of poundage levied under the authority of the said Act upon their respective salaries, every subscriber shall be charged, over and above the amount of the subscription payable under the Tables A. and B., a sum of 2s. 1d. annually upon every annuity of 10l., and also upon every capital sum of 100l. insured; but the contribution of poundage shall be allowed in reduction of such additional charge."

8. In order to secure the second of the objects above mentioned, it was enacted, by the 11th section of the said Act, that "in order to insure to the widows of the subscribers, or any other claimants on the said fund, the full benefit intended by the said Act as alimentary provision for the widows or other claimants entitled thereto, no annuity or sum of money payable to any widow or other claimant under any of the provisions of the said Act should be assignable, except with the permission of the said directors, or liable to be affected by arrestment, or otherwise attachable by any creditor, or be subject to the *jus mariti* of any husband with whom any such widow or other claimant might intermarry, or be subject in any manner to any debts, or deeds, or control of any such husband; but the same should be paid to each widow, or other claimant entitled thereto, upon her own receipt only, notwithstanding such arrestment, attachment, or marriage."

[275] 9. In order to obtain further assistance to the fund without increasing the annual subscription of the members, and thereby to adapt it more completely to the circumstances of the persons for whose benefit it was chiefly intended, it was thought desirable to provide additional sources of profits, besides the general contribution of poundage authorized by the said Act, and the ordinary annual payments of subscribers.

10. With that view the attention of the directors of the said Fund (who were themselves officers in the various departments of the Customs, and whose services from the first establishment of the Fund have in all respects connected with its management, as also with the Bill of Entry Office hereinafter referred to, been entirely gratuitous), was soon after the passing of the said Act directed to two periodical publications, called "The Customs Bills of Entry," issued at the ports of London and Liverpool respectively, and containing various accounts relating to the imports and exports of merchandise into and from the said ports, which had for many years previously been published by or on behalf of the Clerk of the Bills of His Majesty's Customs, under the powers belonging to his office, and from the sale of which considerable profits were derived.

11. The office of clerk of the bills of His Majesty's Customs had been then for upwards of 100 years held under grants thereof made from time to time by successive letters patent under the Great Seal of Great Britain whereby the person for the time being holding the said office was authorized, under due control, to have access to the books and documents kept by the officers of the Customs, and to extract therefrom the particulars of all imports, exports, and shipping into and out of the different ports of England and Wales, and to publish the same for the use and information of the public.

[276] 12. The directors of the Customs Fund having, in the year 1819, with the sanction of the Lords Commissioners of Her Majesty's Treasury, obtained a lease of the said office, to be granted to them by the patentee thereof, for the benefit of the said Fund, and having thereby obtained the management and control of the publication of the bills of entry, caused divers important improvements to be made in the said publications, and thereby so greatly enhanced their public utility, and consequently so increased the profits derived therefrom, that ever since that time a considerable annual income has been obtained by the means aforesaid, and applied in aid of the contributions of poundage authorized by the said Act of the 56 Geo. 3, c. lxxiii., for the benefit of the subscribers to the Customs Annuity and Benevolent Fund.

13. In the year 1846, the then existing patent under which the said office was holden being about to expire, a memorial was presented to the Lords Commissioners

of Her Majesty's Treasury by the then directors of the Customs' Annuity and Benevolent Fund and the patentee of the said office, praying that their lordships would be pleased to recommend the grant of a new patent to the directors of the said fund for the benefit of the subscribers thereto, upon the terms and subject to the conditions therein mentioned or referred to, and accordingly by letters patent under the Great Seal of Great Britain, bearing date the 1st day of August, 1846, the said office or place of Clerk of the Bills of the Customs of and for all goods and merchandise from time to time to be imported into and exported out of the United Kingdom of Great Britain and Ireland, with all the powers, privileges, and emoluments thereto belonging, was granted to the said directors and their successors, directors for the time being of the said Fund, from the 15th day of July, 1848, for the term and subject to the conditions [277] therein mentioned, to the intent nevertheless that the said place or office, and all the sums of money, fees, allowances, wages, and rewards thereto belonging, or therewith received or enjoyed, should be held, received, and taken by the said directors and their successors in trust for the sole use and benefit of the Customs' Annuity and Benevolent Fund, and for no other use, trust, or purpose whatsoever.

14. Since the grant of the said last mentioned letters patent, the directors of the Customs' Fund have, at great expense, and by means of the peculiar advantages possessed by them of superintending the publication of the said bills of entry, considerably increased their circulation; and they have also established similar publications at other parts of the United Kingdom of Great Britain, containing important information to all persons engaged in mercantile pursuits, whereby the profits derived from the said office have been greatly increased; and all such profits have from time to time, in pursuance of the provisions of the said letters patent, been carried to the credit of the Customs' Annuity and Benevolent Fund, and apportioned, with the other profits accruing to the said Fund, among the subscribers thereto, according to computations made of their respective claims on the Fund, by virtue of their assurances, in the manner directed by rule 15 of the rules, regulations, and table of rates of subscription and payment from time to time in force for the management of the said Fund.

15. I have been informed and believe, that the assistance obtained to the said Fund from the profits accruing in manner aforesaid from the publications aforesaid, has been the chief means of enabling the great bulk of the subscribers thereto to secure the benefits of the said Fund for their families and relatives, and that by means of such assistance the directors of the said Fund have been enabled so to reduce the number of annual payments required from sub-[278]-scribers, as in the great majority of cases to free them from all further payments at the usual period or age of retirement or superannuation. By the rules in force from 1827 to 1854, the profits awarded to subscribers were applied in limitation of the estimated number of their prospective annual subscriptions, if payable for the whole term of life, or in reduction of the number of such annual subscriptions where the same were already limited, and in the event of such annual subscriptions becoming ultimately discharged, in an equivalent increase of the annuities or capital moneys insured; but, by rule 15, as altered in 1854, an option was conferred upon subscribers to have the profits awarded to them applied, first in an equivalent increase to their insurances, or secondly, in reduction of the amount of their annual subscriptions, or thirdly, in limitation of the estimated number of their prospective subscriptions, if payable for the whole term of life, or in reduction of the number of such subscriptions, where the same are already limited, and in the event of such subscriptions being ultimately discharged, in an equivalent increase of their insurances.

16. I have been informed and believe it to be the fact, that the profits derived to the Fund in each year from the contributions of poundage, and the publications of the Bill of Entry Office, together amount upon an average to upwards of one-third of the sums received for annual premiums or subscriptions from the members insured, and form nearly one-fourth part of the total receipts from all sources accruing to the Fund in each year. It appears also from a report of the Customs Fund, published by order of the directors in the year 1856, that among the subscribers whose names were then standing on the books of the Fund, there was scarcely one member who had retired from the service at the usual period or age of superannuation, and who had applied his profits in reduction of the number of annual [279] payments, who was not then

entirely free from any further payment of premiums during the remainder of his life ; whilst it also appears, from the same report, that the additions from time to time made to the capital moneys forthcoming at the deaths of subscribers by virtue of their insurances in the said Fund, have been and are rendered, by the means aforesaid, far larger than the ordinary accumulations of the annual payments or premiums in respect of such insurances would allow of being made.

17. For the reasons and under the circumstances herein stated, I am advised and submit, that the said George Burlton Abdy had no property or interest whatever in the capital money forthcoming at his death by virtue of his insurance in the said Fund ; that the said capital money was not in any respect placed at his disposal by the rules and regulations of the said Fund as alleged by the said information ; and that he had not even a limited power of appointment over the same under any disposition taking effect upon the death of any person dying after the time appointed for the commencement of the Succession Duty Act, 1853, by the exercise of which I can be deemed to have taken the said sum of 498l. 13s. 1d. as a succession derived from the said George Burlton Abdy, or from any other person creating the said alleged power as predecessor ; and I submit that I am not liable to pay any succession duty in respect of the sum in the said information in that behalf mentioned.

The Attorney General, the Solicitor General, Locke and Hanson, for the Crown. The defendant is liable to pay succession duty. She became entitled to this money under the will of her brother, an officer of the Customs, who, by reason of his contribution to the "Customs' Annuity and Benevolent Fund" acquired the right to dispose of it. The Fund [280] was established under the provisions of the 56 Geo. 3, c. lxxiii. By section 1,(a) after reciting "that the establishment and regulation of a Fund for

(a) Enacts : "That all the established officers, clerks, and other persons permanently employed in the department of the Customs in the port of London, who shall have signed a notice in the form in the Schedule to this Act annexed marked A, signifying that they accede to the contribution of poundage authorized by this Act in aid of the general purposes of the Customs Annuity and Benevolent Fund, and shall have delivered such notice to the person to be appointed by the Commissioners of the Customs to receive the same, shall meet on some day and at some time and place to be appointed for that purpose by the Commissioners of the Customs, and which the said Commissioners of the Customs, or any four or more of them, are hereby required to appoint within fourteen days after the passing of this Act, and to cause seven days' notice to be given of such day, time and place, in such manner as they shall deem expedient and sufficient ; and the senior officer in the department present at such meeting shall be the president and chairman of such meeting, and have the casting voice in case of equality of votes at such meeting ; and the officers and persons present at such meeting shall elect and nominate twelve persons superintending in the said department, or being principals of offices and not being clerks, as a committee for the formation of the Customs, Annuity and Benevolent Fund ; which said committee shall elect and nominate a president or chairman, and shall forthwith proceed to consider and make and arrange such rules and regulations for the establishment and formation of a fund for the benefit of the widows and children or other relatives of the established officers, clerks, or other persons belonging to or employed in the department of the Customs in England, and the regulating the conduct and management of the said fund, and raising, collecting, and receiving the subscriptions and contributions of poundage necessary for forming such fund, and paying all annuities and claims thereout, and making tables of rates of subscription to and payments out of such fund for that purpose, and also the number and description of directors, trustees, auditors, secretary, or other officers necessary for managing and conducting the said fund, and the collection and safe custody of the monies from time to time to be raised and subscribed, and the interest and growing produce arising therefrom, and paying all sums to be paid thereout according to such rules, regulations and tables ; and it shall be lawful for the said committee in such rules and regulations to specify the respective powers, authorities and duties of such directors, trustees, auditors, secretary, or other officers respectively, and the mode of appointing a new director, trustee, auditor, secretary, or other officer to supply any vacancies or otherwise ; and all questions which may arise at any such meeting of the said committee shall be decided by the majority of persons present at the meeting ; and in case of equality of votes the president or

the conditional bene-[281]-fit and relief of the widows and children or other relatives of the established officers, clerks or other persons employed in the department of the Customs in England would be highly beneficial," certain officers of the Customs are required to meet and elect a committee for the formation of the Fund. This committee is in fact the association; and they are required to make rules and regulations for the establishment and formation of the Fund. By section 2,(a)¹ as soon as the rules, regulations and tables of rates of subscription and payment, have been made by the committee, and approved by the commissioners, and ratified by a Judge, they become of the same force and effect as if they had been enacted in that Act. By section 4,(b)¹ provision is made for a contribution of poundage in aid of the general purposes of the Fund, which is to be deducted from the salaries of all officers, who shall not decline to make such [282] contribution. By section 9,(a)² the directors may admit any person as nominee of a subscriber, although not a relative. By section 11,(b)² no annuity payable to a widow or other claimant shall be assignable, except with the permission of the directors, or attachable by any creditor, or subject to the *jus mariti* of any husband whom a widow may marry. By section 16,(c) the directors are declared to have the exclusive control and management of the [283] Fund, and they may from time to time alter the rules, regulations and tables of rates of subscription. By rule 1,(a)³

chairman, or in case of his absence the officer or person appointed by him to be his deputy at such meeting of the committee, shall have the casting and second vote."

(a)¹ Enacts: "That as soon as such rules, regulations and tables of rates of subscription and payment, together with a statement of the number and description of officers necessary to manage the said fund, shall have been made by the said committee, and approved by the Commissioners of the Customs, or any four or more of them, and thereafter ratified and confirmed by some Judge of either of His Majesty's Courts of King's Bench or Common Pleas, or Baron of the Exchequer, such rules, regulations and tables shall be taken and deemed to be, and shall be, to all intents and purposes, the rules, regulations and tables of rates of subscription and payment of the said 'Customs' Annuity and Benevolent Fund,' and for the management and regulation thereof, and shall be of the same force and effect as if they had been particularly enumerated and enacted in this Act."

(b)¹ This section is set out in the 7th paragraph of the defendant's answer.

(a)² Enacts: "That the said directors shall and may, if they shall deem it expedient, admit any person or persons to be the nominee or nominees of any subscriber to the said fund who may not be a relative or relatives of the said subscriber; and the said nominee or nominees so admitted as aforesaid shall and are hereby declared to have, and thereafter to continue to have, to all intents and purposes, the same and the like interest in the said fund, and in the advantages thereof, as if the said nominee or nominees had been a relative or relatives of the said subscriber, under and subject in every respect to the rules and regulations approved and ratified as aforesaid."

(b)² This section is set out in the 8th paragraph of the defendant's answer.

(c) Enacts: "That the said directors shall and they are hereby declared to have the full, entire and exclusive control and management of and over the said fund, and every thing relating thereto, to all intents and purposes whatsoever, under and subject to such provisions, directions, regulations, and restrictions as may have been made in that behalf; and it shall be lawful for such directors, if they shall at any time after any such rules, regulations, and tables of rates of subscription shall have been made think it necessary, from time to time to alter any such rules, regulations, and tables of rates of subscription, and to make any new and additional rules, regulations, and tables of rates of subscription which may appear to be essential or expedient for the better regulation, management, and control of the said fund: Provided always, that no such alterations of any rule, regulation, or table of rates of subscription already established, or new rule, regulation, or table of rates of subscription, shall be valid or effectual or enforced until the same shall have been approved by such subscribers to the said fund as may be qualified for that purpose, and in the manner set forth in the rules and regulations in force at the time, and by the Commissioners of the Customs, or any four or more of them, and ratified and confirmed by such Judge or Baron as aforesaid."

(a)³ The rules referred to in the course of the argument were as follows:—

"I. 'The Customs' Annuity and Benevolent Fund' shall be raised by subscription

[284] the "Fund" is to be raised by subscription, on the principle of life insurance, and together with the contribution of [285] poundage is to form a Fund for the

upon the principle of life insurance, and together with the contribution of poundage, granted by the aforesaid Act, shall form a fund for the widows, children, and relatives, and nominees of officers or persons belonging to the department of Customs in England; and the admission by the directors of a nominee or nominees of subscribers under the said Act, shall, as to the person of such nominee, or nominees, take place during the life time of such subscriber.

"II. The several tables of rates of subscriptions and payment marked respectively A, B, and C, hereunto annexed, shall be taken and deemed to be the tables of rates of subscription and payment for the use of the fund.

"III. Insurances may be effected at the discretion of the directors, on the life of any officer, clerk, or other person employed in the department of Customs in England, and whose age is not less than sixteen, nor more than sixty years, for an annuity under Table A, not exceeding one hundred pounds, and for a capital sum under Table B, not exceeding two thousand pounds; and should any person agree with the directors, that his subscriptions shall be paid up and liquidated in any limited number of years, the same may be done, the calculations for ascertaining the amount thereof being made on the basis upon which the tables are constructed.

"IV. In order that the amount of insurance effected by subscribers may bear a proportion to the amount of the contribution of poundage levied under the authority of the Act aforesaid upon their respective salaries:—Every subscriber shall be charged over and above the amount of the subscription payable under the Tables A and B, a sum of 2s. 1d. annually, upon every annuity of ten pounds, and also upon every capital sum of one hundred pounds insured; but the contribution of poundage shall be allowed in reduction of such additional charge.

"V. Every person desirous of becoming a subscriber shall make a declaration of his age, and if married, of the age of his wife, and of his state of health, and such other particulars relating thereto, and shall also agree to such terms or conditions of insurance as the directors may require; and if such declaration, or any part thereof be false, or if such terms or conditions agreed upon be not fulfilled, the insurance and whole interest of such subscriber shall be forfeited.

"VI. Every person whose proposal to effect an insurance shall have been accepted, shall, where practicable, sign an order for the payment of his annual subscriptions by equal quarterly instalments out of his salary, in such form as the directors shall deem expedient. And such insurance shall, in all cases, take date from the first day of the quarter, in respect of which the first payment of subscription shall be made by him; if the quarterly proportion of salary due to any subscriber shall not be sufficient to meet the sum payable on account of his subscription, or if there should be no salary due, or if the subscriber shall have ceased to belong to the Customs; he shall pay the amount, or the deficiency thereof, to the Receiver-General of the Customs in London, or to the Collector or Comptroller of the Customs at an out-port, within one calendar month after such subscription became due; if any subscriber shall fail duly to pay his quarterly subscription, or in the event of any omission on the part of the Receiver-General, or Collector and Comptroller, shall not cause the same to be deducted from his salary, his insurance shall be forfeited."

"XI. The directors may, at the instance of the subscriber, exclude his widow from all benefit of the fund on account of misconduct on her part.

"XII. The appropriation of the capital money, forthcoming at a subscriber's death, by virtue of his insurance, shall be subject to the following regulations:—

"If an annuity be insured or forthcoming under Table A, for the benefit of the widow, equal to one-third of the whole insurance (computing 10l. of annuity as equivalent to 100l. of capital money); then the subscriber shall have the power to direct by any instrument in writing,* signed in the presence of one or more witness

* The following Forms of Instruments marked A, B, C: signed, witnessed and deposited as required, will be sufficient and may be used respectively for the purposes of this rule.

Form A. "In pursuance and in exercise of the powers vested in me by the rules of the Customs' Fund. I hereby direct that the capital money forthcoming by virtue

widows, children, and relatives and nominees of officers of the Customs; and the admission by the directors of a nominee must take place during the life of a subscriber. By rule 12, the money insured may be applied in any manner the subscriber may think proper for the benefit of his widow, children or relatives, or of his nominee, who shall have been duly admitted by the directors. But if there is no widow or nominee (as in this case) the capital money is to be subject to the direction of the subscriber, either by an instrument in writing [286] signed in the presence of one or more witnesses and deposited with the directors, or by his will. And by the same rule, where a subscriber shall not have applied the capital money, it shall become the property of his child or children in equal proportions. If no child, the money is to be appropriated to the use of the widow, by allowing her an annuity. If no widow nor child, the money is to be paid to the personal representatives of the deceased subscriber, and applied by them according to the Statute of Distributions. Under these circumstances, although there is no formal policy, the transaction is in effect an insurance. In the [287] case of

or witnesses, and deposited with the directors, or by his will: That the whole capital money insured or forthcoming shall be applied or paid in any manner or proportion he may think proper for the benefit of his widow, children, or relatives,^(a) or of his nominee, who shall have been duly admitted by the directors as aforesaid. See Form A.

"But, if no annuity be insured under Table A: or if the annuity insured or forthcoming shall not amount to one-third of the whole insurance, computed as aforesaid, Then so much of the capital money shall be set apart for the widow as shall give her one-third of the whole, so computed. And the capital money so set apart for the widow, shall be appropriated to the creation of an annuity for her life, according to the rates of Table C, hereunto annexed; and the remainder of such capital money shall be subject to the direction of the subscriber as aforesaid. See Form B.

"Provided, nevertheless, that in lieu of every such 100l. of capital money so to be applied for the widow, the subscriber shall have the option to direct that the interest of not less than 200l. capital money shall be allowed to his widow during her life. And in that case the sum so set apart for the benefit of the widow, shall be invested in the purchase of Three per Cent. Stock, in the names of the trustees of the

of my insurance (or insurances) in the Fund, shall at my death, be paid and applied, according to the rules of the Fund, in manner following," viz.—[*Here state how the same is to be applied for the benefit of the parties described in the rule.*]

Form B. "In pursuance and in exercise of the powers vested in me by the rules of the Customs' Fund. I hereby direct that the capital money forthcoming by virtue of my insurance (or insurances) in the Fund, shall at my death, after due provision shall have been made therefrom by way of annuity to my widow, be paid and applied according to the rules of the Fund, in manner following," viz.—[*Here state how the same is to be applied for the benefit of the parties described in the rule.*]

Form C. "In pursuance and in exercise of the powers vested in me by the rules of the Customs' Fund. I hereby direct that two-thirds (or the whole, or any portion between two-thirds, and the whole as the subscriber may think fit) of the capital money forthcoming by virtue of my insurance (or insurances) in the Fund shall, at my death be invested in the purchase of Three per cent. Stock, and the interest thereof shall be applied for the benefit of my wife, during her life, if she should survive me—and at her death the stock so purchased, shall be paid as undermentioned," viz.—[*Here state how the same is to be applied for the benefit of the parties described in the rule.*] "I also hereby further direct that the proportion of the said capital money not applied as above-mentioned—shall at my death be paid according to the rules of the Fund as follows," viz.—[*Here state how the same is to be applied for the benefit of the parties described in the rule.*]

Note D. If the subscriber should apply his insurance by will, it is necessary he should make specific mention of his insurance in the Customs' Fund; otherwise he will be deemed to have died without having given directions as to that insurance, for it will not pass under any general terms. In fact the insurer himself has no actual property whatever in the sum insured: he has only the power to appoint the same for the benefit of the parties described in the rules.

(a) These must be relatives by blood.

Re Rowse,^(a) this Court decided that a capital sum in this Fund, which a subscriber had bequeathed to his brother, was not subject to legacy duty, because it was not personal estate of the subscriber which he could dispose of as he thought fit; but that he had purchased a mere power to appoint a sum of money amongst a certain specified class. That decision, however, proceeded upon the definition of a legacy in the 36 Geo. 3, c. 52, s. 7. But the circumstance that this money is not subject to legacy duty does not prevent it being subject to succession duty. By the 2nd section of the Succession Duty Act, 16 & 17 Vict. c. 51, "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, &c., upon the death of any person dying after the commencement of this Act, &c., shall be deemed to confer on the person entitled by reason of such disposition a succession." Here there was a disposition of property, by reason whereof the defendant became beneficially entitled to this money on the death of her brother who died after the commencement of the Act. By the Interpretation Clause, sect. 1, the term "personal property" shall include money payable under any engagement. This is money payable under an engagement. [Martin, B. The section also says, "and all other property not comprised in the preceding definition of real property."] This is in substance an arrangement between the directors of the Fund and a [288] Customs officer, whereby he became the purchaser of the sum insured, and the defendant, who takes it under his will, which is an execution of a power, takes it not only through, but from her brother, and the relation of successor and predecessor exists between them. It is true that the money is to be paid by the directors of the Fund, but, in considering the question of successor and predecessor, regard must be had, not to the hand by which the money is paid, but to the person through whom, upon his death, the benefit is derived: *Re Jenkinson* (24 Beav. 64), *The Attorney General v. Yelverton* (7 H. & N. 306). The directors of the "Fund" act ministerially and without an intention to benefit any particular person or class of persons, but the benefit is derived from the deceased officer who purchased the right to dispose of the money. The 17th section of the Succession Duty Act says that no policy of insurance on the life of any

fund, and the amount of stock so purchased shall be held by them as subject to the directions of the subscriber as aforesaid, to take effect at the death of the widow. And the remaining capital money, if any, shall be subject to the direction of the subscriber as aforesaid, to take effect at his death. See Form C.

"If there be no widow or nominee, or if the widow be excluded from all benefit in the fund, on account of misconduct, as hereinbefore mentioned. The whole capital money forthcoming shall be subject to the directions of the subscriber as aforesaid.

"Where a subscriber shall not have applied the capital money herein placed at his direction (see note D), the same shall become the property of his child, or children in equal proportions.

"And in the event of his leaving no child—Then the same shall be appropriated to the use of his widow by allowing her an equivalent annuity under Table C, in addition to the annuity before apportioned to her.

"If there shall be no widow nor any child—The whole capital money shall be paid to the person or persons legally appointed to administer to the estate and effects of the deceased, to be by him, her, or them applied according to the Statute of Distributions, in the same manner as any other money would be applied by law.

"If an annuity to any widow shall have been insured under Table A, and the directors shall have seen cause to allow of a different disposition of such annuity on the ground of misconduct as aforesaid, it shall be competent to the directors to convert such insurance of an annuity into an equivalent insurance of a capital sum, according to the then value of such annuity."

Table A shewed the annual subscriptions payable by equal quarterly instalments, during the joint continuance of the lives of a husband and his wife, for an insurance of an annuity of 10l. payable after his death to his wife during the remainder of her life.

Table B shewed the annual subscriptions payable by equal quarterly instalments, during life, for the insurance of a capital sum of 100l., on the lives of male persons.

Table C shewed the annuity payable by equal quarterly instalments, during life, in lieu of a capital sum of 100l.

(a) Not reported. See Tilsley's Stamp Law, p. 684, 2nd ed.

person shall create the relation of predecessor and successor between the insurer and the insured ; " but any disposition of the monies payable under such policy, if otherwise such as in itself to create a succession, shall be deemed to confer a succession." Therefore, so far as that section has any bearing, the latter part supports the view contended for. The Act does not require that at the time the succession takes place, the disponent should have any interest in the property ; all that is necessary is that there should be a disposition of the property by reason whereof some person becomes beneficially entitled to it on the death of a person dying after the commencement of the Act. It will, perhaps, be argued that as the insurance was effected under certain rules and regulations deriving their authority from the 56 Geo. 3, c. lxxiii., the interest in the capital money was created by that Act, and did not result from any disposition of the property by a person who was a predecessor. But the fallacy is in not [289] distinguishing between the machinery of the Act and the rules which regulate the actions of the directors, and the contract under which the money became payable. Neither the Act nor the rules made the money payable ; but it became payable because a Customs officer effected an insurance upon the terms on which the Act and rules enabled the directors to contract with him. It was a voluntary act on his part : he proposed to effect an insurance ; that proposal was accepted, and a contract was entered into with the directors. The consideration proceeded from the subscriber, who undertook to make certain payments according to the rules ; and by those payments, he bought the right to have a sum of money paid by the directors out of this Fund upon his death. It is immaterial whether the money is payable to his personal representatives or his relations or nominees : he has a right to direct its payment to any of the class mentioned in the rules, and, if he makes no direction, it is payable to his next of kin. This only differs from an ordinary insurance in this respect, that the directors will not contract except upon the terms that the insurer shall appoint the sum to which he is entitled among the class mentioned in the rules. It is the same as if a person insured his life and assigned the sum assured in trust for such of his relations as he should in his lifetime appoint, and in default of appointment, for his next of kin. It makes no difference that a poundage on the salaries of the Customs officers, and the profits of the publication called "The Customs Bills of Entry," are applied in aid of the Fund. There are many insurance companies in which the persons insured participate in the profits. In the case of *Re Jenkinson* (24 Beav. 64) the disponent purchased for himself a reversionary interest, and assigned it, and it was held that did not prevent the case coming within the second section of the Succession Duty Act.

[290] *Amphlett, Welsby and Dean*, for the defendant. No succession duty is payable. The appointment does not create a disposition, because it is only a limited power, and therefore the defendant takes the money not under the power, but from the donor of it. The 4th section of the Succession Duty Act removes all doubt in that respect. But then it is said that the case must be considered as if the subscriber had no such power, but had insured his life for the benefit of his sister. But if a person effected an insurance for the benefit of a child, reserving to himself no power of appointment, that would not create a succession within the meaning of the Act. In the case of *Re Jenkinson* (24 Beav. 64) the testator made, for his own benefit, a contract under which a sum of money was payable to himself, and he settled that money on his children ; in which case there is no reason why succession duty should not be payable. But where a person enters into a contract for the benefit of his children, the money payable under the contract never belonged to him, and it is difficult to see how there can be a succession from him as predecessor. Suppose a father gave money to his son for the purpose of insuring the father's life, it is clear that no duty would be payable, and the result is the same whether the father himself purchases the insurance for his son, or gives him the money to purchase it. The Court will not look beyond the settlement to inquire from whom the consideration may have moved. Suppose a father said to his brother, "If you will settle your estate on my children, I will give you a sum of money," and the settlement was accordingly made, he would be the predecessor, and the Court would not inquire into the consideration which induced him to make the settlement. The contribution to the fund is not a voluntary but a compulsory payment. The 56 Geo. 3, c. lxxiii., and the rules and regulations under it, create a legislative provision for [291] the families of Customs officers, with this condition attached to it, that no family shall be entitled to any benefit from it unless the officer has contributed to the increase of that

fund. When that condition is complied with, the family acquire a parliamentary title to a share of the fund. There is no contract between the officer and the directors which could be enforced in a Court of law by the executors of the officer; but if he makes the proper contribution, the directors become trustees for his widow, relatives, or nominees, who may in a Court of equity enforce payment by proceedings in their own name. Then how can it be said that the testator was the creator of this interest? The legislature created the Fund; the testator merely complied with a condition which enabled his sister to participate in it. *The Attorney General v. Rowse* shews that the testator had (if any) only a limited power of appointment over the Fund. The object of the legislature was to make provision for the families of Customs officers, and care has been taken to prevent it becoming an insurance for the benefit of the officers. That is evident from the preamble (ante, 280) and the 4th (ante, 273), 9th (ante, 282), and 11th (ante, 274) sections of the 56 Geo. 3, c. lxxiii. The rules have been framed with the same object. The first rule (ante, 283) recognises the necessity of a nominee being approved of by the directors. By rule 12 (ante, 284), the widow of a subscriber is entitled to one third of the capital money insured, and no appointment can be made by him to deprive her of it. Again, if the subscriber has not applied the capital money, and has no widow or child, it is to be paid to his personal representatives, not as part of his estate, but to be by them applied according to the Statute of Distributions.^(g) As observed by the Lord Chief Baron in the case of *Re Row*-[292]-sell, this is "a subscription to a fund for particular purposes, over which the subscribers have, in some instances, no control, and even where they have, it is only a limited control." The relatives or nominees of a deceased officer acquire the right to participate in the Fund by virtue of the act of parliament, not by any contract between the officer and the directors. It is only a condition attached to their participation that some additional contribution shall have been paid by the officers. Moreover, letters patent have been granted to the directors enabling them to publish the "Customs Bills of Entry" in aid of the Fund, whereby it has been greatly increased. The question must depend upon the 2nd section of the Succession Duty Act, because no relation of successor and predecessor could be created between the defendant and her brother by his exercise of the limited power of appointment: *In re Barker* (7 H. & N. 109). Then to bring the case within that section, the Crown must establish three propositions; first, that the interest in this Fund is "property" within the meaning of the 2nd section; secondly, that there has been a "disposition" of property within the meaning of that section; and thirdly, that there is a successor and a predecessor. It is conceded that this is money payable under an engagement, and therefore within the definition of "property" in the interpretation clause; but there must be a disposition of that property apart from the engagement itself. The second section should be thus read: "every past and future disposition of money payable under any engagement;" that is, a disposition of money engaged to be paid. Here there is no such disposition, for the subscriber never purchased the interest in the Fund for [293] his own benefit. Moreover, there must be not only a "disposition" of property, but also a predecessor. If no predecessor, however clear the succession, no duty is payable. In the case of a pension granted by Parliament to widows and children of military officers, there is a succession, but no predecessor, for Parliament is not a "person" within the meaning of the interpretation clause, and the deceased officer would clearly not be a predecessor. The only difference in this case is that, the Customs officer is compelled to contribute to the fund, but that does not make him a predecessor. By section 2, "the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor or other person from whom the interest of the successor is or shall be derived." A predecessor is not the person through whom, but from whom, the interest of the successor is derived. The interest of the defendant is not derived from the testator, for he never had any interest in the property, but only a limited power of

(g) They also referred to the new rules made in 1854, amongst which was the following:—"If there shall be no widow nor any child, or other issue as aforesaid of such subscriber, the whole capital money shall belong to the person or persons entitled as his next of kin, according to the Statute of Distributions, and shall be paid to the legal personal representatives of such subscriber, whose receipt shall effectually discharge the directors of the said Fund from seeing to the application of such capital money."

appointment, created, not by himself, but by the act of parliament and the rules and regulations made under it. The succession is derived from a disposition made by virtue of the Act and the rules and regulations, and if that disposition had been made by a corporate body or an individual, he would have been the predecessor. But for the 17th section, the question would have arisen whether, under the 2nd section, the relation of predecessor and successor did not exist between the directors and the defendant, but the 17th section has removed all doubt in that respect. [Martin, B. That section was meant to apply to ordinary policies of insurance, where money is payable by one person on the death of another.] In *The Attorney General v. Yelverton*, the consideration money was paid to the father, and by a separate instrument he settled it on his children; if the whole transaction had been effected by one instrument, the relation of predecessor and successor [294] would not have been created. The case of *Re Jenkinson* is the same in principle as *The Attorney General v. Yelverton*.

Locke replied.

POLLOCK, C. B. All the members of the Court now present (a) are of opinion that our judgment ought to be for the Crown, as appears to me upon grounds that are tolerably clear; and I am not aware that my brother Channell differs in opinion. This is in effect an insurance on the life of an officer of Customs. He paid an annual premium according to the scale in the Rules, by which he became entitled to direct that a sum of 500l. should be applied for the benefit of his relatives, or nominees if approved by the directors; and by his will he gave it to his sister, the now defendant. The question is whether that is a disposition of property, by reason whereof a person has become beneficially entitled to property upon the death of another person, so as to confer a succession within the meaning of the Succession Duty Act; there being no doubt that there must be a predecessor.

It seems to me that this case does not differ, except in some points already adverted to, from an ordinary insurance. When a man insures his life and by his will disposes of the sum insured, no doubt can exist, for the 17th section of the Succession Duty Act expressly says, "that any disposition or devolution of the monies payable under such policy, if otherwise such as in itself to create a succession, shall be deemed to confer a succession." That is an enactment, which brings a disposition or devolution of monies payable under an ordinary policy of insurance within the provisions of the Succession Duty Act; and in what does this case differ?

[295] Two points were made: first, that the Fund is not entirely supplied by the parties who insure; and, secondly, that they have only a limited interest in it. I think that neither of the points raises any objection to the application of this statute. No doubt the Fund is not created by the subscriptions alone, but the legislature seems to have taken pains to indicate that it is the contribution of the officers which forms the nucleus or basis of the Fund; not indeed sufficient to bear the burthen of the whole, but every officer of the Customs must subscribe whether he avails himself of it or not. The provision of this Fund is not separate and apart from the establishment to which the parties belong; and pains are taken to shew that in reality it is stopped out of their pay. No doubt they cannot prevent it, but it is, and the legislature declares it to be, for the purpose of creating this Fund. Then the Fund arises from the actual contribution of the officers of the Customs paying for an insurance in the same way as on an insurance with a company.

Then it is said that the subscriber has only a limited power over the sum assured. But if he has only power to leave it to a certain class of persons, and does leave it to one of them, that person is a successor within the meaning of the 2nd section of the Succession Duty Act, because there is a disposition of property whereby he becomes beneficially entitled to property upon the death of another person. The officer, by payment of the premiums, created the power under which he acted, and therefore he is the predecessor. Suppose the father of a family insured his life, and the policy contained a clause that he should only leave the sum assured amongst his children, would that make any difference? I do not see why the want of an unlimited power over the Fund should prevent there being a succession. There are many powers of appointment which are limited to a certain class of persons, and if exercised [296] in favour of a person who is a member of the class, that would create a succession. If a man had power to appoint a certain sum amongst all his sons, or all his daughters,

(a) Pollock, C. B., Martin, B., and Bramwell, B. Channell, B., had left the Court.

or all his next of kin, and he exercised the power, would not that confer a succession within the 4th section of the Succession Duty Act? The person who created the power would be the predecessor, and the person benefited by the exercise of it would be the successor.

For these reasons, I am of opinion that the Crown is entitled to judgment.

MARTIN, B. I am of the same opinion. I think that the Succession Duty Act ought to be construed according to the rule laid down by Lord Campbell in the case of *Lord Braybrooke v. The Attorney General* (9 H. L. Cas. 150, 165). Lord Campbell there said, "that this statute, which by the same enactments imposes a tax on successions in every part of the United Kingdom, is to be construed, not according to the technicalities of the law of real property in England or in Scotland, but according to the popular use of the language employed; so that all such property may be subject to the succession duty, according to the general intention which the legislature has expressed." In *The Attorney General v. Yelverton* (7 H. & N. 306) there was a difference of opinion in this Court, and therefore it became necessary to consider our judgments; and my brother Bramwell concurred in thinking that the proper mode of construing the Act was that enunciated by Lord Campbell.

Then what are the facts of this case?—and I wish to be understood as giving my judgment simply upon these facts. Mr. Abdy, an officer of the Customs, effected an assurance on his life for a capital sum of 500l., payable out of the "Customs' Annuity and Benevolent Fund," on the terms and conditions contained in the 56 Geo. 3, c. lxxiii., and [297] subject to certain rules and regulations made in pursuance of that Act. I apprehend I am bound to act, and I do act, on the judgment of this Court, in the year 1844, in the case of *Re Rousell*, which put a construction upon policies effected under the 56 Geo. 3, c. lxxiii., which creates a particular species of property, limited as to the persons who are to enjoy it, but over which the person who purchased it had, to a certain extent, a control. The subscription of Mr. Abdy to the fund entitled him, not to any personal benefit during his life, but only to dispose of the sum assured amongst his relatives or nominees on his death; and by his will he gave "all that policy of assurance effected on his life in the Customs Fund for the sum of 500l. and all monies to become payable under the same, unto his sister," the now defendant, absolutely. Therefore what was done by him in his lifetime created a species of property, which by his will he disposed of so that the defendant is legally entitled to it. I agree that, in construing the Succession Duty Act, we ought clearly to see that the duty is imposed, and if the words of the Act do not apply to this case, our judgment ought to be for the defendant. It seems to me, however, that it falls directly within the terms of the Act. The first section defines the meaning of "real property;" it then declares that "personal property" shall include "money payable under any engagement." It is said that unless there was some contract by the directors to pay this money, it was not money payable under an engagement; but the section goes on to say, "all other property not comprised in the preceding definition of real property." Looking at the general language of the Act, it cannot be contended that this money is not "property." Then the 2nd section of the Succession Duty Act enacts that every disposition of property, by reason whereof any person shall become beneficially entitled to any property upon the death of any person, shall be deemed [298] to confer, on the person entitled by reason of such disposition, a succession. Now, if a property was created, how can it be contended that there was not a disposition of that property by Mr. Abdy's will, whereby the defendant became beneficially entitled to that property on his death? If so, the case falls within the first branch of the second section, for the defendant, by reason of the disposition of this property by her brother, became entitled to it on his death, and therefore there is a succession.

I agree, that there must not only be a succession but also the relation of predecessor and successor; and unless that exists duty is not payable. Giving to the second section the construction which I am bound to give it after the judgment of the House of Lords in the case of *Lord Braybrooke v. The Attorney General*, I think that Mr. Abdy was the disposer of this property within the meaning of it. The 2nd section goes on to say, "and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disposer and testator, &c., or other person, from whom the interest of the successor is or shall be derived." Even giving the section the construction contended for, viz., that the interest of the successor must

be derived from a predecessor, I think this case is within it; because there is the act of Mr. Abdy by which he gave this property to the defendant, being one of the persons whom he was authorized to select by the act of parliament and the rules, and he thereby became the disponent of that property, and an interest in it passed to the defendant.

Then it was said that our attention should be directed to the 4th section; and if I thought there was anything in that section which embraced this case, I should be inclined to give judgment for the defendant. But I think that the 4th section has reference to a different class of cases. The first part of that section relates to a person [299] who has a general power of appointment, and it declares that when that person exercises the power, the appointee shall be deemed to derive his succession from the donor of the power. The latter part of the section has reference to a limited power of appointment, and thereby creates a succession as between the person creating the power and the person who gets the benefit of the property. Looking at the language of the 4th section I am disposed to think that it was intended to apply to powers of appointment in a settlement of real property, but I do not say it may not apply to personal property.

The 17th section seems to me to confirm my view. It enacts that no policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured. That was introduced for the purpose of preventing any question whether succession duty was payable on the death of a person whose life was insured, and then the latter part of the section says "that any disposition or devolution of the money payable under the policy, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession." Therefore, in my judgment, this being a disposition of money payable under the insurance effected by Mr. Abdy, so far as the 17th section affords any analogy, if this is a disposition which in itself would create a succession, it must be deemed to confer a succession. That is the view taken in *Trevor on Succession Duty*, and which seems to me the correct one. For these reasons, giving the construction to the Act which I think we are bound to give, it seems to me that the case falls within the second section.

BRAMWELL, B. I am of the same opinion. Mr. Abdy entered into an engagement with the directors of the "Customs' Annuity and Benevolent Fund," whereby, on certain payments being made by him during his life, he acquired a [300] right to appoint a sum of money on his death, either for the benefit of his widow, if he had one, or if not, of his relatives, or nominees if accepted by the directors. In my opinion, that right was "property," and by his will he disposed of that property to his sister, the defendant, so that there was a disposition of property whereby she became beneficially entitled to it upon his death, and consequently there was a succession.

It is said that cannot be so, for several reasons, one of which is that, under the Succession Duty Act, there must be both a successor and a predecessor, and Mr. Abdy is not a predecessor. Undoubtedly, this "Fund" cannot in any sense be said to be a predecessor, but I think Mr. Abdy is; and I confess I have difficulty in seeing why he should not be. Suppose the engagement had been in these words: "If you will pay us an annual premium during your life, you shall have a certain sum to leave by your will to your relatives or nominees on your death." Why in that case should he not be the predecessor? The difficulty is raised by reference to the 4th section, which says "that where any person shall have a general power of appointment, under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property and interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor." That, it is said, supposes three persons, one who takes the benefit, another who executes the power, and a third who [301] creates the power. That is true, but the two latter may be one, for the person who creates the power may be also the person who executes it; and the 12th section contemplates that a person may be both predecessor and successor, under a disposition made by himself.

Then it is said that Mr. Abdy did not create the power, because it exists by virtue of the act of parliament, and the rules and regulations of the Society. But I cannot assent to that proposition, because it seems to me that the power is created by the engagement entered into between the assurer and the directors, and that the act of parliament only enables them to enter into that engagement, and affords them facilities for carrying their purpose into execution. The validity and efficiency of the engagement is attributable to the act of the parties, and not to the Act of Parliament, except so far as I have mentioned. Then here there is property, that is, money payable under an engagement, over which the settlor had indeed but a limited power of appointment, but that power was derived from himself, so that there was an appropriate predecessor, viz., himself, and he made a disposition of it, to take effect upon his death, for the benefit of his sister, the present defendant.

The only other observation I have to make is with reference to the case of *The Attorney General v. Yelverton*. If the opinion of the majority of the Court in that case was right, (and I frankly own that my reason is not convinced), it seems to me to conclude this case; that is, upon the supposition that there was a disposition and a predecessor. But I wish to go further, and decide this case on my own opinion, because it seems to me that the effect of what Mr. Abdy has done has doubly made his duty payable on his death. For instance, suppose in the case of *The Attorney General v. Yelverton* that the money, instead of being payable on Mr. Cowell's death, had been payable in his life time, and that by his will he directed that it should be paid to [302] the persons to whom he appointed it, that would have been a disposition of property which conferred a succession on his death. If the disposition in that case had been by will, a succession would have been created, but my difficulty there was that the instrument was not one which created a succession, but only transferred an interest. Here the succession is created by will, an instrument which gives a benefit upon death. Retaining, therefore, the opinion which I expressed in *The Attorney General v. Yelverton*, it seems to me that the reasons which there influenced me do not apply, and that the Crown is entitled to judgment.

Decree accordingly.

EVANS AND OTHERS v. ROBINS. June 10, 1862.—The defendant put up for sale by public auction certain property described in the particulars as follows:—"Four freehold ground rents of 19l. 4s. each, viz. 15l. ground-rent and 4l. 4s. garden-rent, amounting to 76l. 16s. a year arising from four capital residences of the annual value of 384l., held by four leases granted to W. Reynolds for a term of ninety-five years each (wanting ten days) from the 29th of September, 1844, with reversion to the property in about eighty years." The plaintiff became the purchaser and paid the defendant 282l. as a deposit in part payment of the purchase money. The vendors in making out their title produced four counterparts of leases granted by one Roy to Reynolds. By each of these leases, Roy, in consideration of the yearly rents thereafter reserved, demised to Reynolds a piece of land with a messuage thereon for the term of ninety-five years (wanting ten days) at the yearly rent of 15l.; and for the considerations aforesaid, and also in consideration of the further rent thereafter reserved and of the covenants of Reynolds, Roy covenanted with Reynolds that it should be lawful for him and the tenants of the messuage, at all times during the continuance of the said term, to enter upon and use and enjoy as a pleasure ground or garden a piece of land particularly described, jointly with Roy; and Roy covenanted that he would at his own expense keep in order the garden. There was also a covenant by Reynolds to pay Roy the yearly rent of 15l., and also the further yearly rent of 4l. 4s. in respect of the right of user of the garden or pleasure ground, such rent to be payable in the same manner as the rent of 15l. By the 10th condition it was provided, that if any mistake be made in the description of the property, or any error or misstatement whatsoever shall appear in the particulars, such mistake, error, or misstatement shall not vitiate or annul the sale, but a compensation or equivalent shall be given or taken as the case may require, to be settled by two referees or their umpire.—Held, that the annual sum of 4l. 4s. was not a freehold ground rent, but merely a sum in gross payable under a covenant, and conse-

quently the plaintiff was entitled to rescind the contract and recover back the deposit.—Sembles, that the 10th condition did not apply to such a case.

[S. C. 31 L. J. Ex. 465; 6 L. T. 897: affirmed 1863, 2 H. & C. 410.]

Action for money received by the defendant for the use of the plaintiffs. Plea, never indebted.

By the indorsement on the writ, the plaintiffs claimed the [303] sum of 282l. deposited with the defendant as an auctioneer at a public sale by him on the 3rd May, 1860; and, by consent of the parties and order of a Judge, the following case was stated for the opinion of this Court:—

1. On the 3rd of May, 1860, the defendant put up for sale by public auction certain property purporting to be freehold ground rents (whereof the particulars and the conditions of sale are contained in the paper writing marked A (see post, p. 305), which is to be taken as part of this case.

2. The plaintiffs at the said sale became the purchasers of lot 1, for the sum of 1880l., under and subject to the said particulars and conditions of sale, and paid to the defendant the sum of 282l. as a deposit, and in part payment of the purchase money.

3. The vendors in making out their title produced (inter alia) four counterparts of leases granted by Richard Roy to William Reynolds, and which (so far as the same are material to this case) correspond in form and effect; and the paper writing marked B (see post, p. 308), which is to be taken as part of this case is a copy of one of the said counterparts of leases.

4. The plaintiffs delivered to the vendors certain observations and requisitions on the vendors' title, which (so far as it is material) are in the following words:—

"The description of the property in the printed particulars does not appear to accord with that disclosed by the abstracts, the former being that of freehold ground rents arising out of and secured upon the houses therein mentioned, with the right to the reversion at the expiration of existing leases. Whereas it seems from the abstract that as to that part of the so called ground rent described as payable in respect of the gardens, it is not reserved as [304] issuing out of the houses demised, but rests entirely upon the personal covenant of William Reynolds the lessee, and that without the remedy of a power of distress; this sum is therefore not a rent at all, but merely a sum in gross, and as it is not payable in respect even of the land demised, it is probable that even the obligation of the covenant would not run with the land so as to bind the assigns; it seems also doubtful whether by the terms of the covenant, so far as appears by the abstract, the lessee has not the option of escaping from the payment by ceasing to use the gardens. No sufficient title has therefore yet been shewn to the ground rents described in the particulars."

5. The vendors delivered to the plaintiffs certain answers which (so far as is material) are as follows:—

"We are advised by our conveyancing counsel that the purchasers' objection is untenable, and that the garden rent is as much a rent arising out of the houses as the ground rent. No technical form of reservation of rent is necessary; words of proviso or words of covenant are quite sufficient for the purpose."

6. The plaintiffs delivered to the vendors certain observations on the said answers which (so far as material) are in the following words:—

"My conveyancer is of opinion that this requisition No. 1 is a valid objection to the title, and has not been satisfactorily answered. Conceding that a reservation of rent does not require technical words, yet it does not follow that a covenant to pay a sum of money is always sufficient; and though in this case it is certainly called a rent, yet it is expressed to be in consideration not of the houses and premises demised, but of the use of the garden, a distinct rent of 15l. being reserved in respect of the former: that this circumstance brings the case very nearly to that reported in 12 Modern Reports, 74, and that it is at least [305] very doubtful whether either the benefit or the obligation of the lessees' covenant to pay this so called rent would run with the land."

7. The vendors delivered to the plaintiffs the following answer to the last mentioned observations.

"We are further advised by our counsel that the present case does not at all

resemble that in Modern Reports, 74. In the present case the demise of the ground is expressly in consideration of the rents hereinafter reserved, and then there is an express reservation of the 15l. ground rent, and an implied reservation of the 4l. 4s. rent, and there is a proviso to re-enter upon all the property demised in case either of the rents had been in arrear."

In consequence of the above objection to the vendors' title, the treaty for the sale of the said premises came to an end, and the present action was commenced to recover the deposit.

The question for the opinion of the Court is whether the plaintiffs are entitled to recover the deposit. If the Court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiffs for the sum of 282l. and their costs. If the Court shall be of opinion in the negative, then judgment shall be entered for the defendant, with costs.

The material parts of the Particulars were as follows :—

KENSINGTON PARK, NOTTING HILL.

The whole of the
FREEHOLD GROUND RENTS,

Included in this Sale,

ARE MOST ABUNDANTLY SECURED,

And Mr. Robins has much pleasure in recommending them to Capitalists as

THE MOST ELIGIBLE INVESTMENTS

That can possibly be met with, especially at the present high price of the Funds :

[306] They arise from

RESIDENCES OF A SUPERIOR DESCRIPTION,

Well and substantially erected and completed for the
perfect accommodation of Families of respectability, with Gardens,
Situate in a favourite and improving locality, at a convenient distance from
Town, and with rapid communication to all parts.

The Houses forming

LANDSDOWNE TERRACE,	LANDSDOWNE ROAD VILLAS,
HANOVER TERRACE,	CLARENDON ROAD VILLAS,
LANDSDOWNE CRESCENT VILLAS,	AND ST. JOHN'S VILLAS,

With

EXTENSIVE AND BEAUTIFUL ORNAMENTAL GARDENS

At the rear part of these Premises ;

These Gardens will remain in the hands of the Freeholder, and will be
kept up by him as Ornamental Gardens, a sufficient sum
being reserved and set aside for the purpose.

THE VALUABLE REVERSION TO THE PROPERTY,

At the expiration of the Leases, will in each case be included in the purchase.

THERE IS NO LAND TAX ON THE PROPERTY.

N.B.—A Plan shewing the Property for Sale may be seen at the Offices of
Messrs. Roy and Cartwright, No. 4 Lothbury, and at Mr. Robins,
Waterloo Place, Pall Mall.

The Properties Sold are to be taken as those comprised in the Leases mentioned in the following Particulars.

The Counterparts of the Leases will be produced at the Sale.

The following Freehold Ground Rents are secured upon the attractive Residences in the most esteemed part of the Kensington Park Estate, at Notting Hill, One Guinea a [307] Year being allowed from each of the Garden Rents for the use and keeping up of the Ornamental Pleasure Garden.

Lot 1.

FOUR FREEHOLD GROUND RENTS OF £19, 4s. EACH,

Viz. £15 Ground Rent and £4, 4s. Garden Rent,

Amounting to £76, 16s. a Year.

Arising from the Four Capital Residences,

Nos. 5, 6, 7 and 8 LANSDOWNE CRESCENT VILLAS,

Of the Annual Value of £384.

Held by Four Leases, granted to Mr William Reynolds, for a Term of Ninety-Five Years each (wanting ten days), from the 29th day of September, 1844,

WITH REVERSION TO THE PROPERTY IN ABOUT EIGHTY YEARS.

The material parts of the Condition of Sale were as follows:—

“8. Upon payment of the remainder of the purchase-money by any purchaser at the time above mentioned, the vendor and all other necessary parties will execute to the purchaser a proper conveyance of the property contracted for, such conveyance to be prepared by and at the expense of such purchaser, and the draft thereof to be left or tendered at the office of the said Messrs. Roy and Cartwright fourteen days at least before the said 24th day of June next. The conveyances of lots 1, 2, 3, 4, 8, and part of lot 9, and lots 11, 12, 13, 17, 18, 19 and 20, shall respectively contain a grant on the part of the vendor, of the perpetual right of user of the respective gardens now enjoyed by the tenants of each house comprised in such lots respectively, as appurtenant to each house, and the purchaser shall in consideration of such grant of user, by deed grant to the vendor a perpetual yearly rent charge of 1l. 1s. out of each such house, [308] with the usual powers of distress and entry for securing the same; such several deeds of grant of rent charge are to be according to forms already prepared, which may be seen at the office of Messrs. Roy and Cartwright, and will be prepared by and at the expense of the vendor, but no title to the gardens is to be required by any purchaser.”

“10. If any mistake be made in the description of the property, or any error or misstatement whatsoever shall appear on the particulars, such mistake, error or misstatement shall not vitiate or annul the sale, but a compensation or equivalent shall be given or taken, as the case may require, to be settled by two referees or their umpire, one referee to be nominated by each party, within fourteen days after the discovery of such mistake, error or misstatement, and notice thereof given to the other party, and in case either party shall neglect or refuse to nominate a referee within the time aforesaid, the referee of the other party may proceed alone; if two referees are appointed, they shall nominate an umpire before they enter upon the consideration of the matter referred to them, and the decision of such referees, referee or umpire as the case may be, shall be final.”

The material parts of the indenture were as follows:—

“This Indenture made the 12th day of September, 1845, between Richard Roy, of &c., of the one part, and William Reynolds, of &c., of the other part: Witnesseth that in consideration of the costs and charges incurred and to be incurred in erecting and completing the messuage and buildings hereinafter described, and in consideration of the yearly rents hereinafter reserved, and of the covenants and agreements hereinafter contained, and by and on the part of the said W. Reynolds, his executors, administrators and assigns to be performed fulfilled and kept: He the

said R. Roy hath demised and leased and by these presents doth [309] demise and lease unto the said W. Reynolds, his executors, administrators and assigns all that piece of ground situate at Notting Hill, in the parish of St. Mary Abbots, Kensington, in the county of Middlesex, &c., abutting north on premises called No. 9 Lansdowne Villas, south on other premises called No. 7 Lansdowne Villas, west on the road called Lansdowne Crescent, and east on a piece of ornamental inclosure demised by J. Ladbroke, Esq. to the said R. Roy, together with the brick messuage, tenement or dwelling house, and the offices erected and built on the said piece of ground or on some part thereof, and called No. 8 Lansdowne Villas aforesaid: To have and to hold the said piece of ground, messuage or tenement and all other the premises hereby demised or intended so to be, with their and every of their appurtenances unto the said W. Reynolds, his executors, administrators and assigns, from the 29th day of September 1844, for and during and unto the full end and term of 95 years (wanting 10 days), and fully to be complete and ended: Yielding and paying therefore yearly and every year during the said term unto the said R. Roy, his executors, administrators and assigns the yearly rent of 15*l.*, the said rent to be paid free from all deductions whatsoever, and to be payable by even and equal quarterly payments on, &c. And this indenture further witnesseth that for the considerations aforesaid, and also in consideration of the further rent hereinafter reserved and of the covenants and agreements herein-after contained on the part of the said W. Reynolds, his executors, administrators and assigns, he the said R. Roy, his executors, administrators and assigns, doth hereby covenant and agree with and to the said W. Reynolds, his executors, administrators and assigns that it shall be lawful for him the said W. Reynolds, his executors, administrators and assigns, and the tenants and occupiers for the time being of the mes-[310]-suage and premises hereby demised, and all or any of the members of the families of such tenants or occupiers respectively either attended or unattended by their domestic servants, from time to time and at all times hereafter during the continuance of the said term of 95 years wanting 10 days, at their respective wills and pleasures, to enter into and upon and use and enjoy as a pleasure ground or garden the piece of land particularly delineated and described in the plan or ground plot thereof drawn in the margin of these presents, and therein coloured green, and the ornamental enclosure formed thereon, jointly with the said R. Roy, his executors, &c., and the tenants and occupiers of the dwelling houses at Kensington Park, Notting Hill, &c. And also that the said R. Roy, his executors, administrators and assigns, shall and will from time to time and at all times hereafter during the continuance of the said term of 95 years, wanting 10 days, at his and their own costs and expences, keep or cause to be kept in good order and cultivation the said pleasure and ornamental enclosure and the walks therein. And the said W. Reynolds for himself, his executors, administrators and assigns, doth hereby covenant, promise and agree with and to the said R. Roy, his executors, administrators and assigns, that he the said W. Reynolds, his executors, administrators and assigns, or some or one of them shall and will during the continuance of the term hereby granted, well and truly pay or cause to be paid unto the said R. Roy, his executors, administrators and assigns, the said yearly rent hereinbefore reserved in the proportions and upon the respective days appointed for the payment thereof according to the true intent and meaning of these presents, without any deduction, defalcation or abatement thereof; and also the further yearly rent or sum of 4*l.* 4*s.* to and in respect of the right of user hereinbefore granted of the said garden or pleasure ground, such last mentioned [311] rent to be payable on the days and in all respects in a similar manner with the rent of 15*l.* per annum hereinbefore reserved and made payable. Provided always and these presents are upon this express condition that if the said yearly rents hereinbefore reserved, or any part thereof, shall be in arrear and unpaid by the space of 21 days next after any of the days or times on which the same ought to be paid as aforesaid, or if the said W. Reynolds, his executors, administrators or assigns, shall not well and truly perform and keep all and singular the covenants, provisoes, conditions and agreements hereinbefore contained, and on his and their part and behalf to be observed, performed and kept, according to the true intent and meaning of these presents, then and in any or either of the said cases it shall be lawful for the said R. Roy, his executors, administrators or assigns, at any time or times thereafter into or upon the said premises or any part thereof in the name of the whole wholly to re-enter and the same to have again, retain, repossess and enjoy as in his and their first and former estate, and the said W. Reynolds, his executors, administrators and

assigns, and all other tenants and occupiers of the said premises thereout and from thence utterly to expel, put out and amove, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And the said R. Roy, for himself, his executors and administrators, doth hereby covenant, promise and agree to and with the said W. Reynolds, his executors, administrators and assigns, that he the said W. Reynolds, his executors, administrators and assigns, paying the said yearly rents hereby reserved when and as the same shall become payable, and observing and performing, fulfilling and keeping all and singular the covenants, conditions and agreements hereinbefore contained, on his and their part to be [312] observed, performed and kept, according to the true intent and meaning of these presents, shall and lawfully may peaceably and quietly have, hold, use, occupy, possess and enjoy the said messuage and premises hereby demised, with their and every of their appurtenances, for and during the said term hereby granted, without any lawful let, suit, trouble, denial, eviction or interruption of, from or by the said R. Roy, his executors, administrators or assigns, or any other person or persons claiming or to claim, by, from or under him or them."

Rochfort Clarke, for the plaintiffs. The plaintiffs are entitled to recover the deposit. They purchased a freehold ground rent in the strictest sense of the term, but the garden rent is not a ground rent. The particulars describe the subject-matter of sale as freehold ground rents from residences of a superior description, "with the valuable reversion to the property;" and they state that "the whole of the freehold ground rents included in this sale are most abundantly secured," and that "the valuable reversion to the property, at the expiration of the leases, will in each case be included in the purchase." Lot L., which the plaintiffs purchased, is described as consisting of "four freehold ground rents of 19l. 4s. each, viz., 15l. ground rent and 4l. 4s. garden rent, arising from four capital residences," &c., "with the reversion to the property in about eighty years." [Martin, B. The garden rent is not a ground rent. The indenture of the 12th September, 1845, does not demise to the lessee the soil in the garden: there is only a covenant by the lessor that the lessee and occupiers of the houses shall be at liberty to use the garden, and a covenant by the lessee that he will pay the yearly rent of 4l. 4s. for the right to use it. It is a mere sum in gross. Pollock, C. B. Suppose the leases of all the houses were bought by different persons, to whom would the garden belong when the leases expired?] The Court then called on

Macnamara, for the defendant. First, according to the true construction of the lease, the yearly sum of 4l. 4s. is a "rent," as described in the particulars of sale. The demise is in consideration of the yearly rents thereafter reserved, and by the reddendum a yearly rent of 15l. is reserved. Then, in consideration of the further rent of 4l. 4s. thereafter reserved, the lessor grants to the lessee and the occupiers of the houses the right to use the garden; and there is a covenant by the lessee to pay the yearly rent of 15l. and also the further rent of 4l. 4s. There is also a proviso for re-entry if the yearly rents thereinbefore reserved are in arrear, and there is a covenant for quiet enjoyment upon payment of the rents and performance of the covenants. [Channell, B. Could the lessor distrain for the garden rent?] By the 8th clause of the conditions, no title to the gardens is to be required by any purchaser, but a perpetual right of user of the gardens is contemplated. [Pollock, C. B. That is repugnant to what is professed to be sold. Bramwell, B. Suppose the assignee of the owner of the gardens thought fit to exclude the occupiers of the houses from the gardens, would they have any remedy? Does the covenant run with the land?] It is submitted that it does. An intention is indicated on the face of the lease that the yearly sum of 4l. 4s. shall be a rent, and that there should be the same remedy for its recovery as in respect of the 15l. rent. In Rolle's Abridg., tit. "Reservation" (L.) 40, pl. 6, it is said: "Si A. leas terre al B. per indenture, et les parolls tout, in consideration del payment del rent hereafter mentioned ill leas, &c., et puis en mesme indenture B. covenant pur luy et ses [314] assigns ove A. et ses assigns a paier 10l. rent en certain feasts annuelment, &c., ceo serra un rent et nemy un somme en gross, car sur tout l'indenture ceo serra un reservation et nemy un covenant, car les parolls (en consideration del rent hereafter mention) fait ceo assets clear, M. 12, Ja. B. R. enter Athowe and Heming: adjudge." [Martin, B. Here the two sums of 15l. and 4l. 4s. are reserved separately.] The demise is in consideration of the rents

thereinafter reserved, and there is a right of entry on the nonpayment of either of them. [Martin, B. The right to use the gardens is an incorporeal hereditament, and rent cannot issue out of an incorporeal hereditament.] It issues out of the land demised. In *Williams v. Hayward* (1 El. & El. 1040) the plaintiff demised to the defendant certain mines and minerals, with power of getting the same and with a right to use a certain railway, at a royalty which should not be less than 100l., and it was held that a rent was created which issued out of the mines and minerals, and could not have issued out of the easement to use the railway. [Bramwell, B. When a man buys a ground rent, he buys the reversion to land upon which there are buildings out of which a rent issues. The plaintiffs supposed they were purchasing land which was built upon, and for which the tenant was paying a rent of 19l. 4s. a year, but it turns out that he was paying a ground rent of 15l. and a sum of 4l. 4s. for the right to use the garden. Pollock, C. B. A freehold ground rent means a freehold with a rent issuing out of it. Here there is a mere covenant to pay a sum in gross.] In an *Anonymous case* (12 Mod. 74) Holt, C. J., said: "A rent may be reserved on words of covenant; but where there is a rent reserved, and a covenant also for other money in the same deed, debt will not lie for the latter; as if I demise twenty acres, reserving 20l. a year, and further agree with him in the same deed that, for as many acres as he shall [315] plough up, he shall give ten shillings more for each per annum; this last sum is no rent, and an action of debt will not lie for it." In the case there put, the demise was not in consideration of the latter sum, but was merely in the nature of a penalty. The 8th clause must be read as if incorporated with the description of Lot I. [Pollock, C. B. That clause cannot alter the subject-matter of the sale.] If there is any conflict between the conditions and the descriptions, the former ought to prevail. At all events the description may be modified by the conditions. Secondly, the plaintiffs had notice by the particulars that the ground rents arose from houses held by four leases, and therefore they were bound to look at them. A purchaser who buys with notice of a lease has notice of its contents: *Hall v. Smith* (14 Ves. 426). Therefore the plaintiffs bought such freehold ground rents as were described in the leases, and the defendant offered them that which they bargained for. Thirdly, this is a mere mistake in the description of the property, which, under the 10th clause of the conditions, does not vitiate or annul the sale, but only entitles the plaintiff to compensation, the amount of which is to be settled by two referees or their umpire. The plaintiffs ought not to have rescinded the contract, but to have required compensation. [Channell, B. That clause does not apply where any substantial part of the property turns out to have no existence or cannot be found, or where the vendor has given a very exaggerated description of the property: *Robinson v. Musgrove* (2 Moo. & R. 92).]

Rochfort Clarke was not called upon to reply.

POLLOCK, C. B. I am of opinion that the plaintiffs are [316] entitled to recover the deposit. I think so because in the case presented to us an objection is raised by the purchasers to the vendors' title, which is not answered by him. It appears that, in consequence of that objection, the treaty for the sale came to an end; and the plaintiffs now seek to recover the deposit. By the assent of both parties, the only question for our opinion is whether the plaintiffs are entitled to recover it.

Now the matter in dispute is whether this yearly sum of 4l. 4s. is a freehold ground rent. The plaintiffs say that it is not, the defendant says it is. The defendant does not say that there is a mere mistake in the description of the property, which under the 10th condition does not vitiate or annul the sale, but the question between the parties is whether this is a freehold ground rent or not. If it is, the plaintiffs must accept a conveyance or forfeit their deposit; if it is not, they are entitled to recover the deposit. That is the way in which the case is presented to us, and I am clearly of opinion that this yearly sum of 4l. 4s. is not a freehold ground rent. It is perhaps better not to indulge in any speculative opinion on a point not before us, but certainly it may be doubtful whether the 10th clause of the conditions would cover every possible misdescription and deviation from what is professed to be sold. My impression is that it was only intended to apply to mistakes such as where land is described as of a certain quantity, and it turns out to be more or less, and not to substantial and solid deviations from what is professed to be sold. It is also doubtful whether the 8th clause can operate so as entirely to alter the nature of what is professed to be sold, but on that point I give no opinion. My judgment proceeds

solely on the question whether this yearly sum of 4l. 4s. is a freehold ground rent, and it certainly is neither a freehold ground rent nor a rent.

[317] MARTIN, B. I am also of opinion that the plaintiffs are entitled to recover the deposit. I agree with Mr. Macnamara that we ought to look at the substance of the transaction, and see whether the vendees could have got that which they agreed to buy. Now the vendor agreed to sell "four freehold ground rents of 19l. 4s. each, viz., 15l. ground rent and 4l. 4s. garden rent, amounting to 76l. 16s. a year, arising from the four capital residences, Nos. 5, 6, 7 and 8 Lansdowne Crescent Villas, of the annual value of 384l., held by four leases granted to Mr. William Reynolds for a term of ninety-five years each (wanting ten days), from the 29th of September, 1844, with reversion to the property in about eighty years." Then we have to ascertain whether or no the vendees could in substance and reality have got that which the vendor professed to sell. That depends upon the construction of the lease of the 12th of September, 1845, between Richard Roy of the one part and William Reynolds of the other part. It is true that the demise is in consideration of the yearly rents thereafter reserved, and the 4l. 4s. payable yearly is called a "rent," but it is not so in the proper sense of the term. A "rent" is a thing well known to the law. It is the reservation of a sum of money, with certain incidents annexed to it. This yearly sum has none of the essential qualities of a rent. The indenture describes by metes and bounds the land and house which are demised for a term of ninety-five years (wanting ten days), "yielding and paying therefore, yearly and every year during the said term, unto the said Richard Roy, his executors, &c., the yearly sum of 15l." So that there is a rent of 15l., which is declared to issue out of the house, and nothing else. The indenture further witnesses "that for the considerations aforesaid, and also in consideration of the further rent thereafter reserved, and of the covenants and agreements thereafter contained [318] on the part of the said W. Reynolds," &c., "the said R. Roy doth hereby covenant and agree with and to the said W. Reynolds, his executors, &c., that it shall be lawful for him the said W. Reynolds, his executors, &c., and the tenants and occupiers for the time being of the messuage and premises hereby demised, and all or any of the members of the families of such tenants or occupiers respectively, &c., from time to time, and at all times hereafter during the continuance of the said term of ninety-five years (wanting ten days), at their respective wills and pleasure, to enter into, upon, and enjoy as a pleasure ground or garden the piece of land particularly delineated and described in the plan, &c., and the ornamental inclosure formed thereon," &c. Therefore it is perfectly clear that the land itself is not demised, but there is merely a grant of a right to enter upon and enjoy it as a pleasure ground. In the judgment of *Wood v. Leadbitter* (13 M. & W. 838) it was said that such a right is in the nature of an incorporeal hereditament. There is not even a reservation of rent, but simply a covenant by W. Reynolds that he will, during the continuance of the term, pay "the further yearly rent or sum of 4l. 4s. in respect of the right of user hereinbefore granted of the garden or pleasure ground." There is therefore a substantial objection to this sum of 4l. 4s. being a "rent," because it is essential to a rent that it should issue out of a corporeal hereditament, which this sum does not. No distress could be levied for this sum of 4l. 4s., for there is no reservation of a rent, but a mere covenant by Reynolds to pay this annual sum during the continuance of the term. I doubt whether an action of debt could be maintained by the plaintiffs against W. Reynolds for the recovery of this sum, (assuming the plaintiff had a conveyance) for it is not an annuity or rent charge, but merely a [319] sum in gross. I am disposed to think that the only mode in which it could be recovered would be by an action at the suit of Roy against Reynolds. At the utmost it is a yearly payment of 4l. 4s. for eighty years, and then it is at an end, the plaintiffs having during that time a right to enjoy the pleasure ground.

With respect to the 10th clause of the conditions, it has not been relied on by the vendor. If he had stated that there was a mistake in the description of the property, and had offered an adequate compensation, I do not say what the consequence would have been. But the vendees delivered to him the real objection to his title, and his answer was, not that there was an error in the particulars of sale, but that there was no mistake whatever; and the result (as stated in the case) was that, "in consequence of the above objection to the vendor's title, the treaty for the sale of the premises came to an end." From that I understand that neither party desired to act upon the 10th

clause of the conditions; and, as the objection to the vendor's title is good, the plaintiffs are entitled to recover the deposit.

BRAMWELL, B. I am of the same opinion. I think, for the reasons given by my brother Martin, that this yearly sum of 4l. 4s. is not a freehold ground rent which could be distrained for; but I cannot entertain a doubt that it is not a ground rent within the meaning of what the plaintiffs supposed they purchased. The plaintiffs intended to purchase the reversion of land on which buildings had been erected, and for which, so long as the lessee occupied the whole, he was bound to pay a ground rent of 19l. 4s. I cannot doubt that if the lessee was evicted from the garden he would be under no obligation to pay the yearly sum of 4l. 4s. It may be that he could not be permanently evicted, because, if an assignee of the lessor had notice of the lease, he would [320] be affected in equity with notice of the covenant by the lessor that the garden should be a perpetual garden for the use of the tenants of the houses, and upon proceedings in equity being taken the garden might ultimately be restored to the enjoyment of the lessee, who would then be liable to pay the 4l. 4s. a year. But that is not a ground rent in the sense in which that expression is used.

The next point has been already answered by my Lord. The 8th clause of the conditions does not give notice to a purchaser that there may be such an essential difference between the thing sold and that described. My brother Martin has given an answer to the point raised upon the 10th clause of the conditions. That clause does not mean that if the parties differ as to whether there is a mistake, but if they agree that there is a mistake, compensation is to be given, and the amount is to be settled by two referees or their umpire. Whether or no there is a right to the compensation is not to be settled by the referees, but only the amount of compensation. Here the parties did not act under that clause; but the vendees claimed to rescind the contract on the ground of the objection to the vendor's title; the vendor said that there was no defect in his title. After that it seems to me impossible to rely on the 10th clause. For these reasons I agree that the plaintiffs are entitled to recover the deposit.

CHANNELL, B. This is an action to recover the amount of a deposit paid on the purchase of certain ground rents, and I think that the plaintiffs are entitled to judgment. I agree that we must look at the substance of the transaction, not excluding the conditions so far as they throw any light on the nature of the contract. The contract is in substance this—the plaintiffs purchased freehold ground rents issuing out of residences described in the particulars of sale. As [321] to the sum of 4l. 4s. payable in respect of the garden, I think that it is not a ground rent; but, assuming that it is, it is not a freehold ground rent.

It is said that there is a rule of equity, that if the purchaser of property held under a lease has notice of the lease, he has notice of everything contained in the lease. I do not propose to dissent from that rule so far as it lays down the general principle that, if there are covenants in a lease of such a restrictive character that the value of the property is rendered less than it otherwise would be, the purchaser, by omitting to look at the lease, takes upon himself those covenants. But I cannot think it necessary for a purchaser to call for a lease for the purpose of seeing whether a person who purports to sell one thing is giving another.

Then it is said that, supposing there is some error in the description, the plaintiffs' remedy is under the 10th clause of the conditions. I agree with my brother Bramwell that that imports an agreed difference to exist, the compensation for which is matter of dispute, and that is what is to be settled by the referees. But, supposing that is not the true construction of the 10th clause of the conditions, we must look at this case as the parties have brought it before us, and I think the true view is, that the defendant has admitted the right of the plaintiffs to rescind the contract provided they have not been offered that which they purchased under the name of freehold ground rents.

Judgment for the plaintiffs.

[322] *CURLLEWIS v. BROAD*. June 9, 1862.—A process server is not liable to an action for a breach of duty in neglecting to indorse on a writ of summons the time of service, as required by the 15th section of the Common Law Procedure Act, 1852.

[S. C. 31 L. J. Ex. 473 ; 10 W. R. 797.]

Declaration. That after the passing and coming into force of the Common Law Procedure Act, 1852, and before and at the time of the defendant's employment, as hereinafter mentioned, the defendant was a process server and the business of a process server exercised and carried on ; and the defendant before such employment had on divers occasions been employed by the plaintiff and other persons to serve writs of process on the persons against whom such writs were issued ; and the defendant had served such writs and had duly indorsed on such writs the indorsements of the time of such service within the time and as was and is required by the said statute. And thereupon, after the coming into force of the said Act, the plaintiff commenced an action in her Majesty's Court of Exchequer, &c., against one W. Wignall, for the recovery of a debt justly due to the plaintiff from the said W. Wignall, by the plaintiff causing to be issued a writ of summons out of the said Court against the said W. Wignall at the suit of the plaintiff, in the form and under and according to the said Act, and which said writ the plaintiff caused to be duly indorsed with the indorsements required by the Act, and also to be specially indorsed with the particulars of the plaintiff's claim, according to the said Act, in the special form therein provided. (The declaration then set out the indorsements.) And thereupon the plaintiff retained and employed the defendant as such process server to serve the said writ of summons upon the said W. Wignall, according to the provisions of the said act of parliament, for reward to the defendant in that behalf ; and for that purpose the plaintiff at the same time caused [323] the said writ of summons, with the said indorsements thereon, together with a copy of such writ and indorsements, to be delivered to the defendant as such process server for the purpose aforesaid, and the defendant as such process server accepted such retainer and employment, and received the said writ with the said indorsements thereon, and the said copy of the said writ and of the said indorsements thereon, from the plaintiff for the purpose aforesaid. And thereupon the plaintiff as such process server, in consideration of the premises, promised the plaintiff that in case he, the defendant, should serve the said writ upon the said W. Wignall, that he the defendant would do and perform his duty in that behalf. Averments : that the defendant did afterwards personally serve the said writ of summons with the said indorsements thereon upon the said W. Wignall, according to the said Act : that all things have happened, &c., to entitle the plaintiff to have the defendant do and perform his duty in that behalf. Breach : that the defendant as such process server did not do or perform his duty in that behalf in this : that he did not nor would, within three days after such service of the said writ on the said W. Wignall, indorse on the said writ the day of the month and week of such service thereof as required by the said Act, and as he ought to have done, but wholly omitted and neglected so to do : that although the said W. Wignall did not cause any appearance to be entered in the said action to the said writ, according to the exigency of the said writ, and made default in such appearance, yet by reason of the defendant's said neglect and omission of his said duty, &c., the plaintiff was wholly hindered and prevented from signing final judgment in the said action against the said W. Wignall, as he might and ought and otherwise would have been entitled to have done and would have done, at the expiration of eight days after such service of the said writ, [324] inclusive of the day of such service ; and thereby the said service of the said writ and the expense thereof became and were wholly useless and of no avail, &c.

Plea. That the defendant, before and at the time of the alleged employment in the declaration mentioned, was not retained or employed or instructed in any way to indorse on such writ of summons the time of service thereof as required by the 15th section of the Common Law Procedure Act, 1852 ; and that he never was at any time retained or employed by the plaintiff, or any other person for him, to do more than serve the said writ, and was not at any time requested or directed to make such indorsement.

Demurrer, and joinder therein.

H. T. Cole, in support of the demurrer. The plea affords no answer to the action. The defendant having, as a process server, accepted the employment to serve the plaintiff's writ, it was the duty of the defendant to indorse on it the time of service, as required by the 15th section of the Common Law Procedure Act, 1852. That section enacts, that "the person serving the writ of summons shall, and he is hereby

required, within three days at least after such service, to indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed under this Act; and every affidavit of service shall mention the day on which such indorsement was made." The statute therefore casts upon the server of the writ an express duty, the neglect of which has precluded the plaintiff from proceeding to sign judgment for want of an appearance. [Channell, B. Is it not the duty of the attorney to see that the indorsement is made?] Perhaps the attorney sends the writ into the country at a distance to be served. [Martin, B. Suppose the defendant had pleaded that he was told [325] by his employer to serve the writ but not to indorse on it the time of service.] In that case he would be excused, but in the absence of any directions it was his duty to indorse the writ. [Channell, B. The Act says "the person serving the writ;" therefore, if the fact of being employed to serve it raises a duty, if an attorney sent the writ in a letter to a friend and asked him to serve it he would be bound to indorse it.] The words of the statute are imperative, "and he is hereby required." [Channell, B. The attorney may serve the writ himself, or by his clerk or agent. A process server is his agent, and if there is no indorsement of the time of service, the attorney is liable for a breach of duty.] Whatever may be the liability of the attorney, the person employed is also responsible for his neglect of duty. [Pollock, C. B. Suppose the attorney said: "Serve this writ, but I do not care about its being indorsed with the time of service, as in the event of non-appearance I shall not sign judgment." The statute merely says, if in the case of non-appearance the plaintiff intends to proceed under that Act the writ must be indorsed. Channell, B. The argument for the plaintiff would be the same, if an attorney knew a boy at school and sent the writ in a letter to him to serve.] The declaration alleges that the defendant carried on the business of a process server, and therefore it must be implied that he knew his duty. A person who undertakes an employment is bound to bring competent skill to the performance of the service: *Harmer v. Cornelius* (5 C. B. N. S. 236). [Martin, B. The plea is an argumentative traverse of the alleged employment, and would formerly have been bad on special demurrer.]

J. E. Davis appeared for the defendant, but was not called upon to argue.(b)

[326] Per Curiam.(a) The plaintiff may have leave to amend by taking issue on the plea, otherwise judgment for the defendant.

Judgment accordingly.

(b) The defendant's points for argument were as follows:—

1st. That the object or effect of the 15th section of the Common Law Procedure Act is not to throw an absolute unconditional duty on every person who serves a writ of summons to make the indorsement therein mentioned, but only to give the party requiring the indorsement a right to require the making of it, and no action will lie for not doing it without shewing a request or a contract.

2nd. That the declaration is bad in substance, because it relies on a breach of a supposed duty, and the law does not imply any such duty from the facts stated in the declaration alone.

3rd. That it is consistent with the allegations in the declaration that the defendant, when employed to serve the writ, may have been requested to delay or defer making the indorsement, or not to make it at all, and in such a case there would be no retainer or duty to make the indorsement and no cause of action for not doing it, and such a case would be admissible to proof under the plea, and if proved would be a defence to the action.

4th. The declaration should have alleged, not only that the defendant was employed to serve the writ, but to make the indorsement, which is a distinct and subsequent act, and the facts alleged in the beginning of the declaration might have been evidence to prove such a retainer although the indorsement might not have been expressly mentioned in the defendant's instructions, but they do not amount in point of pleading to such an allegation, for they are only a statement of evidence, and of evidence which might or might not prove it.

(a) Pollock, C. B., Martin, B., and Channell, B.

WILLIAM THORPE AND HANNAH PITKIN v. ELIZABETH THORPE. June 2, 1862.—

A testator named Henry Thorpe devised his real estate to trustees to permit his son Henry to receive the rents thereof during his life; and after his decease, the testator devised the property to the heirs of the body of his son Henry, and for want of such issue to the testator's nephew Henry for life, and after his death to the testator's "right heirs of the name of Henry Thorpe, if any such there should then be, for ever." Held, that the ultimate limitation was a contingent remainder which would vest in the person who at the time of the nephew's death filled the character of a right heir of the testator and had the name of Henry Thorpe; but, there being at that time no person who answered both descriptions, the property vested in the testator's heir-at-law.

[S. C. 32 L. J. Ex. 79; 8 Jur. (N. S.) 871; 10 W. R. 778.]

Ejectment to recover possession of a messuage and lands at Preston Bisset, in the county of Buckingham.

[327] The cause came on for trial, before Erle, C. J., at the Buckinghamshire Summer Assizes, 1861, when a verdict was entered for the plaintiff William Thorpe, subject to the opinion of the Court on the following special case:—

The property sought to be recovered consists of a house, homestead and fifty acres of land, of which one Henry Thorpe, hereafter called the testator, who died on the 21st October, 1820, before and at the several times of making his will and of his death, was seised in fee simple in possession. The testator's will, dated the 29th of September, 1804, was (so far as material to the present case) as follows:—

"I give and devise all that my messuage or tenement with the homestead and appurtenances thereto belonging, and also those my several closes, &c., situate in the parish of Preston Bissett, in the county of Bucks, and now in my own occupation, and all and every other my messuages, lands and real estates whatsoever and where-soever, unto J. King, J. Kearse and W. Thornton, their heirs and assigns, during the natural life of my son Henry Thorpe, upon this special trust and confidence in them reposed, and to the intent and purpose that they the said J. King, J. Kearse and W. Thornton and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall permit and suffer my said son Henry Thorpe to take, have, hold, occupy, possess and enjoy the said messuage or tenement, hereditaments and premises, with the appurtenances (or in case it should be found most expedient to let or lease the same to some other person or persons), to permit and suffer him to receive and take the rents, issues and profits thereof to and for his own use and benefit for and during the term of his natural life. And I do hereby beseech and request them the said J. King, J. Kearse and W. Thornton, and the survivors and survivor of them, and the heirs and assigns of such survivor, to advise, direct, and assist my said son Henry Thorpe in the conducting and [328] management of his business and affairs, and on account of his incapacity to superintend the same for him. And from and immediately after the decease of my said son Henry Thorpe, I give and devise all and singular the said hereditaments and premises, with the appurtenances, unto the heirs of the body of my said son Henry Thorpe lawfully issuing for ever. And for want or in default of such issue, I give and devise the said hereditaments and premises, with the appurtenances, unto my nephew Henry Thorpe (son of my brother James Thorpe), and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after his decease, I give and devise the said hereditaments and premises with the appurtenances unto my own right heirs of the name of Henry Thorpe, if any such there shall be, for ever."

Henry Thorpe, the son, and Henry Thorpe, the nephew, survived the testator. On the death of the testator, Henry Thorpe the son being a lunatic, his trustees entered into possession of the property and paid the rent to him until his death. Henry Thorpe, the son, died a lunatic and unmarried on the 23rd March, 1832. Henry Thorpe, the nephew, then entered into possession of the said estate, and continued in such possession until his death in June, 1843. At the time of the death of Henry Thorpe, the nephew, the nearest relative of the testator having the name of Henry Thorpe was the testator's great-grandnephew, the husband of the defendant

and the son of William Thorpe, the plaintiff; and he then entered into possession of the estate and continued in such possession until his death in 1859. At the death of Henry Thorpe, the nephew, the plaintiff's father, one Thomas Thorpe, who was the son of Thomas Thorpe the next brother to the testator, was then alive and was then the heir-at-law of the testator, as the following agreed pedigree [p. 913] shews:—

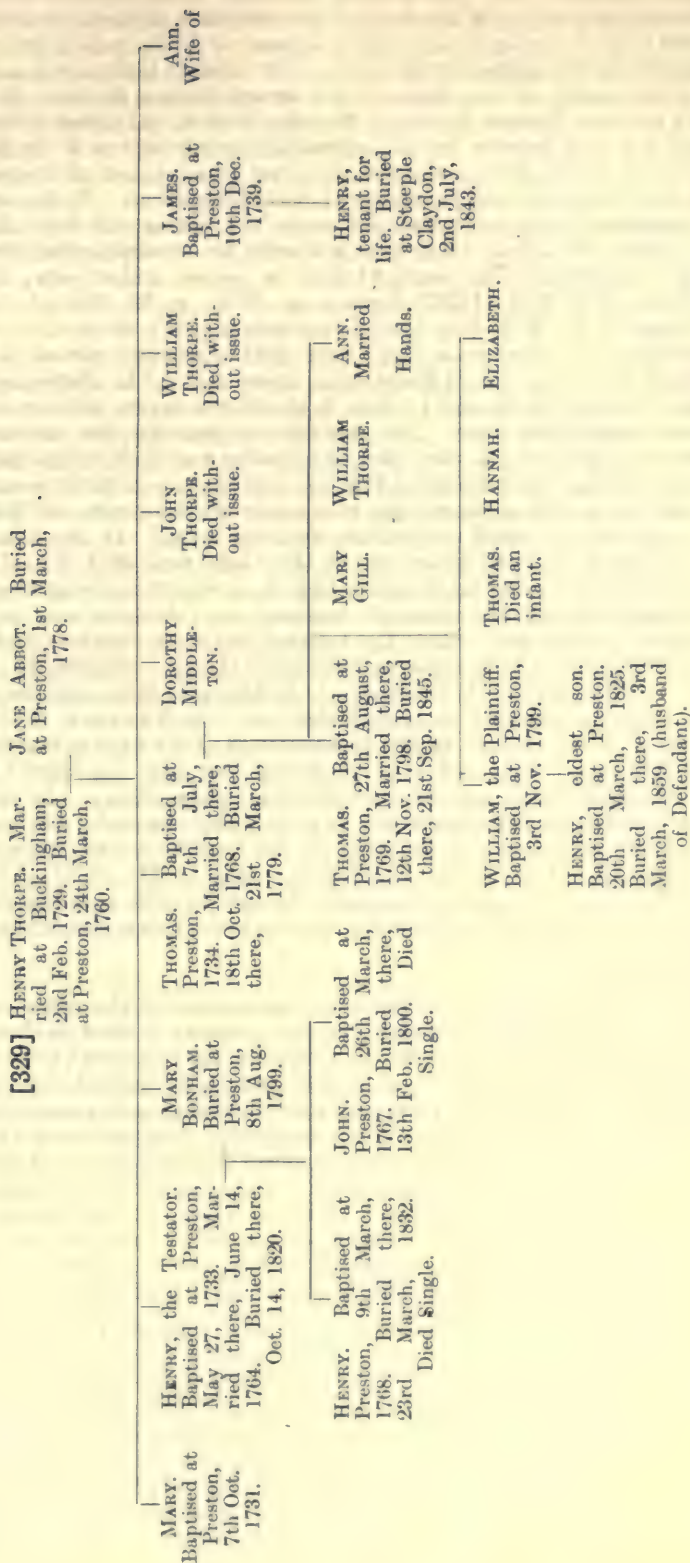
[330] Thomas Thorpe, the father of the plaintiff, died intestate on the 21st of September, 1845. The plaintiff, William Thorpe, was his eldest son. Henry Thorpe, the great-grandnephew, died in the early part of the year 1859, leaving lawful issue alive. The plaintiff, William Thorpe, contends that he is entitled to the property as heir-at-law; and that on the death of the nephew there was no person alive who then satisfied the description in the will, "my own right heirs of the name of Henry Thorpe."

The plaintiff, Hannah Pitkin, claims as mortgagee by virtue of a mortgage deed of the 25th May, 1854, in which the defendant's late husband, Henry Thorpe, the said great-grandnephew of the testator, joined. The defendant contends that on the death of the nephew the property passed by the will to her late husband, Henry Thorpe, the said great-grandnephew of the testator; and that he then satisfied the description in the will, my own right heirs of the name of Henry Thorpe."

The question for the opinion of the Court is whether on the death of Henry Thorpe, the testator's nephew, the plaintiff's father or the defendant's husband was entitled to the testator's real estate.

If the Court shall be of opinion that the plaintiff's father was so entitled, the verdict for the plaintiff, William Thorpe, is to be altered into a general verdict for the plaintiffs. If the Court shall be of opinion that the defendant's husband was the person so entitled, the verdict for the plaintiff, William Thorpe, is to be set aside and a verdict entered for the plaintiff, Hannah Pitkin, only; and in that case the defendant is to pay the said Hannah Pitkin her costs of the trial; and the plaintiff, William Thorpe, is to pay the defendant her costs of this case.

D. D. Keane argued for the plaintiffs, in last Easter Term (May 7). First, if the word "then," in the ultimate limitation, has reference to the time of the testator's death, the plaintiff is entitled to recover, because at that time there was no person who answered the description of the testator's right heir of the name of Henry Thorpe. It is a rule of law that estates in remainder shall be construed to vest at the earliest possible period. *Wrightson v. Macaulay* (14 M. & W. 214) is an authority that in this case the ultimate limitation took effect in interest on the death of the testator. Therefore no person could take under that devise unless at that time he answered the description in both particulars. The term "right heir" is used in its strict sense. Where a testator devised his lands, in a certain event, to the "right heirs of his name and posterity," it was held that his brother, who was of his name, but was not his heir, was not entitled, and that the devise was void: *Cownden v. Clerke* (Hob. 29). So where the devise was to the "right heirs male" of the testator for ever, it was held that, as the testator died, leaving no other issue than three daughters, the devise failed, and did not apply to his next collateral heir male: *Ashenhurst's case* (cited Hob. 34). In *Doe d. Angell v. Angell* (9 Q. B. 328) the devise was to the "male heirs, if any such there be, of W.," and although it was admitted that the rule was modified, as stated by Lord Hardwicke in *Newcoman v. Bethlem Hospital* (Amb. 8), yet the Court said that, unless there were circumstances to take the case out of the rule, a claimant must shew himself heir general as well as male. In *Doe d. Bailey v. Pugh* (2 Meriv. 348) the Court of King's Bench put a different construction on the words "right heirs;" but that decision was reversed by the House of Lords (3 Bro. P. C. 454). Moreover, the ultimate limitation is void for uncertainty. In *Fearne on Contingent Remainders*, vol. 1, [332] p. 252, after observing that a possibility upon a possibility is never admitted by intendment of law, it is said: "Upon the same ground ariseth the distinction between a remainder limited by a general description, and one limited by a particular name to a person not in esse. In the first case the remainder is good, as a limitation to the right heirs of J. D., who is alive, or primo-genito filio of B., who has no son then born; but in the other case the remainder is void, as if a remainder be limited to G., son of D., in that case if D. hath not a son named G. at the time of the limitation, the law will not expect that he should afterwards have a son so named, because it amounts to a possibility upon a possibility, viz., first, that he should have a son, and secondly, that such son should be named G.:



Cholmley's case (2 Rep. 51 b.).” Secondly, if the word “then” in the ultimate limitation has reference to the time of the death of the testator’s nephew, the devise is void for remoteness: *Jee v. Audley* (1 Cox, 324); Jarman on Wills, p. 252, 3rd ed.

H. Matthews, for the defendant (June 2). The ultimate limitation is a contingent remainder, which vested on the death of the second devisee for life. At that time the testator’s heir was Thomas, the son of his elder brother, and father of the plaintiff; but he could not take because he did not satisfy both branches of the description. But he had a son, named Henry, who was the great-grandnephew of the testator and husband of the defendant, and he answered both descriptions. If the term “right heirs” be construed in its strict technical sense the devise will fail. *Goodright d. Brooking v. White* (2 W. Black. 1010) is an authority for construing that term in the sense of “heir apparent.” The word “heirs” is nomen collectivum: *Durdant v. Burchett* (Skinn. 205, 206); [333] Jarman on Wills, p. 56, 3rd ed. In *Doe d. Winter v. Perratt* (9 Cl. & F. 606) Lord Cottenham and six of the Judges were of opinion that the words “first male heir” were used to denote a person of whom an ancestor might be living. Lord Cottenham there said: “In *Farrington v. Darel* (Year Books, 9 Hen. 6, pl. 23, and 11 Hen. 6, pl. 12) the devise, after an estate, was to the testator’s next heir male. The contest was between the testator’s granddaughter, who was heir, and her son; and no objection was made to his claim because his mother was living. It is admitted that the rule ‘nemo est hæres viventis’ is not inflexible, and that an heir apparent may take under the description of ‘heir,’ if such appear to be the sense in which the testator used the term.” In *Darbison d. Long v. Beaumont* (1 P. Wms. 229) the devise was to the “heirs male of J. S.” J. S. having a son, and the testator having taken notice that J. S. was then living, that was held a sufficient description of the testator’s meaning, and that the son took, though strictly speaking not the heir. Here the testator had a son, brothers and nephews, but he has passed over all heirs apparent not named Henry. [Martin, B. *Wrightson v. Macaulay* (14 M. & W. 214) is conclusive.] In that case there were no contingent words as are here “if any such there shall then be.” In *Wharton v. Barker* (4 K. & J. 483) Sir W. P. Wood revised all the authorities as to the time to which the word “then” had reference. That case is an authority that here the word “then” has reference to the time of the death of the testator’s nephew, Henry. In the case put in *Fearne on Contingent Remainders*, vol. 1., p. 252, the remainder was limited to a particular person not in esse at the time of the limitation, and therefore no one could take under it. The position rests on the dicta in *The Rector of Chedington’s* [334] case (1 Rep. 148 a.); but in a note to that case (id. 156, note (1)) the doctrine there laid down is questioned, and authorities are cited to shew that there may be a possibility upon a possibility.

D. D. Keane replied.

MARTIN, B. The question turns upon the construction of the will of one Henry Thorpe, by which he gave and devised his landed property to trustees during the life of his son Henry, upon trust to permit him to receive the rents and profits thereof for his own use during his life. The testator then goes on to request the trustees “to advise, direct and assist his son Henry in the conducting and management of his business and affairs, and, on account of his incapacity, to superintend the same for him.” Therefore it is clear that the trustees took an estate for the life of the testator’s son Henry. The testator then goes on to say, “and from and immediately after the decease of my said son Henry Thorpe, I give and devise all and singular the said hereditaments, premises, &c., unto the heirs of the body of my said son.” Now, if the previous devise had given the legal estate to the son Henry for life, the rule in *Shelley’s case* (c) would have applied, and he would have [335] taken an estate tail.

(c) 1 Rep. 93. The rule is, that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word “heirs” is a word of limitation; that is, the ancestor takes the whole estate comprised in the term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple.

The learned editors of the 3rd edition of Jarman on Wills remark that the rule is usually stated in the above general terms, but by the word “limitation” we must understand a limitation by way of remainder, as distinguished from a limitation by way of executory devise or a shifting use, which, though it be to the person taking a previous estate of freehold, vests in the heir as a purchaser.

But, inasmuch as he took an equitable interest only for his life, the rule does not apply. The son Henry died without issue, and therefore that estate was at an end. Then the testator, for want or in default of such issue, devises the hereditaments and premises unto his nephew, Henry Thorpe (son of his brother James Thorpe), during his life; and from and immediately after his decease the testator devises the property unto his "own right heirs of the name of Henry Thorpe, if any such there shall then be, for ever." Now, Mr. Matthews contended that this estate must vest at the termination of the second estate for life, and he cited *Wharton v. Barton* (4 K. & J. 483) as an authority for that proposition. Assuming that to be the construction naturally arising from the words of the will, there is an estate for the life of the son Henry; an estate tail for his children, if he had any; an estate for the life of Henry Thorpe the nephew, and a contingent remainder, to arise immediately after the termination of the last life estate, to the testator's own right heirs of the name of Henry Thorpe—an estate which would not be void on the ground of perpetuity, for the reasons given by Mr. Matthews. The consequence is, that there would be vested in the right heirs of the testator at the time of his death, a contingent reversion in fee (for the law does not allow an inheritance to be in abeyance), subject to be defeated by the particular remainder taking effect upon the death of the nephew. I doubted whether that estate could have any operation, and the same difficulty occurred to my brother Bramwell. But, on consideration, I think it may, and that the true construction of this will is that it was a contingent remainder, to vest, upon the termination of the second devise for life, in the testator's right heir, if there was one, of the name of Henry Thorpe; [336] and the effect of that would be to defeat any intermediate conveyance of the estate by an intermediate right heir.

Giving that construction to the words of the will, there is a contingent remainder to the person who might fill the character of right heir of the testator at the time the second estate for life terminated, provided his name was Henry Thorpe; but inasmuch as at that time there was no person who answered that description, the devise never took effect. To support the view of Mr. Matthews, we must necessarily hold that any person who, at the time of the determination of the second estate for life, might possibly be in the line of descent however remote, and of the name of Henry Thorpe, would be entitled to the estate. That is a construction which the words of the will do not bear. We give effect to all the words of the will by giving to the term "right heirs" its true construction, and by holding that this was a contingent remainder to the right heir in existence at the determination of the second life estate, provided his name was Henry Thorpe. That estate did not vest in the husband of the defendant, Elizabeth Thorpe, and consequently the plaintiffs are entitled to judgment. (a)

BRAMWELL, B. I am of the same opinion. We ought to construe this will, not according to what we think the testator meant, but we ought to see what construction has been put upon wills in almost the same words. At first it seems unreasonable to ascertain what A. B. meant by seeing what has been said that C. D. meant in a similar case. But it is more important, with reference to the interest of the possessors of property and their successors, that documents of this kind should receive a uniform construction, than that [337] the very intention of the testator should be carried into effect. It is immaterial to the public at large whether Henry or Thomas takes an estate, or whether a devise is void or not. There is no abstract justice in the matter: for aught that appears the one is as much entitled as the other. Therefore it is not unreasonable to have certain rules of guidance in construing such documents. If that is so, there is an end of the case, because Mr. Matthews admitted that it could not be distinguished from some of those cited. I felt some difficulty upon the argument of Mr. Keane, that the limitation in question was void. But I am now satisfied that is not so, and that the words have the meaning pointed out by my brother Martin. I think that this case is concluded by authority, and that our judgment ought to be for the plaintiff.

CHANNELL, B. I was not in Court on the former occasion when the case was argued, and therefore I have not had the advantage of hearing the whole argument; but I have paid the best attention to the case as presented to us to-day, and I agree

(a) His lordship stated that the Lord Chief Baron, who had left the Court, was of the same opinion.

with the view my brother Martin has expressed. I do not participate in the doubt at one time entertained by my brothers Martin and Bramwell. This rule is laid down by Mr. Jarman in his Treatise on Wills (vol. 2, chap. xxviii. p. 80, 3rd ed.), that "if the contingency of the devise consists in the uncertainty of the object, as if lands be devised to the person who shall, at a specified time, be the testator's heir of the name of H., no person will be duly qualified to take under the will unless he bears the name at that time."

Judgment for the plaintiff.

[338] COX AND OTHERS v. THE LORD MAYOR, ALDERMEN, AND COMMON COUNCILLORS OF THE CITY OF LONDON. June 10, 1862.—A custom of the city of London, on a plaint being entered in the Lord Mayor's Court, to attach a debt due to the defendant from a third person, upon his being found within the jurisdiction, though none of the parties are citizens or resident in the city, and neither the original debt nor that due from the garnishee accrued within the city, is void in law.

[S. C. 8 Jur. (N. S.) 542; 10 W. R. 694; 6 L. T. 498: affirmed 1863, 2 H. & C. 401; 1867, L. R. 2 H. L. 239.]

Prohibition. The declaration stated, that the city of London is, and immemorially has been, an ancient city; and there is, and immemorially has been, a certain court of her present Majesty, or her Majesty's predecessors, kings or queens in England, holden or to be holden for the said city of London, before the mayor and aldermen of the said city for the time being, in the chamber of the Guildhall of and in the said city. And heretofore, to wit, on the 17th September, 1860, Sarah Buckmaster and Robert Addams, trading as W. Buckmaster and Co., went into the said court holden for the said city, before the mayor and aldermen, in the said chamber of the Guildhall of and in the said city, and affirmed a plaint against Richard Farquharson, &c., in a plea of debt on demand for, to wit, 86l. 3s.; and it was returned and certified to the same court that the said R. Farquharson had nothing within the said city, or the liberties thereof, whereby he could be summoned, nor was he to be found within the said city and liberties, and the said plaint was returned "nihil"; and thereupon, at the same court, then and there, before the said mayor and aldermen, the said S. Buckmaster, and R. Addams surmised and alleged that Richard Cox, C. Hammersley, &c. (naming all the plaintiffs) were debtors to the said R. Farquharson in a certain sum, to wit, the sum of 86l. 3s., and had garnishment against the said R. Cox, C. Hammersley, &c., to warn them to come in and answer whether they were indebted in the manner alleged by the said S. Buckmaster and R. Addams; and the said R. Cox, C. Hammersley, &c., were thereupon warned to come [339] in, at the said court holden for the said city, before the mayor and aldermen of the said city, at the said Guildhall of and in the said city, on the 12th October, 1860, and to answer whether they were indebted in the manner alleged as aforesaid; and the said R. Cox, &c., did, at the said last mentioned court, by their attorney, come in and appear to the said warning; and the said R. Farquharson has not appeared to the said plaint. And the said R. Cox, C. Hammersley, &c., aver that they, and the said S. Buckmaster and R. Addams, and the said R. Farquharson, did not, nor did any or either of them, at the time when the said S. Buckmaster and R. Addams so went into court and affirmed the said plaint as aforesaid, reside, dwell, or carry on business, nor have they, or any or either of them, at any time since resided, dwelt, or carried on business, within the said city of London, or the liberties thereof, or within the jurisdiction of the said court; and that the alleged debt in the said plea in the said plaint so affirmed as aforesaid mentioned, or the said debt alleged to be due from the said R. Cox, C. Hammersley, &c., to the said R. Farquharson in the said garnishment mentioned as aforesaid, did not, nor did either of them, arise or accrue within the said city of London, or the liberties thereof, or within the jurisdiction of the said court before the said mayor and aldermen of the said city, by means whereof the said court before the mayor and aldermen aforesaid had not jurisdiction over the said plaint, or the said proceedings thereunder, or over the said garnishment, or over the said R. Cox, C. Hammersley &c., as garnishees, or over the said alleged debts in the said plaint mentioned, or over the said R. Farquharson, at any time during the said alleged proceedings aforesaid: Neverthe-

less the said court before the said mayor and aldermen, and the said mayor and aldermen, did assume to have, and did take upon themselves, jurisdiction in the premises, and did proceed with the said garnishment against [340] the said R. Cox, C. Hammersley, &c., and the said plaint and garnishment are now pending and being proceeded with in the said court, whereby the said R. Cox, C. Hammersley, &c., are prejudiced, and have sustained damage to the value of 1000*l.*; wherefore the said R. Cox, C. Hammersley, &c., the aid of the Court of the said lady the Queen, before the Barons of her Exchequer, now here, most humbly imploring, pray remedy by the writ of the said lady the Queen, of prohibition to the said mayor and aldermen, in form of law, to be directed to prohibit them from holding and proceeding with the plaint and plea and garnishment aforesaid, the premises aforesaid anywise concerning, further before them.

Plea (inter alia). That the city of London now is, and immemorially has been, an ancient city, and that there is, and immemorially has been, a custom therein that if any plaint of debt shall be levied or affirmed by any person in the court of the lord the King, before the mayor and aldermen for the time being, in the chamber of the Guildhall of the same city, so that by virtue of such plaint the same court shall command any serjeant-at-mace of the same mayor within the same city, and the minister of such court, to summon the party defendant in the same plaint specified to appear at the court of the lord the King, in the chamber of the Guildhall of the same city holden before the mayor and aldermen of such city, to answer the plaintiff in the same plaint named in the plea in such plaint specified; and such serjeant-at-mace and minister at such court whereat such plaint shall be levied or affirmed shall, by virtue of such precept, testify by word of mouth, to the same mayor and aldermen, that the defendant in the same plaint named had nothing within the liberty of the city aforesaid whereby he might be summoned, and then the same defendant at the same court shall make default; and thereupon in such court the plaintiff named in [341] such plaint shall testify and allege by word of mouth, to the same mayor and aldermen, that some other person, for any cause whatsoever, is indebted to such defendant in any sum of money amounting to the debt in the plaint aforesaid specified, or part thereof; then, on the petition of the plaintiff in the same plaint named, the same court shall command such serjeant-at-mace and minister that the same serjeant shall attach the defendant in such plaint named by such sum being in the hands or custody of such other person found within the jurisdiction of the said court; and then, if such serjeant-at-mace and minister of the court return and certify to such court such defendant to be attached according to the said custom by such sum of money so being in the hands or custody of such other person to be defended and kept, so that such defendant in such plaint named may or might appear at the same or the then next court holden or to be holden, to answer such plaintiff in the plea in such plaint specified; and if the defendant at that and three other courts then next severally holden or to be holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, being solemnly called, does not appear, but makes default, and such four defaults, according to the custom of the said city, are recorded against such defendant at such four courts after such attachment made, if such plaintiff in such plaint named at every of such four courts in his own person or by his attorney appeared, according to the custom of the said city, then, and at the last of the said four courts, or at any court holden or to be holden after such four defaults recorded, at the petition of such plaintiff in such plaint named made to the court, it is and has been used for the court to command such or any other serjeant-at-mace and minister of the court to warn such other person, so being found within the said city, according to the custom of the said city, to be and appear at any court afterwards to be [342] holden before the mayor and aldermen of the said city, to shew if anything he has or knows to say for himself why such plaintiff in such plaint ought not to have execution of such sum so attached as aforesaid; and if at such court such serjeant-at-mace return and certify such other person in whose hands such sum of money is or has been attached to be warned, according to such custom, to be and appear in the same court to shew such cause, and if such person so warned, being solemnly called at such court, do not appear, or has not appeared, but makes or has made default, then it is, and from time immemorial it has been, used and accustomed for such court to award such plaintiff to have execution of such sum so attached to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such sum so attached extends

or has extended to satisfy, by sufficient pledges to be found and given by such plaintiff in such plaint named in the court, according to such custom, to restore to such defendant such sum of money so attached, if such defendant, within a year and a day thence next ensuing, come or has come into the court so holden, and disproves or avoids, or has disproved or avoided, such debt in such plaint mentioned, according to the custom of the said city; and that after such pledges found and execution had of such sums so in the hands and custody of such other person attached and defended by the plaintiff in such plaint named, such other person in whose hands or custody such sum is or has been attached, or is or has been discharged, against such defendant, of the sum so attached and had in execution, and such defendant in such plaint named is or has been discharged against the said plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remain in force and effect, not revoked or disproved by such defendant; and if such sum of money so attached and defended, and had in execution, amount not, nor has amounted, to [343] the whole sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff, by the custom of the said court, is and, from time immemorial, has been used and accustomed to have process against such defendant, according to such custom, for the residue of his debt by him in such plaint demanded. That the said custom, and all other customs of the said city obtained and used in the same city during all the time aforesaid, were, by authority of a parliament holden in the seventh year of the reign of his Majesty Richard II., King of England, and by divers other statutes, ratified and confirmed to the then mayor and commonalty of the said city, and their successors. And the defendants say, that S. Buckmaster and R. Addams, trading as W. Buckmaster and Co., before the commencement of this action, to wit, on the 17th September, 1860, in their own proper person, came into the court of our Sovereign lady the Queen, then before the mayor and aldermen of the said city of London, in the chamber of the Guildhall of and within the said city, according to such custom, the said chamber then and still being in and parcel of the said Guildhall, and then and there affirmed a certain plaint against R. Farquharson, in a plea of debt on demand for 160l., &c., and there appointed in their stead G. Ashley their attorney, against the said R. Farquharson, in the plea of the said plaint, according to such custom, and it was granted to him, &c.; whereupon, at the petition of the said S. Buckmaster and R. Addams then and there made to such court by their said attorney, and by virtue of such plaint, it was then and there commanded by the said court to C. Fitch, then being one of the serjeants-at-mace of the said mayor, and a minister of such court, that he, according to such custom, should summon the said R. Farquharson to appear at the same court so holden before the mayor and aldermen of the said city, to answer the said S. Buckmaster and the said R. Addams [344] in the plea in such plaint specified; and that such serjeant-at-mace should return and certify what he should do by virtue of the said precept. That afterwards, at the same court, the said serjeant-at-mace, according to such custom, returned and certified to the same court that the said R. Farquharson had nothing within the said city, or the liberties thereof, whereby he could be summoned, nor was he to be found within the same; and thereupon the said R. Farquharson was then and there at the same court solemnly called, and did not appear, but made default. That thereupon, afterwards, and before the commencement of this action, to wit, on the 17th September last mentioned, at the same court, it was alleged by the said S. Buckmaster and R. Addams, by their said attorney, that the now plaintiffs owed to the said R. Farquharson 86l. 3s. in monies numbered as the proper monies of the said R. Farquharson, and then had and detained the same in their hands and custody. Thereupon the said S. Buckmaster and R. Addams, by their said attorney, then and there prayed process, according to such custom, to attach the said R. Farquharson by the said 86l. 3s. being in the hands and custody of the now plaintiffs, so that the said R. Farquharson might appear at the next such court to be held before the mayor and aldermen of the said city, in the chamber of the Guildhall of and in the said city, to answer the said S. Buckmaster and R. Addams in the plea in such plaint specified. Whereupon, at their said petition, it was then and there commanded by such court, before the commencement of this action, to the said serjeant-at-mace and minister of the said court, that he, according to such custom, should attach the said R. Farquharson by the said 86l. 3s. so being in the hands and custody of the now plaintiffs as aforesaid, and the same in their hands and custody defend and keep according to such custom, so that the said

R. Farquharson might appear at the then next such court to be holden [345] before the mayor and aldermen of the said city, &c., according to such custom, to answer the said S. Buckmaster and R. Addams in the plea in the said plaint specified; and that the said serjeant-at-mace, &c., should then return and certify to such court what he should do by virtue of that precept; and the same day was given to the said S. Buckmaster and R. Addams. That afterwards, and before the commencement of this suit, to wit, the 5th October, in the year aforesaid, they, the now plaintiffs, being then found within the said city, and within the jurisdiction of the said court, were then and there duly warned, according to the said custom, by the said serjeant-at-mace, &c., not to part with the said sum of 86l. 3s. without the license of the said court, but the same in their hands and custody safely to keep, so that the said R. Farquharson might be attached thereby, that he might appear at the said court to answer the said S. Buckmaster and R. Addams in the plea in the said plaint specified. That thereupon the said serjeant-at-mace duly attached the said R. Farquharson by the said sum of 86l. 3s. That afterwards, to wit, at the said then next court holden before the said mayor and aldermen of the said city, in the said chamber of the Guildhall of the said city, on the 6th October last aforesaid, the said serjeant-at-mace returned and certified to the same court that he, by virtue of the said precept, had theretofore, to wit, on the 5th October, in the year last aforesaid, attached the said R. Farquharson by the said 86l. 3s. so being in the hands of and custody of the now plaintiffs, and the same had defended and kept in their hands and custody according to such custom, so that the said R. Farquharson might appear at the said court so holden on the said 6th October, in the year aforesaid, to answer the said S. Buckmaster and R. Addams in the said plea in their said plaint specified. That thereupon the said R. Farquharson at the same court was solemnly called, but did not appear, but then [346] made a first default, which said first default at the same court was recorded according to such custom. That thereupon, according to such custom, a further day was then given by the same court to the said R. Farquharson to appear at the then next court to be holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, on the 8th October. That thereupon the said R. Farquharson was solemnly called, but did not appear, but then made a second default, which said second default at the same court was recorded according to custom. That thereupon, according to such custom, a further day was then given by the same court to the said R. Farquharson to appear at the next such court to be holden before the mayor and aldermen as aforesaid. That thereupon the said R. Farquharson was solemnly called, but did not appear, but then made a third default, which said third default was duly recorded to such custom; and thereupon, according to such custom, a further day was then given by the same court to the said R. Farquharson to appear as aforesaid. That thereupon the said R. Farquharson was solemnly called, but did not appear, but then made a fourth default, which said fourth default was duly recorded according to such custom. That thereupon, afterwards, and after the said four defaults had been recorded as aforesaid by the same court against the said R. Farquharson in the plea aforesaid, according to such custom, the said S. Buckmaster and R. Addams having appeared at each and every of such courts so held as aforesaid, by their said attorney, then at the same court prayed process, according to such custom, to warn the now plaintiffs, the garnishees, to be and appear in the same court to be holden on the 31st October then instant, to shew cause why the said S. Buckmaster and R. Addams should not have execution of the said 86l. 3s. so attached in their hands and custody. That thereupon, at such court as [347] aforesaid, at the petition of the said S. Buckmaster and R. Addams made in such court, it was commanded by the said court to the said serjeant-at-mace, that he, according to such custom, should warn and make known to the now plaintiffs, being the garnishees, to be and appear in such court to be so as aforesaid holden on the 31st October then instant, to shew cause why the said S. Buckmaster and R. Addams should not have execution of the said 86l. 3s. so attached in their hands and custody; and that the said serjeant-at-mace should then return and certify to the same court what he should have done by virtue of such precept; and the same day was given by the same court to the said S. Buckmaster and R. Addams to be there according to such custom. That afterwards, to wit, on the 25th October aforesaid, they, the now plaintiffs, were, within the said city, duly warned by the said serjeant-at-mace to be and appear at such court, to be as aforesaid holden on the 31st October, to shew cause

why they, the said S. Buckmaster and R. Addams, should not have execution of the said sum of 86l. 3s. That at the said court holden on the 31st October, in the year last aforesaid, the said S. Buckmaster and R. Addams, by their said attorney, appeared and the said serjeant-at-mace then returned and certified to the same court that he, by virtue of such precept to him directed according to such custom, had warned and made known to the now plaintiffs, the garnishees, to be and appear at the same court to shew such cause; and thereupon, at the same court, the now plaintiffs, the garnishees in such attachments, were solemnly called, according to such custom, and appeared, and appointed in their stead C. Oxtan their attorney, and had leave to imparl &c., until &c. And the defendants say that the garnishment against the plaintiffs, and the warning of them, and appearance by them, in the declaration alleged, were and are the said garnishment, warning, and appearance in this plea set out, [348] and no other, and by means whereof the said court before the mayor and aldermen aforesaid had jurisdiction over the said plaint and proceedings, and over the said garnishment, and over the plaintiffs in this action, as garnishees, and over the said R. Farquharson.

Demurrer and joinder therein.

Replication. That the said custom in the said plea mentioned does not extend to, or authorize or give jurisdiction to the said Court of the said mayor and aldermen over any plaint of debt to be levied or affirmed, or levied or affirmed, by a person or persons who at the time of the levying or affirming thereof does or do not reside, dwell, or carry on business within the said city of London or the liberties thereof; or where, at the time of the levying or affirming of the plaint, the defendant or defendants in such plaint mentioned shall not reside, dwell or carry on business in the said city of London or the liberties thereof; nor where the debt or cause of action in the plaint mentioned shall not have been contracted, or shall not have accrued, within the said city of London or the liberties thereof; and that the said custom does not extend to or authorize the plaintiff named in a plaint to testify and allege, by word of mouth, to the same mayor and aldermen, that any other person, for any cause whatsoever, is indebted to such defendant in such plaint mentioned in any sum of money amounting to the debt in the plaint specified, or part thereof: nor the same court to command the serjeant-at-mace and minister to attach the defendant in such plaint named by such sum being in the hands or custody of such other person, where such other person does not at the time of such testification or allegation, and of such command to the said serjeant-at-mace and minister, reside, dwell or carry on business within the said city of London or the liberties thereof; nor where the debt or cause of action so testified or alleged against such other person [349] has not arisen or accrued within the said city of London or the liberties thereof; and the said custom does not give jurisdiction to the said court of the mayor and aldermen aforesaid to attach, as in the said plea mentioned, a person who does not, at the time of the testification or allegation and command aforesaid, reside, dwell or carry on business within the said city of London or the liberties thereof; nor where the debt or cause of action so testified and alleged against such other person has not arisen or accrued within the said city or the liberties thereof.

Demurrer and joinder therein.(a)

Montagu Chambers (Griffiths with him) argued for the plaintiffs.(b) The plea is bad. It alleges a custom by which the Lord Mayor's Court assumes jurisdiction in respect of debts contracted without the city of London by persons not resident or carrying on business within the city. Such a custom is void in law. In the preface to Bohun's *Privilegia Londini*, reference is made to the ancient charters granted to the citizens of London, the earliest of which was in the reign of William the Conqueror. The charter granted in the 15 Car. 2 was merely a confirmation of the liberties and privileges of the citizens of London. The custom, as described in the *Liber Albus* (c)

(a) The defendants also rejoined that the custom is and immemorially has been as alleged in the plea, upon which the plaintiffs took issue, and on the 20th of November Russell Gurney, Esq., Recorder of London, came into Court and certified the custom as alleged in the plea.

(b) In last Michaelmas Term, Nov. 20 and 22. Before Pollock, C. B., Bramwell, B., Channell, B., and Wilde, B.

(c) The *Liber Albus* of the City of London was compiled, in the year 1419, by John Carpenter, Common Clerk, and Richard Whittington, Mayor. In page 183 of

of the city [350] of London, is confined to goods or debts within the city. In a case of *Bowser v. Collins* (22 Edw. 4, pl. 11 [B.]), Sterkey, Recorder of London, certified the custom as follows:—"That if a plaint be affirmed in London before &c. against any person, and it be returned 'nihil,' if the plaintiff can surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him to warn him to come in and answer whether he be indebted in the manner alleged by the other, and if he comes in and does not deny the debt, it shall be attached in his hands, and after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt; and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other, after execution sued out by the plaintiff." Pulling's Customs of London, p. 188. Therefore the custom as alleged in the plea does exist. But assuming that it does, it is a custom that a particular class of persons shall, through the instrumentality of an inferior court, have jurisdiction over all other persons. In *Bac. Abridg. tit. Customs (C.)*, it is said that "every custom which appears to [351] have been unreasonable in itself, as being against the good of the commonwealth or injurious to a multitude, though beneficial to a particular person &c., is void, nor can any continuance of such a custom give it sanction or make that good which was void in its creation." The custom here set up is injurious to a vast multitude, because proceedings may be taken against persons without their knowledge, not only whilst they are in this country, but even whilst they are abroad. In order to give the Court jurisdiction, the garnishee or the goods must be within the city of London at the time of the attachment. In *Andrews v. Clarke* (Carth. 25), the garnishee pleaded that the debt due from him to the defendant, and the contract on which it was founded, arose and was made in the county of Middlesex, and out of the jurisdiction of the Court; but the Court said that was not material, "for it was always the custom in London to attach debts upon bills of exchange, and goldsmiths' notes, &c., if the goldsmith who gave the note, or the person to whom the bill is directed liveth within the city, without any respect had to the place where the debt was contracted." *Tamm v. Williams* (3 Doug. 281; S. C. 2 Chit. Rep. 438), is an express authority that the garnishee must reside, or the goods must be within the city of London. In the notes to *Turbill's case* (1 Wms. Saund. 67 b.), it is said that if the plea of foreign attachment states the custom to be, "that if any person be or hath been indebted to any other person within the city, it ought to aver that the defendant in the plaint was indebted to the plaintiff within the city;" but it is not necessary so to aver the custom; it is enough to state that the garnishee was warned: *Banks v. Self* (5 Taunt. 234, note). In *Vin. Abridg. tit. "Customs of London" (K.) 3*, it is said: "If in bar of an action a foreign attachment is [352] pleaded, that the custom is, that if any man bring his action against another for any debt, and upon a return made, that he non est inventus et quod nihil unde &c., and thereupon surmises that any other is indebted to the defendant in such a sum, and thereupon to pray process to attach the sum in his hands, and to defend, ita quod the defendant appears

the translation, edited by H. T. Riley, and published in the year 1861, the custom (so far as material to the present case) is described as follows:—

"Item, when plaint of debt is made before one of the said sheriffs and it is testified by the officer that the defendant has not sufficient assets in the city, and allegation is made by the plaintiff that the defendant has goods and chattels, or debts in other hands or in other keeping within the said city; and it is prayed by the said plaintiff that such goods and chattels may be arrested and the debts stopped; then, at the suit and suggestion of such plaintiff, such goods and chattels whenever they may be found within the city, shall be arrested, and the debts stopped in the hands of the debtors, at peril of the plaintiff.

"And upon this the plaintiff shall continue his suit at four courts before the same sheriff before whom the plaint was first alleged, until such time as the defendant shall have been four times demanded; and if the defendant does not appear at the fourth court, and makes four defaults, then the defaulter's goods and chattels, so arrested, shall be appraised and delivered to the plaintiff; and if the goods be not of the same value as the debt, then the debts stopped in the hands of the debtors shall be levied and delivered to the said plaintiff, up to the amount in demand, and such arrests of goods and stoppages of monies are called 'Foreign Attachments,' according to the custom of the city," &c.

to answer the plaintiff, and the serjeant returns that he hath attached him to defend the sum in his hands, and the defendant does not appear at four courts after &c., that judgment shall be to recover it in his hands &c., this is no good custom, without a surmise that the stranger who is indebted to the plaintiff is within the jurisdiction of the Court; and the return of the serjeant is not sufficient that he hath attached him to defend it in his hands, for perhaps the serjeant intends that he may attach the debt in his hands though he be not within the jurisdiction of the Court, and his return shall not bind the party without an actual surmise thereof by the party himself: Trin. 11 Car. B. R., between Sir Nicholas Halse and Walker, adjudged upon a demurrer, where a foreign attachment in Exeter was pleaded, which was all one with the custom of London, and all customs there confirmed by parliament in the time of Queen Elizabeth." In *Lord Barrymore v. Taylor* (1 Esp. 327), Lord Kenyon ruled that the process of foreign attachment was confined to cases where, at the time of the attachment, the parties were resident in London. *Crosby v. Hetherington* (4 Man. & G. 933), decided that a plea of payment under a foreign attachment must state that the garnishee, at the time of the attachment, was within the city of London. Moreover, the cause of action must have arisen within the jurisdiction: *De Haber v. The Queen of Portugal* (17 Q. B. 171, 213). There Lord [353] Campbell, in delivering the judgment of the Court, said: "The circumstance that the cause of action, if there were any, arose out of the jurisdiction of the Lord Mayor's Court, need not be relied upon. Nevertheless, after the strong assertions at the bar that this is immaterial where the defendant does not appear, we think it right to say that, having examined the authorities, we entertain no doubt that the process of foreign attachment can only be duly resorted to where the cause of action arose within the jurisdiction of the Court from which it issues. The garnishee is safe by paying under the judgment of the Court; but the objection that the cause of action did not arise within the jurisdiction of the Court, if properly taken, must prevail." *Westoby v. Day* (2 E. & B. 605), is an authority to the same effect.

Sir F. Kelly (C. Pollock with him), for the defendants. The question is whether the custom is void on the ground that it is unreasonable and repugnant to every principle of law. If so, it must be either because the creditor or the debtor or the garnishee reside out of the jurisdiction of the Lord Mayor's Court, or because the debt did not arise within it. Where a cause of action arises within the jurisdiction of an inferior court, it may entertain the plaint, although the parties reside out of the jurisdiction. Again, there is nothing to prevent a party who resides within the jurisdiction of an inferior Court, from suing another who resides without the jurisdiction; or to prevent a party who resides without the jurisdiction from suing a party who resides within it. The circumstance that the cause of action arose and the parties reside out of the jurisdiction of the Lord Mayor's Court does not render the custom [354] repugnant to any principle of law, for the superior Courts pronounce judgment in cases where the cause of action arose and the parties reside abroad. [Bramwell, B. The power of the superior Courts to attach debts, owing from a garnishee to a judgment debtor, is expressly limited to cases where the garnishee is within the jurisdiction: 17 & 18 Vict. c. 125, s. 61.] Suppose an Austrian contracted a debt with a Frenchman in Spain, if the Austrian happened to be in England for an hour, and was served with process, this Court might compel payment of the debt. In *Lewis v. Masters* (5 Mod. 76), Holt, C. J. said, "It is one thing if a custom be different from the law, and another thing if it be repugnant to it and unreasonable." It is not unreasonable that the Lord Mayor's Court should enforce payment of debts because they were contracted without the city of London. No doubt, cases of partial inconvenience may arise, but they cannot affect an immemorial custom. A translation of the writ and certificate of Sterkey, Recorder, is given in Brandon on Foreign Attachment, App. 211, from which it appears that it is not necessary that the garnishee should reside within the city of London. Confusion has arisen in some of the cases from not distinguishing between the residence of the garnishee in the city and his being within it at the time he is served with the attachment. In *Tamm v. Williams* (3 Doug. 281; S. C. 2 Chit. Rep. 438), and *Lord Barrymore v. Taylor* (1 Esp. 327), the custom was not directly pleaded or before the Court. In *De Haber v. The Queen of Portugal* (17 Q. B. 171), the question was whether property belonging to a foreign sovereign prince in his public capacity, could be attached in the hands of garnishees in [355] London to compel an appearance in a suit instituted against him on a cause of action arising here. The case of *Halse v.*

Walker, as stated in Viner's Abridg. tit. "Customs of London" (K.), pl. 3, is at variance with other decisions, if it be taken as deciding anything more than that the garnishee must be within the city of London when the attachment is served. The expressions of the Court in *Westoby v. Day* (2 E. & B. 605), so far as regards the present question, are mere obiter dicta. [Wilde, B. All that the Court there laid down was that, in an action against a garnishee, it is not necessary for him, in pleading payment under a foreign attachment, to shew that the cause of action arose within the city of London.] *Harington v. Macmorris* (5 Taunt. 228), decided that in a foreign attachment it is not necessary that the debt should arise or the defendant reside within the jurisdiction. In *Banks v. Self* (id. 234, note), the custom was pleaded, but the plea did not aver that the cause of action arose within the city of London; the Court, however, observed that the uniform course of pleading had been so ever since the time of the Year Books in Edward the Fourth's time, and it was too much to ask them to overthrow so uniform a practice without citing so much as a single applicable case in favour of that request. In *Magrath v. Hardy* (6 Scott, 627), it was held that the custom does not require that any notice of the proceedings should be given to the defendant in the Lord Mayor's Court. *Crosby v. Hetherington* (4 M. & G. 933), is an authority that it is only necessary that the defendants should be within the city of London at the time the attachment is served.

Montagu Chambers, in reply, cited Bac. Abridg. tit. Customs of London (H.), Black. Com., vol. 1, p. 74, *The City of London case* (8 Rep. 383), Viner's Abridg. tit. Customs (I.), pl. 10, [356] (I. 2), pl. 13, *Rowles v. Mason* (2 Brownl. 87), *Regina v. The Mayor of London* (13 Q. B. 1), *Stannian v. Davis* (1 Salk. 404), *Huxham v. Smith* (2 Camp. 19), *Anonymous* (2 Show. 374), *Trevor v. Wall* (1 T. R. 151), *Harwood v. Lee* (2 Dyer, 196).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. The question in this case arises on demurrer. The defendants have pleaded to the plaintiffs' declaration in prohibition, and the plaintiffs have demurred to the plea, thereby confessing its truth, and denying its validity in point of law. We have, therefore, nothing to do with the certificate, not of the learned and respected recorder, but of the mayor and aldermen of London by his mouth. That certificate would be under consideration if the truth of the plea were in issue, which on the argument of the demurrer it is not.

The question then is, is the custom set forth in the plea valid in law, assuming it to exist in fact? Now, that custom is thus stated:—London is an ancient city; immemorially in it has been a court, confessedly a local court, with a local jurisdiction, and no more in any respect except as to the matter in question. So that, if any ordinary action is brought in the court by a plaintiff against a defendant to recover a debt due from one to the other, the cause of action must arise within the jurisdiction, and the defendant ordinarily must have notice of the action by service of process upon him. But besides this, the ordinary jurisdiction of a local court, there is claimed for this court a further power, viz., that if a plaintiff sues a defendant, and if some third person, who is indebted to the [357] defendant, is found within the jurisdiction, then, though the plaintiff's cause of action against the defendant did not arise in the city; though neither of them is in any sense a citizen, or resident in the city; and though the debt of the third person in no way arose in the city; and though that person is in no sense a citizen or resident in the city; though his visit there is casual, or he is only passing through it, "being found there," then, without any notice or attempt at notice to the defendant by any one, the debt due from the third person to the defendant may be attached in that person's hand. Thus, any one owing money to another, if he casually enter the city, is subject, first, to a warning to pay, though his creditor has not sued him or desired payment, and, on his next visit, to an execution for the amount of the debt he owes, which amount is handed over to the person suing his creditor, without any proof of his debt (his swearing to it is no necessary part of the custom), on giving a pledge to restore it to such creditor if he appears within a year and a day and disproves the debt.

It seems unnecessary to do more than state this custom to shew its invalidity. It seems to violate every principle of justice, and every rational rule of jurisprudence and procedure. For it is impossible to suppose that this local court, like other local courts, has jurisdiction, in ordinary cases of actions brought in it, only where the

cause of action arose within the jurisdiction, yet that when its extraordinary procedure is resorted to, (which, indeed, is in theory only in aid of the ordinary, and to compel the defendant to appear), its jurisdiction is practically without limit as to locality; that if the defendant should appear after the attachment, the suit may be defeated by the cause of action not arising within the jurisdiction, while if the proceeding can be carried through without his knowledge, that matter is unimportant. Such a jurisdiction as claimed is repugnant to the very idea of a local court. Such a court is, by [358] its name, and in good sense, a court for a locality and the inhabitants thereof, and those who have dealings within it, and with reason.

In holding this plea bad, we neither overrule nor dissent from any former decision, for in no previous instance has the custom here stated been brought before any court by plea or certificate, and held to be good. The superior courts have at all times investigated the customs under which justice has been administered by local jurisdictions; and unless they are found consonant to reason, and in harmony with the principles of law, they have always been rejected as illegal. Various instances of customs regulating the proceedings of local courts having been so dealt with, are to be found collected in *Bac. Ab. tit. "Customs,"* in the latter part of the division, letter (C.).

Judgment for the plaintiffs.

SHEEN v. BUMPSTEAD. June 7, 1862.—In an action for fraudulently representing that a trader was trustworthy, the defendant proposed to ask a witness what was the reputation of the trader on a certain day, as to his trustworthiness. Held, that the question was admissible: Per Pollock, C. B., and Martin, B. Bramwell, B., dissentiente.

[S. C. 32 L. J. Ex. 124; 8 Jur. (N. S.) 702; 10 W. R. 740; 7 L. T. 466: affirmed 1863, 2 H. & C. 193.]

The first count of the declaration stated, that the defendant fraudulently, and with the intent that one Charles Watson might obtain goods upon credit, represented to the plaintiff that the said Charles Watson was, to the best of his (the defendant's) knowledge, trustworthy; whereas the said Charles Watson was not then trustworthy, as the defendant then well knew; and the defendant by so representing as aforesaid induced the plaintiff to sell and deliver to the said Charles Watson goods on credit: whereby the plaintiff lost the price of the said goods, and incurred expense in endeavouring to recover the same. Second count: that the defendant fraudulently represented to the plaintiff that the said Charles Watson was in good circumstances and might safely be trusted with goods on credit; whereas the said [359] Charles Watson was not then in good circumstances, and could not then safely be trusted with goods on credit, as the defendant then well knew; and the defendant by then so representing as aforesaid, induced the plaintiff to sell and deliver to the said Charles Watson goods on credit: whereby the plaintiff lost the price of the said goods, &c.

Plea. Not guilty. Issue thereon.

At the trial, before Martin, B., at the Norwich Spring Assizes, there was evidence (a) that the plaintiff had been induced to trust Watson with goods to the amount of 41l. 8s. 5d., by means of the following letter written by the defendant to the plaintiff, in answer to one from the plaintiff to him, in which the plaintiff inquired as to Watson's credit:—

"Sir,—In reply respecting Mr. Watson, to the best of my knowledge he is trustworthy. I have knowing (b) him In Business here these 14 years he do (b) with many of the London Houses that I do; he also do business with Mr. Church of your Town, of whom you can here (b) his opinion.—Yours resp.,

"ROBERT BUMPSTEAD. Oct. 24/60."

To establish that the defendant knew that Watson was not trustworthy at the time mentioned, the plaintiff put in evidence, along with other matters, an examination

(a) The following is the statement of the facts agreed upon by counsel on appeal to the Court of Exchequer Chamber.

(b) Sic.

of the defendant taken on oath in the matter of the bankruptcy of the said Watson, who in fact had become a bankrupt after the delivery of the goods; from which the jury was called on by the plaintiff to conclude that at the very time the defendant wrote to the plaintiff the letter of the 24th October, 1860, and in the same year, both before and afterwards, [360] he had bought goods of Watson to a considerable amount, at 25l. per cent. under cost price.

In answer to the plaintiff's case, the defendant gave his explanation of his dealings with Watson, and also called one Alfred Adams, who said: "I am the counterman to defendant. I have been in his service four years or thereabouts. I have been acquainted with the trade of a grocer 16 years. I went on one occasion to Watson's to look at goods. It was in October, 1860, I believe. It was to examine a parcel of cheese and ascertain whether they were worth the money Watson had asked for them. They were not worth the money which was asked. I refused to take them at the price asked. I bought them for the defendant. I refused to take them at the price he asked, 75 per cent. I bought them at 70/ per hundredweight. This was the full value, I believe. I believe money was lost by the transaction. I know the price given by the defendant for the other goods. The defendant always consulted me as to the purchases. In my opinion he always paid Watson the full market value. He could have bought as cheap elsewhere. All the transactions with Watson came within my knowledge." He was then asked, "Was Watson, on the 24th October, 1860, trustworthy to your belief?" This question was objected to by the counsel for the plaintiff, but admitted by the learned Judge. The answer to it was, "I believe he was trustworthy at the time."

The defendant also called one John Fenn, who said: "I am a tallow-chandler, at Yarmouth, in a large way of business. I know Watson. I knew him in October, 1860. I had dealings with him in 1860. My dealings were not more than 20l. a year. He paid me from deal to deal." He was then asked, "What was the reputation of Watson in October, 1860, as to his trustworthiness as a tradesman?" [361] This question was also objected to by the plaintiff's counsel, but admitted. The answer was: "It was good: this is my belief."

The defendant also called Richard Tanbridge, George Pulford and William Hacon, tradesmen of Yarmouth, to whom, severally, the same question was put as had been put to the witness John Fenn and objected to. The like objection, as in Fenn's case, was taken in each case and overruled. The answer of Tanbridge was: "I considered him perfectly safe." The answer of Pulford was: "I know nothing to the contrary, but that he was a trustworthy, straightforward, and honest man." The answer of Hacon was: "His reputation was very good at that time."

The said answers were left with other matters to the jury as evidence for their consideration, and they returned a verdict for the defendant.

O'Malley, in the following term (April 23), obtained a rule nisi for a new trial, on the ground of the improper reception of the evidence; against which

Bulwer and Cherry shewed cause in last Easter Term (May 12). The question whether the evidence was admissible depends on the issue raised by the pleadings. Now, in order to maintain this action, the defendant must be shewn to have been actually and fraudulently cognizant of the falsehood of his representation, or to have made the representation fraudulently, without belief that it was true: *Smith's Lead. Cas.* vol. 1, p. 161, 5th ed.; *Chandelor v. Lopus* (Cro. Jac. 4); *Pasley v. Freeman* (3 T. R. 51). In that respect there is a distinction between the action for a false representation and an action upon a warranty, in which the gist of the action is the breach of warranty. Therefore in this case the issue was whether the defendant, knowing that Watson was [362] not trustworthy or in good circumstances, fraudulently represented that he was; and the evidence was admissible for the purpose of shewing that the defendant acted *bonâ fide* and under a reasonable belief that the representations which he made were true: *Shreusbury v. Blount* (2 Man. & G. 475). [Pollock, C. B. The foundation of the action is fraud, and if the defendant truly stated what he believed to be true the action will not lie. Martin, B. Suppose this case had been tried before the alteration of the law which allowed the parties to a suit to be witnesses, what other evidence of *bona fides* could the defendant have given?] The defendant was not bound to prove that the representations were in fact true, but only that they were made under a reasonable and well grounded belief that they were true: *Haycraft v. Creasy* (2 East, 92). Reputation is evidence to prove a man's character, for it is

the general conclusion formed by society: Starkie on Evidence, p. 43, 46. In *Gurr v. Rutton* (Holt, N. P. 327), Gibbs, C. J., said: "Now, what is reputation of ownership? It is made up of the opinions of a man's neighbours; it is a number of voices, as it were, concurring upon one or other of two facts." That definition was cited with approbation by Dallas, C. J., in *Oliver v. Bartlett* (1 B. & B. 269).

Keane (O'Malley with him), in support of the rule. The evidence was not admissible. The question was whether the defendant made the representation fraudulently and with intent to deceive the plaintiff, and the opinion of a third person as to the credit of Watson cannot be evidence that the defendant when he made the representation *bonâ fide* believed it to be true. If that third person had communicated his opinion to the defendant, and he had acted upon it, believing it to be true, the case might have been [363] different; but because a third person says that he believed Watson was trustworthy the jury are called upon to conclude that the defendant believed him to be so. *Shreusbury v. Blount* (2 M. & G. 475) was an action by A. against B., C. and D. for false representations alleged to have been made by them acting as directors of a joint stock company, and it was ruled that conversations between B. and C., and conversations between C. and E., a former agent of the company, were admissible, not as evidence of the facts, but for the purpose of shewing the *bona fides* of the defendants in making such representations. If the defendant had pleaded, as in *Evans v. Collins* (5 Q. B. 804), that at the time he made the representation he had good and probable cause to believe, and that he did with good faith believe it to be true, this evidence would not have been admissible in support of that allegation. General reputation is only admissible in questions where conclusive evidence cannot be obtained, as in questions of pedigree, or right of way. *Oliver v. Bartlett* was a question of reputed ownership. [Pollock, C. B., referred to *Polhill v. Walter* (3 B. & Adol. 114).] The defendant ought to have given evidence of his knowledge of the trustworthiness of Watson at the time he made the representation, not of the opinion of other persons. Such evidence is no more admissible than if, in an action for false imprisonment with a plea of justification on the ground that the plaintiff committed felony, the defendant should propose to call a number of witnesses to state that they believed him innocent.

Cur. adv. vult.

The Court having differed in opinion, the following judgments were now delivered:—

[364] BRAMWELL, B. I think this rule should be made absolute. The plaintiff alleged that the defendant had stated, "that to the best of his knowledge one Watson was trustworthy;" that that representation was untrue, and untrue to the defendant's knowledge. These allegations the defendant denied; the only admissible evidence, then, is such as goes to prove or to disprove them or any of them. A question was put to a witness, which was not "what was the general opinion as to Watson's trustworthiness?" nor "what was the belief of the tradesmen in the town thereon?" I will assume such questions would have been admissible on one or both of two grounds, viz., first, that the defendant had made a representation as to such general opinion; second, that the defendant might be assumed to be aware of and participate in such general opinion, and so *bonâ fide* make the statement he has made. But that was not the question; the question was, "Was Watson, on the 24th October, 1860, trustworthy to your belief?" That question was objected to, but allowed, and, as I think, erroneously. It is obvious that it does not go directly to prove or disprove any of the controverted allegations. Though the witness did on the 24th of October, 1860, believe Watson to be trustworthy, he may not have been so, and the defendant may have stated what he did, stated it untruly, and untruly to his knowledge. But it is said the question was admissible because it might be submitted to the jury that that which was the knowledge and belief of the tradesmen in the town, was the knowledge and belief of the defendant. But, as I have said, the question was not "what was the knowledge and belief of the tradesmen in the town;" but what was the belief of the witness. It is true that several of the tradesmen were called, and, if enough were, it may be that it would be reasonable to infer that their opinion was the common opinion; and if all the tradesmen had been called, the common opinion [365] would have been proved in the most conclusive way. But the question must be proper when put and allowed, and cannot become so or not according as a sufficient number of witnesses is or is not called. The mistake, as I think it, seems to me the same as where, on the question what is the fair price of a piece of

land, an inquiry is proposed as to the price at which a piece of neighbouring land similarly circumstanced sold, or where the question is, what is the fair price of wheat on such a day, and it is asked at what price A. then sold such wheat to B. The proper question in each case to the expert is, what is the fair or market price. On cross-examination he may give, as his reason, because such a piece of land was sold at such a price, and because A. sold wheat at such a price to B., and any other reasons; but he cannot be asked those particular questions on the examination in chief. I accept the illustration put. If the plaintiff had proposed to ask one of these tradesmen what was his belief on October 24th as to Watson's trustworthiness, would not the defendant have been entitled to contend that that man's belief was nothing to him unless known to him; surely, the fallacy is in saying that it is "the knowledge and belief of the tradesmen in the town" or a legitimate mode of proving it.

I think this a question of considerable importance in principle. If such evidence were admissible, collateral issues would be raised at great expense, and with an opportunity for great injustice and dishonesty. For instance, in this case, it may have happened that twenty persons may have been applied to, who had a bad opinion of Watson, and it may be that each of those called, if asked what was the general opinion on October 24th, might have said either that he did not know or that he had since found out it was unfavourable. In this particular I think it by no means improbable that this evidence unduly weighed with the [366] jury. I confess with great respect I entertain a strong opinion that the question was objectionable, equally in point of law and of convenience, and that the rule should be absolute.

MARTIN, B. This was a motion for a new trial upon the ground of the illegal admission of evidence.

The action was for fraudulent misrepresentation as to the trustworthiness of a person named Watson, and the plea was not guilty. The plaintiff was a cheese factor at Leicester, and the defendant a grocer at Yarmouth; Watson was also a grocer there, and had written to the plaintiff requesting him to supply cheese, and referred to the defendant, who had had dealings with the plaintiff, as to his responsibility. The plaintiff in consequence addressed a letter to the defendant, who wrote an answer dated the 24th October, 1860, stating that to the best of his knowledge Watson was trustworthy. This was the alleged fraudulent misrepresentation. The evidence at the trial consisted of this letter, a supply of goods to Watson in consequence, and an examination of the defendant before the Commissioner in the bankruptcy of Watson, in which the defendant stated that he had bought goods from Watson during the year 1860, at 25l. per cent. under the invoice prices; and a purchase of this kind on the 23rd October (the day before the letter to the plaintiff was written) was especially relied on. For the defence the defendant himself was examined, and also his shopman, who gave evidence that he was much concerned in the defendant's transactions with Watson, and that he himself had made the purchase on the 23rd of October, and the following question was proposed to be asked him, namely, "Was Watson on the 24th October, 1860, trustworthy to your belief?" It was objected to; but I admitted it, and his answer, "I believe he was trustworthy at that time." Four [367] other tradesmen at Yarmouth were called as witnesses who had had dealings with Watson, and the same question proposed to them, subject to the same objection; and the point for judgment is, whether it was by law admissible. I think it was.

It was objected, first, that the question was not addressed to the evidence adduced on the part of the plaintiff, that the plaintiff relied upon knowledge possessed by the defendant personally as to the circumstances and dealings of Watson, and that it was immaterial to him what was the knowledge or belief of other persons as to Watson's trustworthiness. I think this objection fails; for, in my opinion, the admissibility or non-admissibility of evidence depends upon the issue on the record then being tried, and not upon the evidence which the plaintiff may adduce in support of it.

It was secondly objected that the evidence was not admissible upon the issue, which was whether, on the 24th October, 1860, the defendant fraudulently stated that, to the best of his knowledge, Watson was trustworthy. I apprehend the rule of law upon the subject to be that all facts and circumstances which afford a fair presumption or inference as to the question in dispute, and which may fairly and reasonably aid the jury in arriving at the just and true conclusion, are admissible, and that the true principle is to extend rather than restrict the admissibility of evidence (1 Starkie on Evidence, p. 76). Suppose the plaintiff had called witnesses such as

those called by the defendant, to prove, that upon the 24th October, to their knowledge and belief, Watson, a brother tradesman in the same town, was not trustworthy, would not this have been evidence as against the defendant? I apprehend it would, and that it might fairly and reasonably be submitted to the jury that that which was the knowledge and belief of the [368] tradesmen in the town as to the trustworthiness of Watson, was the knowledge and belief of the defendant. In my opinion, an inference might fairly and reasonably be drawn from it, not indeed a conclusive one, but that it was a fact or circumstance which might lawfully be laid before the jury as an element to aid in guiding them to a true conclusion upon the question in issue. And if this evidence would have been admissible for the plaintiff, evidence the other way would seem to be clearly admissible for the defendant, not by any means as conclusive, for it might well be that the defendant possessed knowledge which the witnesses did not, and if the jury were satisfied that, notwithstanding the belief of others, the defendant knew or had reason to know that Watson was not trustworthy, they very properly might have found their verdict for the plaintiff. Indeed before parties were admissible as witnesses for themselves, such evidence as that alleged to be inadmissible, might have been the only evidence which a defendant could by possibility adduce. His own mouth would have been closed, and when the question was whether a brother tradesman was to his belief and knowledge trustworthy at a certain time, surely what other tradesmen in the same line of business believed would be evidence to be laid before the jury,—it might be the only evidence possible to be adduced. It is not evidence of opinion in the sense that makes such evidence inadmissible, it is evidence of a fact that at that time Watson was believed to be trustworthy.

I have hitherto considered the question in reference to the evidence of the tradesmen, because, as regards the shopman of the defendant, I think the matter clear. According to his evidence he was cognizant of all the transactions of the defendant with Watson, from which his knowledge as to Watson's solvency was said to be acquired [369] and had himself conducted that of the 23rd of October. He had therefore the precise means of knowledge which the defendant had. No objection was made to the defendant giving evidence that to his knowledge and belief Watson was trustworthy, and what possible objection can there be to his shopman, who knew all that he did, giving the same evidence? It seems to be conceded that evidence as to the reputation of Watson's state of solvency amongst the tradesmen at Yarmouth would have been admissible; if so, the question objected to would seem to be the first step towards it; for the reputation upon the subject is only the aggregate of the opinion and belief of a number of individuals upon it.

POLLOCK, C. B. I regret that there should be any difference of opinion upon the subject. The question was: "Was Watson trustworthy to your belief?" And it appears to me that the term "trustworthy" for the purpose of this inquiry does not mean a fact, that is, that the party was able to pay his debts, but it means credit. In speaking of a person of good credit the expression does not mean that he is solvent, but that he has credit, and that his reputation is such that people trust him. I think the question means in substance and fact this: "According to your opinion, was Watson in good credit at that time?" And I think this was admissible according to my brother Bramwell's view of the law.

I therefore agree with my brother Martin, and the rule must be discharged.
Rule discharged.

[370] TAYLOR, *Appellant*, AND ORAM AND ANOTHER, *Respondents*. June 9, 1862.

—On an information, under the 23 & 24 Vict. c. 27, for keeping a house "for public refreshment, resort and entertainment," the evidence was that the defendants kept a dancing saloon. The entrance from the street led to a room fitted with chairs, looking-glasses and a number of shelves holding glasses, measures and pots. This room opened into the dancing room. When the house was visited by the police, one of the defendants was behind a counter at the entrance of the dancing room pouring beer from one jug into another. A number of persons were in the room, some dancing, some drinking beer; men were sitting at a table, drinking and singing; and there were a number of quarts of beer in persons' hands, from which glasses were filled and handed to others. No sale of anything was seen. Threepence was charged for admission, and if a pot of beer

was wanted, the persons paid sixpence first and one of the defendants went for it. The magistrate, before whom the information was laid, was of opinion that there was no sufficient evidence that it was a house kept open for "public refreshment and entertainment," conceiving that the word "entertainment" meant not diversion or amusement, but the provision of food, drink and whatever might be reasonably required for the personal comfort of guests. Held, that the finding of the magistrate was conclusive: Per totam Curiam.—That the magistrate's construction of the word entertainment was correct: Per Pollock, C. B. That the evidence was sufficient to support a conviction: Per Martin, B. That the decision of the magistrate was correct in law and fact: Per Bramwell, B.

[S. C. 31 L. J. M. C. 252; 8 Jur. (N. S.) 748; 10 W. R. 800; 7 L. T. 68. Discussed, *Howes v. Inland Revenue Board*, 1876, 1 Ex. D. 389.]

Pursuant to the 20 & 21 Vict. c. 43, the following case was stated for the opinion of this Court, by a stipendiary magistrate for the borough of Cardiff:—

This was an information, prosecuted by order of the Commissioners of Inland Revenue, which charged the respondents, under the 9th section of the 23 Vict. c. 27, with having, on the 7th, 10th and 17th days of December, 1861, kept a refreshment house without a licence.

The evidence for the prosecution was as follows:—

John Lynn said: I am an inspector of police in this borough. I know No. 30 Bute Street, it is a dancing saloon; the entrance is by an outside passage from the street; at the end of this passage is a small partition to screen a door, round that is a door and an entrance to a small room; in this room is a fire-place, and it is fitted with chairs, looking-glasses and a number of shelves, holding glasses, measures and pots; from this room a door leads to a larger room, the dancing room, which is fitted up with forms all around. When I visited the house in December last, there was a counter on the left-hand side of the entrance of this large room, and further in the room a large table with seats on both sides of it, at the bottom was a place for musicians. On the 17th of December last I went [371] into the house at half-past eleven at night. I went into the little room, several persons were there; Oram was behind the counter pouring beer from one jug into another. I went into the dancing room and found men and women dancing, sixty or seventy persons were in the room, some dancing, some standing about, some drinking beer; at the table sat a number of men drinking and singing chorus and lifting their glasses as they sang: they wanted us to drink. I saw a number of quarts of beer in persons' hands. Oram went into the room with me. I saw glasses filled from the quarts and handed to others. Oram is always there: he is one of the managers: he said it was his room. I was also in these rooms on the 10th of December last at a quarter to twelve at night, saw a quart of beer standing on the counter in the small room, Oram was there; dancing was going on, as I described on the last occasion; about sixty or seventy persons were there. I had also been there on the 6th and saw the same thing going on there; it was eleven o'clock when I was there on the 6th. Smart's wife was always there; she took the entrance money.

Cross-examined by Smart. I never saw any thing sold there. Threepence is charged for admission.

William Price said: I am a police constable, and was with Mr. Lynn on the 17th of December last. I have heard what he said about these premises; it is true.

Cross-examined by Oram. I don't know whether the beer was given by you to the persons. I saw drinking. I never saw anything sold there.

William Selby said: I am a police constable, and know No. 30 Bute Street: visited this saloon nearly every night in December; have seen Smart and his wife take money for admission; have seen a great number of people drinking in the large room and dancing.

Cross-examined. Never saw anything sold there.

[372] Oram said in defence, "threepence is charged for admission, and if a pot of beer is wanted they pay sixpence first and one of us goes to fetch it."

Smart said in defence, "no refreshment is sold there."

No evidence was offered for the defendants.

This case depended on the construction of the 6th section of the Act. The first part of the section defines "a refreshment house" to be "any house, room, shop or

building kept open for public refreshment, resort and entertainment at any time between the hours of nine (now by a subsequent Act ten) o'clock at night and five o'clock in the morning."

The evidence given in support of the information did not in my opinion bring the house in question within this definition. It was shewn, no doubt, to be a place of public resort, of resort for the purpose of dancing; but there was nothing to satisfy the remaining terms of the definition. "Entertainment" I conceived to mean, not diversion or amusement, but the provision of food, drink and whatever else might be reasonably required for the personal comfort of guests, and of such entertainment there was no sufficient evidence; and I could not say that this was a house kept for public refreshment, inasmuch as no refreshments at all were kept there, only one kind of refreshment was obtainable, and visitors wanting that were dependent upon the chance of being able to procure it from other places.

Then with regard to the remainder of the section, it seems to be clearly discretionary with the class of persons referred to whether or not they take out licences under the Act; and I only allude to it here in order to remark that such a license does not authorize the sale of beer or other exciseable liquors. Looking to this circumstance and to the form of license given in the schedule, in which the sale of beer, &c., is expressly excepted from its authority, it seemed to me that a person could not obtain a license under this [373] Act if beer were the only refreshment offered for sale or consumption by him. It would follow that where, as in the present case, beer is the only refreshment proved to be consumed in the house, the definition in the first part of the section would not be satisfied; and that the keeper of such a house could not be held liable to the penalties imposed by the Act for doing, without a license, that which he could not be licensed to do.

Upon these grounds I dismissed the information.

Locke (Welsby with him), for the appellant. The question is whether these rooms are a "refreshment house" within the meaning of the 6th section of the 23 & 24 Vict. c. 27.(a) The first part of that section declares that "all [374] houses, shops, or buildings, kept open for public refreshment, resort, and entertainment," at any time

(a) Section 1 imposed certain rates and duties "For every license to keep a refreshment house."

"And for every license to be granted as hereinafter mentioned to any licensed keeper of a refreshment house, to sell therein by retail foreign wine to be consumed in such house, or on the premises belonging thereto."

"And for every license to be taken out by any person for the selling by retail in any shop of foreign and British wine not to be consumed in the house or shop or on the premises where sold."

Section 6. "All houses, rooms, shops, or buildings kept open for public refreshment, resort, and entertainment at any time between the hours of nine of the clock at night and five of the clock of the following morning, not being licensed for the sale of beer, cider, wine or spirits respectively, shall be deemed refreshment houses within this Act, and the resident owner, tenant, or occupier thereof shall be required to take out a license under this Act to keep a refreshment house; and every person who shall keep any house, room, shop, or building for the purpose of selling therein any victual or refreshment to be consumed on the premises where the same shall be sold (except beer, cider, wine and spirits sold respectively under a proper license in that behalf); and every person who shall keep any house, room, shop, or building for the consumption therein by the public of any refreshment (except as aforesaid), although the same shall not be sold therein, may, if he shall think fit, take out a license under this Act to keep a refreshment house; and in all proceedings and upon all occasions whatever it shall be sufficient to describe by the term refreshment house any house, room, shop, or building in which any such article as aforesaid (except as aforesaid), is sold to be consumed, or is consumed as aforesaid, without further or otherwise designating or describing the same."

Section 9. "Every person who shall keep a refreshment house for which a license is required by this Act, without taking out and having in force a proper license in that behalf granted to him under the authority of this Act, shall forfeit a sum not exceeding twenty pounds, which penalty shall be recovered as hereinafter directed."

By the 24 & 25 Vict. c. 91, ss. 8, 9, the hour of ten is substituted for that of nine in the above Act, and the amount of duties altered.

between the hours of nine o'clock at night and five in the morning: not being licensed for the sale of beer, cider, wine, or spirits respectively, "shall be deemed refreshment houses within that Act." This is clearly a house for public resort, and it is also a house for public refreshment, since any person may obtain refreshment there. [Bramwell, B. Theoretically it is a favour on the part of the defendants to get the beer.] The latter part of the 6th section defines two cases in which a person may take out a license to keep a refreshment house; first, where he shall sell any victual or refreshment to be consumed on the premises where the same shall be sold; and secondly, where he shall keep any house, room, &c., for the consumption therein by the public of any refreshment, although the same shall not be sold therein. These rooms were kept open for public entertainment, and refreshment was consumed on the premises. [Channell, B. The words are "for public refreshment," that is, where the public may obtain refreshment as a matter of course.] Any person might obtain a pot of beer upon payment of sixpence in addition to the threepence entrance money: or he might pay the threepence and bring his own beer; and it cannot be denied that beer constitutes refreshment. It is not necessary that the beer should be sold by the persons who keep the house. These are also rooms for "public [375] entertainment," for music and dancing has in all ages and in all countries been considered "entertainment."

Poland, for the respondents. To render a license necessary, the house must be kept open for public refreshment, resort and entertainment. These rooms are not a "refreshment house" within the meaning of the 23 & 24 Vict. c. 27, which only requires a license where a person keeps a refreshment house. It is not a house for "public entertainment," because persons are allowed to drink there; for, if so, every place of amusement where iced water is provided would be a house for "entertainment" within the meaning of the Act. The house is not kept open for the purpose of supplying beer, but for dancing; and from that alone the profit is derived. [Martin, B. It is a question of fact whether this is not in substance a house for refreshment.] If so, the Court will not review the magistrate's decision. This is no more a house for entertainment than a room at which billiards are played. To bring the case within the Act, the principal object for which the house is kept open must be the supply of refreshments: *Hall v. Green* (9 Exch. 247). By the first branch of the 6th section every person who keeps a refreshment house is required to take out a license; by the second branch every person who keeps a house for the purpose of selling therein victuals or refreshment to be consumed on the premises; and every person who keeps a house for the consumption therein of refreshment, although not sold therein, may, if he think fit, take out a license to keep a refreshment house. If in a penal action the three questions had been separately left to the jury, whether this was a house for refreshment, resort and entertainment, and they had found any one of them in the negative, their finding would have been conclusive: *Gregory v. Tavernor* (6 C. & P. 280). [376] [Martin, B. In such a case the Judge would tell the jury what was in point of law a house "for public refreshment and entertainment."]

Locke, in reply, referred to *Atkinson v. Sellers* (5 C. B. N. S. 442).

POLLOCK, C. B. I am of opinion that the appeal ought to be dismissed. The question turns upon whether this house was a place for "public refreshment, resort and entertainment," within the meaning of the 23 & 24 Vict. c. 27; and it must have been for all three, otherwise the case is not within the Act. That it was a place for "public resort," there can be no doubt. As to whether it was a place for public refreshment, I give no opinion. I agree with Mr. Locke that that part of the magistrate's decision is not satisfactory; but I do not think he was wrong as to the meaning of the word "entertainment." If I found in some other acts of parliament that word coupled with the word "refreshment," I should be strongly disposed to think it meant amusement and gratification rather than food or drink. But I agree with my brother Martin that the word "entertainment," as here used, is only another expression for "refreshment," and probably means something more substantial than simple refreshment. The word "entertainment" has unquestionably an ambiguous meaning, and being found in connection with the word "refreshment," I should have thought that if the legislature meant it to signify something not ejusdem generis, but quite different, they would have said, "All houses kept open for public refreshment, resort, and entertainment such as music, dancing, and other similar entertainment." But, finding the word where it is, I think it means refreshment ejusdem generis.

[377] The 41st section strongly confirms that view. It enacts, that "any person who shall be drunk, riotous, quarrelsome or disorderly in any shop, house, premises, or place licensed for the sale of beer, wine, or spirituous liquors by retail to be consumed on the premises, or for refreshment, resort, and entertainment under the provisions of this Act," &c., shall be liable to a fine. That seems to me nearly decisive of the meaning of the word "entertainment." In construing a penal Act, we ought to take care that it is not extended beyond that which the legislature clearly meant and has adequately expressed. If the word "entertainment" refers to bodily and not mental gratification, whether the magistrate was right or wrong in his finding, he has distinctly found, as a fact, that there was not sufficient evidence to satisfy him that this was a place of entertainment. I am disposed to agree with him, and I think the word "entertainment" means something more than refreshment. Beer may be "refreshment," but it is not "entertainment." However, upon one of the points the magistrate has decided in a manner which is conclusive, and therefore we ought not to send the case back to him; for if he is right upon any one of the three points the appeal ought to be dismissed. It seems to me that he is right in the meaning which he has attached to the word "entertainment," and he has found as a fact that this was not a place of entertainment. That was purely a matter for him to decide; his finding is conclusive and the appeal must be dismissed.

MARTIN, B. I do not differ, but I own I think this a question of difficulty. If I were called upon to draw a conclusion from the facts stated in this case, I should arrive at the conclusion that these were rooms "kept open for public refreshment, resort and entertainment." It is not necessary to decide what is the meaning of the word "en-[378]-tertainment," but my impression is that it means entertainment in the nature of refreshment. I think that Mr. Poland is right in saying that it must be shewn that these rooms were "kept open for public refreshment, resort and entertainment." My mind is not affected by the form of the license, for a keeper of a refreshment house "to sell any victual or refreshment to be consumed therein; provided that for the sale of any exciseable liquor he shall have in force a proper license granted to him in that behalf;" because the 6th section says that certain houses shall be deemed refreshment houses, and therefore the legislature has given a sort of interpretation clause of its meaning. Assuming, as the justice has found, that these were primarily dancing rooms, and that persons went night after night to these rooms who never danced and were habitually supplied with beer, only one conclusion of fact seems to me to follow, namely, that these were rooms for public refreshment, resort and entertainment. But we have to determine whether or no the justice was wrong in point of law; for an appeal is only given by reason of the appellant being dissatisfied with the determination of the justice "as being erroneous in point of law." I do not say that it was; and if the question was submitted to another justice, and he arrived at the conclusion that these rooms were kept open not merely for dancing but that persons might go and get beer there, I should say that they were kept open for public refreshment, resort and entertainment. But, upon the ground that the justice has determined the facts, I concur with the rest of the Court that the appeal should be dismissed.

BRAMWELL, B. I am of the same opinion. I agree with the magistrate's view of the act of parliament; and I think that upon the evidence he came to a right conclusion. For the reasons given by my brother Martin, it is not necessary [379] to make any distinction between "entertainment" and "refreshment"; and the question is whether the justice ought to have decided that this was a house kept open for "public refreshment" within the meaning of the Act. The 6th section may be thus read:—"The owner, tenant, and occupier of every house kept open for public refreshment between the hours of nine at night and five in the morning is hereby required to take out a license." Then what are the facts? The place in question was a dancing saloon, and a great many people went there; some danced, others did not; some had beer, others had none; some danced and had beer, others had beer and did not dance; but those who wanted beer gave the money to one of the defendants to fetch it. That being so, I am of opinion that this was not a house kept open for "public refreshment," because the statute means a house kept open for the purpose of supplying refreshment to persons, not for the purpose of going and buying it for them. Assuming that the latter purpose did not involve the making any profit, I think that this was not a house kept open for refreshment, if it was

merely obtained in the way I have described. I am confirmed in that opinion by the language of the license, because it is for a person who sells, and it is impossible to suppose that the legislature meant that, in order to authorize a person to do what he does, he should take out a license to do what he does not do. If, indeed, the proceeding was very colourable, and there was a bargain between the publican and the defendants by which they were to get a profit on each pot, or by taking a certain quantity of beer, I am not sure that I should not be prepared to hold that the house was kept open for "refreshment and entertainment" within the meaning of the Act; because, though I am inclined to think that by the word "entertainment" the [380] legislature meant something more than "refreshment," I doubt whether a person could evade the Act by saying, "I refresh to a certain extent only." However, upon that it is not necessary to express any opinion. I think the magistrate came to a correct conclusion upon the facts and the law as applicable to the facts; and it seems to me that this was not a house kept open for public refreshment. I concur in the sort of negative reasons which the magistrate has given for his decision, namely, that refreshment was not kept there nor sold there, but fetched from a public house. For these reasons I think the decision right, and that the appeal ought to be dismissed.

CHANNELL, B. I am also of opinion that the appeal ought to be dismissed. The house in question was clearly kept open for public resort, but that is not enough; it must be shewn that it was also kept open for public refreshment and public entertainment. Now, the magistrate has found that it was not kept open for public refreshment or entertainment. It is not necessary to say whether, if I had exercised the functions of the magistrate, I should have come to his conclusion of law or fact; but I do not say that he is wrong. With regard to its not being a house of public entertainment he gives one reason; with regard to its not being a house of public refreshment he gives three reasons; and if the reason he has given why it is not a house of public entertainment be good, or if any one of the three reasons he has given why it is not a house for public refreshment be good, we ought not to allow this appeal. I am disposed to go further, and say we must find upon the facts that the reason for its not being a house for public entertainment, and every one of the three reasons for its not being a house for public refreshment, altogether fail, before [381] we can reverse his decision. But I cannot say that the magistrate was wrong; and that is sufficient to dispose of the case.

Appeal dismissed.

FREDERICKS, *Appellant*, AND HOWIE, *Respondent*. June 9, 1862.—A portable theatre or booth consisting of two caravans or waggons drawn from place to place by horses, and when joined together forming a temporary structure for the performance thereon of stage plays, is not a "tenement" within the meaning of the 2 & 3 Vict. c. 47, s. 46.

[S. C. 31 L. J. M. C. 249; 8 Jur. (N. S.) 750; 10 W. R. 796; 6 L. T. 544.]

Pursuant to the 20 & 21 Vict. c. 43, the following case was stated for the opinion of this Court by justices of the peace for the county of Essex:—

On the 11th of November, 1861, Daniel Howie, the respondent, who is a superintendent of the Metropolitan Police Force, brought before the justices sitting in petty sessions at Stratford, in the county of Essex, and within the Metropolitan Police District, Frederick Fredericks, the appellant, and then and there informed and charged against the appellant that he had, on the 2nd day of November, A.D. 1861, at the parish of Barking, in the county of Essex, and within the Metropolitan Police District, been found performing in a certain tenement used as an unlicensed theatre, contrary to the statute in that case made and provided.

The information or charge arises under the statute 2 & 3 Vict. c. 47, for "further improving the police in and near the Metropolis." The 46th section enacts, "That it shall be lawful for the Commissioners of Police, by order in writing, to authorize any superintendent belonging to the Metropolitan Police, with such constables as he may think necessary, to enter into any house or room kept or used within the said district for stage plays or dramatic entertainments into which admission is obtained by payment of money, and which is not [382] a licensed theatre, at any time when the same shall be open for the reception of persons resorting thereto, and to take

into custody all persons who shall be found therein without lawful excuse; and every person keeping, using, or knowingly letting any house or other tenement for the purpose of being used as an unlicensed theatre shall be liable to a penalty not more than twenty pounds, or, in the discretion of the magistrate, may be committed to the House of Correction, with or without hard labour, for a time not more than two calendar months; and every person performing or being therein without lawful excuse shall be liable to a penalty not more than forty shillings; and a conviction under the Act for this offence shall not exempt the owner, keeper, or manager of any such house, room or tenement from any penalty or penal consequences to which he may be liable for keeping a disorderly house, or for the nuisance thereby occasioned."

It was contended on behalf of the appellant, as hereinafter mentioned, that the temporary theatre, or building, or booth, hereinafter described, was not a "tenement" within the meaning of that provision.

Daniel Howie was duly authorized by an order in writing of the Commissioners of the Metropolitan Police to enter with such constables as he should think necessary an unlicensed theatre, situate on premises known as the "Peto Arms" at Barking, in the Metropolitan Police District; and with such authority, and accompanied by several constables, he proceeded on the evening of Saturday, the 2nd day of November, 1861, at about eight o'clock, to a temporary and portable theatre or booth, hereinafter described, where he saw the said Frederick Fredericks, the appellant, within the said temporary and portable theatre or booth; and the persons who were then on the stage were, together with the said Frederick Fredericks, then and there taken into custody. The said Frederick Fredericks [383] was then and there the owner, keeper and manager of the said temporary and portable theatre or booth, and the manager of a company of strolling players, who were with others then and there dressed in theatrical costume and acting a stage play or theatrical performance.

It was proved that the said temporary and portable theatre or booth was not a licensed theatre: that it was then and there temporarily placed and situate within the Metropolitan Police District; that it was kept and used by the said Frederick Fredericks as an unlicensed theatre and for stage plays or dramatic entertainment, and into which admission was obtained by payment of money, namely, three pence for each person; that as regards the construction thereof, the said portable and temporary theatre or booth consisted of two caravans or waggons, drawn from place to place by horses, and when the two said caravans or waggons were joined together it formed a temporary structure, in size about twenty yards long by nine yards wide, and above eight yards high; that it had a boarded front as high as the top, and that the boards on the sides and end reached about two yards high; that the remainder of the sides and end and also the roof were of canvas, supported by poles; that there were several posts in the ground around the outside; that the door through which persons were admitted was of wood; that inside there were seats erected to accommodate about 300 persons, and that there was a stage and curtain to let down; that the said temporary theatre or booth was put together in the following manner:—the said two caravans which stand upon wheels were placed front and back; the stage was formed by two flaps which fall down and form the level floor; the sides and back were formed by uprights and fixed by screw bolts and fastened to the vans; the whole of the materials were portable, capable of being taken to pieces and readjusted; that [384] it required about four hours to put it up and two hours and a half to take down; that the materials consisted of the said caravans and materials brought in the said caravans, and taken away in like manner. And upon the whole it appeared to us that it was proved; and we were of opinion that, assuming the said temporary and portable theatre or booth to be a "tenement" within the meaning of the said 46th section above mentioned, the same was such an unlicensed theatre as is mentioned in the said 46th section, and that the appellant was guilty of performing and being therein without lawful excuse.

It was contended, on behalf of the appellant, that the said temporary and portable theatre did not come within the meaning of the said 46th section, on the ground that the same was not a "house or tenement" within the meaning of that section; but we were of opinion that the said temporary and portable theatre or booth did come within the said word "tenement" in such 46th section, and this, together with the facts above stated, as proved, were the grounds of our determination in the case. And we therefore convicted the appellant of the said offence; and did adjudge the said

Frederick Fredericks, the elder, to forfeit and pay the sum of five shillings, together with the costs.

The question of law is, whether the said temporary, and portable theatre or booth was or was not a "tenement" within the said 46th section of the said act of parliament.

If the opinion of the Court be in the negative, the said conviction should be reversed; if otherwise, the said conviction should be affirmed.

G. Browne, for the respondent. This portable theatre or booth, was a "tenement" used as an unlicensed theatre, in contravention of the provisions of the 2 & 3 Vict. c. 47, [385] s. 46 (ante, p. 381). [Bramwell, B. Could it be distrained for rent?] It could not. In *Davys, Appellant, Douglas, Respondent* (4 H. & N. 180), the question arose under the 6 & 7 Vict. c. 68, and it was held that a booth theatre which was taken to pieces and carried from place to place for theatrical performances was not a "house, or other place of public resort, for the public performance of stage plays" within the meaning of the 2nd section of that Act. But if it could have been proved that the performance was for hire, the conviction might have been supported under the 11th section, for the words "any place not being a patent or duly licensed as a theatre" would include a booth. The 46th section of the 2 & 3 Vict. c. 47 applies to the same unlicensed theatres as the 11th section of the 6 & 7 Vict. c. 68. [Martin, B. The 38th section (c) contains an express enactment with respect to a "booth, standing, tent, caravan, waggon, &c.," clearly meaning those things with which persons go about travelling to fairs; then the 46th section authorizes the police "to enter into any house or room kept or used for stage [386] plays," and it imposes a penalty on every person keeping "any house or other tenement" for the purpose of being used as an unlicensed theatre. Contrasting the two sections, it is evident that the word "tenement" means something different and of a more permanent character than a booth or caravan. Pollock, C. B. The latter part of the 46th section uses the words "house, room or tenement;" the 38th section uses the words "house, room, booth," &c.] In Black. Com. vol. 2, p. 16, it is said that the word "tenement, though in its vulgar acceptation is only applied to houses and other buildings, yet in its original, proper and legal sense, it signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial ideal kind." In Lilly's Abridgment the word tenement is thus defined:—"A tenement may be said to be any house, land, rent, or other such like thing which is any way held or possessed; and it is a word of very large and ambiguous meaning, and therefore not fit to be used to denominate or express anything which requires a particular description." [Pollock, C. B. In Tomlin's Law Dictionary it is said: "Tenement (tenementum) signifies properly a house or home-stall; but more largely it comprehends not only houses, but all corporeal inheritances which are holden of another, and all inheritances issuing out of or exerciseable with the same." If a tent is erected in a field for the accommodation of persons playing at cricket, can that be said to be a tenement?] This booth was supported by posts fixed into the ground; and it was capable of being holden at a rent. [Martin, B. In Co. Lit. 20 a., it is said: "Tenements, tenementa. This is the only word which the said statute of Wm. 2, that created estates tail, useth; and it includeth not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those [387] inheritances, or concerning or annexed to or exerciseable within the

(c) Section 38. "That the business and amusement of all fairs holden within the Metropolitan Police District shall cease at the hour of eleven in the evening, and shall not begin earlier than the hour of six in the morning; and that if any house, room, booth, standing, tent, caravan, waggon, or other place, shall during the continuance of any such fair be open within the hours of eleven in the evening and six in the morning, for any purpose of business or amusement, in the place where such fair shall be holden, it shall be lawful for any constable to take into custody the person having the care or management thereof, and also every person being therein who shall not quit the same forthwith upon being bidden by such constable so to do; and the person so then having the care or management of any such house, room, booth, standing, tent, caravan, waggon, or other place, shall be liable to a penalty not more than five pounds, and every person convicted of having been therein, and of not having quitted the same forthwith upon being bidden by a constable so to do, shall be liable to a penalty not more than forty shillings."

same, though they lie not in tenure, therefore all these without question may be entailed." That is the proper legal definition of the word "tenement."

Poland appeared for the appellant, but was not called upon to argue.

MARTIN, B. I am of opinion that the determination of the justices ought to be reversed. The word "tenement," in the 46th section of the 2 & 3 Vict. c. 47, is used in connection with the words "house or room," and must mean something of the same character, and absolutely immoveable from the land. I am disposed to think that this booth would be distrainable for rent, just as a cart or any other moveable chattel. It is a "booth" in contradistinction to a "house" or "room." The 38th section of the 2 & 3 Vict. c. 47, speaks of a "house, room, booth, standing, tent, caravan, waggon or other place;" and this portable theatre would be properly described as a booth, waggon or caravan. Then, in the 46th section of the same Act, the legislature has used the expression "house or room;" and it being a matter of notoriety that persons go to fairs with booths, or travelling caravans, in which they perform, it would seem that the legislature has purposely omitted in that section the words "booth, standing, tent, caravan, waggon, or other place." The section goes on to speak of a "house or other tenement," and in another part of a "house, room or tenement." Now a tenement means something fixed or permanent; and my impression is that the legislature purposely omitted to make this enactment extend to booths, otherwise they would have used in the 46th section the same words as they have used in the 38th. For the purpose of supporting this conviction, we ought clearly to see [388] what the legislature intended by this Act; and in my opinion the offence charged has not been committed.

BRAMWELL, B. I am of the same opinion. The case appears to me so clear that it is unnecessary to say anything upon it.

CHANNELL, B. If I had to construe the 46th section by itself, I should say that this portable theatre was not a tenement within the meaning of that section; but construing it with the 38th section, and finding words in that section which are omitted in the 46th, I am clearly of opinion that this is not a tenement within the meaning of the 46th section.

POLLOCK, C. B., concurred.

Determination of justices reversed.

BASTIFELL v. LLOYD. June 5, 1862.—By charter-party the plaintiff and defendant agreed that the plaintiff's ship, "Bebec," should proceed to Llanelly, and take on board a cargo of culm, and being so loaded should "therewith proceed with all convenient speed to Cole's Wharf, Rochester, or so near thereto as she might safely get, and deliver the same on being paid freight, &c. The regular turn to be allowed for loading, and fifty tons per working day, if required, for delivery at Rochester, and demurrage over and above the said days at the rate of 4l. per day." The ship arrived with her cargo at Rochester, on the 24th October and was moored at the Buoy, about 500 yards from and opposite to Cole's Wharf. On the 25th October the master gave the defendant's agent notice that the vessel was ready to discharge her cargo, and he desired the master to come alongside Cole's Wharf. At that time there was not sufficient water for the vessel to come alongside the wharf, and the agent refused to send lighters to receive part of the cargo, so as to lighten the vessel and enable her to come alongside the wharf. The state of the tide did not allow the vessel to be removed to Cole's Wharf until the 4th November, and on the following day she commenced discharging her cargo. In an action for demurrage: Held, that the master was bound to take the vessel alongside Cole's Wharf, unless prevented by some impediment which endangered her safety, and as the inability to bring the vessel alongside the wharf was occasioned by the ordinary course of navigation the lay days did not commence until the vessel arrived there.

[S. C. 31 L. J. Ex. 413; 10 W. R. 721. Referred to, *The Alhambra*, 1880, 5 P. D. 264; reversed 6 P. D. 68; *Dahl v. Nelson*, 1881, 6 A. C. 51; *Horsley v. Price*, 1883, 11 Q. B. D. 247; *Allen v. Collart*, 1883, 11 Q. B. D. 786.]

Declaration on a charter by the defendant of the plaintiff's ship, called the "Bebec," to take on board [389] at Llanelly a cargo of culm and proceed therewith to Rochester.

Breach: that the defendant kept the ship on demurrage ten days, and thereby became liable to pay the plaintiff 40l.

Plea. That the defendant did not keep the ship on demurrage. Issue thereon.

At the trial, before Bramwell, B., at the London Sittings after last Easter Term, it appeared that the plaintiff and defendant agreed by charter-party (so far as material to the present case) that the plaintiff's ship "Bebec" "should with all convenient speed sail and proceed to New Dock or Channell, Llannelly, and take on board from the agent or wharf of the defendant a full and complete cargo of culm not exceeding what she could reasonably stow and carry over and above her tackle, &c., and being so loaded should therewith proceed with all convenient speed to Mr. Cole's Wharf, Rochester, or so near thereto as she might safely get, and deliver the same on being paid freight at the rate of 8s. 9d. per ton delivered, and one guinea gratuity to the master. The freight to be paid in cash on safe delivery of the cargo. The regular turn to be allowed the defendant for loading the ship at Llannelly, and fifty tons per working day, if required, for delivery at Rochester, and demurrage over and above the said days at the rate of 4l. 4s. per day," &c.

The ship proceeded to Llannelly, and was there loaded with 420 tons of culm. On the 17th of October the ship sailed for Rochester, where she arrived on the 24th of October, and the master moored her at the Buoys, about 500 yards from and opposite to Cole's Wharf. On the 25th of October the master reported to the defendant's agent at Rochester the arrival of the vessel and his readiness to discharge the cargo. The defendant's agent requested the master to come alongside Cole's Wharf. The master stated [390] that there was not sufficient water for his vessel alongside the wharf, but that if the defendant's agent would send lighters to receive a portion of the cargo, he would, when the vessel was lightened, bring her close to the wharf. This the defendant's agent refused to do. The state of the tide was such that the vessel could not get alongside Cole's Wharf until the 4th of November. On the following day she commenced discharging her cargo, and completed her unloading on the 14th.

It was contended, on behalf of the plaintiff, that when the vessel was moored at the Buoys on the 24th of October she was as near Cole's Wharf as she could then safely get, and that the defendant's agent ought to have commenced unloading her on the 25th: that the time for the delivery of the cargo, at the rate of fifty tons per working day, expired on the 4th of November, and that the defendant was liable for ten days' demurrage, from the 5th to the 14th of November.

It was submitted, on behalf of the defendant, that he was not bound to unload the vessel until she was alongside Cole's Wharf; and therefore he was not liable for demurrage.

The learned Judge was of opinion that the defendant was not bound to unload the vessel until she was alongside Cole's Wharf; and he left the following questions to the jury:—

First: Could the vessel have got alongside Cole's Wharf on the 24th of October? The jury found that she could not.

Secondly: Was there any unloading of the vessel on the 14th of November? The jury found that there was.

Thirdly: Was it the fault of the plaintiff or the defendant's agent that the unloading did not begin on the 4th of November? The jury found that the defendant might have commenced unloading on that day.

[391] The learned Judge then directed a verdict for the plaintiff for 4l. 4s. the amount of one day's demurrage, reserving leave to him to move to increase the damages to 40l., if the Court should be of opinion that, upon the facts, the plaintiff was entitled to a verdict for the full amount of demurrage claimed.

Edward James, in the present term, obtained a rule nisi accordingly, against which

G. Denman and Prentice now shewed cause. The question is when did the demurrage days commence. That depends on whether the defendant was bound to unload the cargo when the vessel arrived at the Buoys, or was entitled to wait until she was alongside Cole's Wharf. *Parker v. Winlow* (7 E. & B. 942) is an express authority that the defendant was not bound to unload the vessel until she was alongside the wharf. There the charter-party provided that "the ship should proceed to Plymouth, not higher than Torpoint or New Passage, or so near thereunto as she may safely get." The vessel arrived at Plymouth, and the consignees ordered her

discharge at a wharf below Torpoint and New Passage. At that time the tides were neap, and in order to reach the wharf it was necessary to cross a mud bank, in doing which the vessel grounded and lay there until the high tides: it was held that the lay days did not commence until the vessel reached the wharf, the delay in getting to it being occasioned only in the ordinary course of navigation in a tidal harbour. In the absence of any express stipulation, the lay days are to be reckoned from the time of the ship's arrival at the usual place of discharge in the port, and not at the port, although for the purposes of navigation some of her cargo may be discharged at the [392] entrance: *Brereton v. Chapman* (7 Bing. 559); *Abbott on Shipping*, p. 304, 8th ed. Here the vessel was to proceed to Cole's Wharf, "or so near thereto as she might safely get," but she did not arrive so near the wharf as she might safely get, if by waiting for high water she might with safety have got nearer. A mere temporary obstruction does not determine the obligation to reach the place of discharge: *Schillizzi v. Derry* (4 E. & B. 873); and the master was bound to wait until there was sufficient water to enable him to get alongside Cole's Wharf. It was the duty of the plaintiff, before he entered into the contract, to acquaint himself with the nature of the place of discharge.

Edward James and Dowdeswell, in support of the rule. When the vessel was moored at the Buoys she was as near Cole's Wharf as she could safely get; and the lay days commenced on the 25th of October, when the defendant's agent had notice that the vessel was ready to unload. No doubt, if a shipowner enters into a charter-party to proceed to a particular port, he is presumed to be cognizant of the state of that port. For instance, if it be a harbour with a bar at its entrance which can only be passed at spring tides, he must be taken to know that fact; and the insertion in the charter-party of the words, "or so near as the vessel can safely get," will not relieve him from the obligation to reach the place of discharge. But a shipowner who enters into a charter-party is not bound to know the depth of water at every wharf in the port of destination. In *Parker v. Winlow* (7 E. & B. 942) the contract was to proceed to a tidal harbour, and therefore the shipowner must be presumed to have entered into the contract with knowledge that in the ordinary course of navigation the vessel might be prevented from [393] reaching its place of discharge. There Lord Campbell said, "If, when the ship got fixed on the mud bank, the master had given notice that he was ready to discharge there, it might have been open to him to shew that it was the duty of the other party to take the cargo there; and if he could have shewn such to be their duty, the lay days would have commenced." Here the plaintiff fulfilled his contract when the vessel arrived so near Cole's Wharf as the depth of water would permit. [Pollock, C. B. According to that argument, if the tide changed whilst the vessel was proceeding to the wharf, the master would not be bound to go any nearer.] Suppose the vessel could only have got to the wharf when there was a very high tide, which might not occur more than once or twice a year, would the master be bound to wait all that time? Some effect must be given to the words, "or so near thereto as she might safely get." In *Brown v. Johnston* (10 M. & W. 331), it was held that the lay days were to be calculated from the period the ship arrived in the dock, and not at the place of unloading. [Pollock, C. B. Suppose it had only been necessary to stop at the Buoys for one tide, would that have exonerated the plaintiff from his obligation to go alongside the wharf.] It would be a question for the jury, what was a reasonable time to wait for high water.

POLLOCK, C. B. I am of opinion that the rule ought to be discharged. The plaintiff only asks to increase the damages to 40l.; therefore, if there be any question which ought to have been left to the jury with respect to what was a reasonable time to wait for high water, the rule must nevertheless be discharged, because it cannot be made absolute for a new trial.

It appears to me that the meaning of this charter-party [394] is that the vessel shall proceed to the wharf, that is, go alongside of it, and there discharge her cargo, and it is manifest that the object was to avoid the expense of lighters. That in some measure raises the question what was a reasonable time to wait for a sufficient depth of water to get alongside the wharf. That, however, is a question of fact for the jury, and this rule cannot be made absolute unless we see very clearly that the defendant was bound to send lighters to unload the vessel. It is conceded that if the vessel had been obliged to wait for one tide, that would not have got rid of the obligation to go alongside the wharf, but it is contended that it is unreasonable to wait for several

days. It seems to me, however, that there is no distinction in principle. This is a contract to get to the wharf, if in the ordinary course of navigation it could be reached.

BRAMWELL, B. I am of the same opinion. At the trial I was struck with the hardship of making the shipowner responsible for the condition of a particular wharf; but the charterer is responsible for the condition of the particular ship, and it was by the conjoint condition of the wharf and ship that the latter was prevented from getting alongside the wharf. The usual depth of the water at the wharf was a matter which either of the parties might have ascertained for himself. If there is any question of fact which ought to have been left to the jury, none was proposed; and, assuming it to be a question for the Court, I cannot help thinking that the defendant is right when he says that the vessel was bound to go alongside the wharf. As pointed out by the Lord Chief Baron, the object of the charterer was to save the expense of lighterage. Suppose the shipowner found that he could not get alongside the wharf for two or three days, when the tide would rise high, he would clearly have been bound to wait, since he could then safely get there. He has [395] undertaken to go alongside Cole's Wharf, unless the want of safety renders it necessary that he should stop short of that place. It is admitted that by waiting a short time, he not only could, but did, get there. It might be different if there were only one or two tides in the year which would enable the vessel to reach the wharf, but it is not necessary to say what the master ought to do in that case. As it is, convenience and common sense are in favour of the defendant.

CHANNELL, B. I am also of opinion that the rule ought to be discharged. No doubt, there are extreme cases which shew that the contention on the part of the shipowner might not be unreasonable, but we cannot decide with reference to those cases. This is a contract between two parties which must receive a reasonable construction, and the prevailing rule is, that the words of the contract must be construed most strongly against the contractor. The words, "or so near thereto as she might safely get," are to be taken essentially as the words of the shipowner. *Parker v. Winlow* is an authority in favour of the defendant. In that case there were two points. The first has no application to this case, but the second is identical with it. No doubt there was no express mention in the charter-party of a particular wharf, but what was done between the parties shewed that they intended that the wharf which was afterwards designated should be the wharf at which the vessel should actually arrive. Here the question is whether the vessel arrived alongside Cole's Wharf, within the meaning of the charter-party. I think it did not, and that the navigation was a risk which the shipowner took upon himself.

Rule discharged.

[396] LAWSON v. BURNESSE. May 28, 29, 1862.—By charter-party it was agreed between the plaintiff, owner of the ship "Sultan," and the defendant, that the ship should proceed to a certain dock and there load in the customary manner a cargo of Marley Hill coke, "to be loaded in regular turn." The Marley Hill Company kept a book in which they entered ships to be loaded, and it was their practice to enter ships not only before they were ready to load, but before their arrival at the dock, or even at the port, and if a ship was not ready to load when her turn came the ship next in turn was loaded, and the other took its turn, when ready, before others which had been ready before it. On the 29th November the plaintiff's ship arrived at the dock and on the 8th December his agent told the manager that he was ready to load, but several ships which had not arrived and were not ready until after the plaintiff's ship, were loaded before it, in consequence of the order in which they were entered in the book, and the loading of the plaintiff's ship did not commence until the 23rd of January. The Judge left it to the jury to say what was the meaning of "regular turn," and they found that the plaintiff's ship was loaded according to the practice of the Marley Hill Colliery, but that it was not an established or known custom, and that "regular turn" was the order of readiness, not the order of entry in the book. Held, that the defendant was liable for demurrage.

[S. C. 10 W. R. 733: at Nisi Prius, 2 F. & F. 793. Referred to, *Tapscott v. Balfour*, 1872, L. R. 8 C. P. 53; *Postlethwaite v. Freeland*, 1879, L. R. 4 Ex. D. 160; *Kay v.*

Field, 1882, 8 Q. B. D. 598; *Dunlop & Sons v. Balfour, Williamson & Company*, [1892] 1 Q. B. 518.]

The declaration (in substance) stated, that the plaintiff, being owner of the ship "Sultan," and the defendant, being a merchant, agreed by charter-party that the said ship should proceed to Tyne Dock and there load in the customary manner from the agent of the defendant a cargo of Marley Hill coke, with sufficient coal for ballast, to be loaded in regular turn; and therewith proceed to Alexandria, and there deliver the same. Averment: that the plaintiff did all things necessary to entitle him to have the ship loaded by the defendant according to the said charter-party within a reasonable time. Breach: that the defendant did not load the said ship in regular turn according to the said charter-party, and neglected and refused so to do, and wrongfully and improperly detained the said ship in loading for a long, unreasonable and unnecessary time in that behalf, to wit, for fifty-five days, &c.

Plea (inter alia). That the defendant did load the said ship in regular turn in accordance with the terms of the said charter-party, and did not neglect or refuse so to do, or detain the said ship in loading beyond the time allowed by the said charter-party in that behalf. Issue thereon.

At the trial, before Willes, J., at the last Northumberland Spring Assizes, it appeared that on the 24th of November, [397] 1860, the plaintiff and defendant entered into a charter-party which (so far as material to the present case) was as follows:—"It is this day mutually agreed between Henry Lawson, owner of the good ship or vessel called the 'Sultan,' now in the Tyne, and James Burness of London, merchant, and agent for the freighter, that the ship being tight, staunch, and now every way fitted for the voyage, shall, with all possible dispatch, sail and proceed to Tyne Dock, and there load in the customary manner from the agents of the said merchant, a full and complete cargo of Marley Hill coke, with sufficient coal for ballast, say not exceeding ten keels, to be loaded in regular turn (a) respectively, not exceeding what she can reasonably stow and carry over and above her tackle, &c.; and, being so loaded, shall therewith proceed to Alexandria, Egypt, or so near thereto as she may safely get, and there deliver the same on being paid freight," &c.

On the 29th November the ship proceeded to Tyne Dock, and on the following day the plaintiff's agent saw the manager of the Marley Hill Colliery and told him that the ship was there for a cargo of coke, and he entered her on a book called the "turn book." The coals for ballast were put on board on the 7th of December, and on the 8th the plaintiff's agent again saw the manager of the colliery, and told him that the ship was ready to receive the coke; when he said she would be loaded about the end of the next week. On the 20th of December the plaintiff's agent again saw the manager, who said that several ships which were "in turn" before the plaintiff's had come in, and were in the course of being loaded; that several ships which were not ready had been got ready; that the plaintiff's ship could not be loaded that week or the next, but would probably be the week after. The plaintiff's agent again saw the manager of the colliery on the 15th and 21st of January and complained of the delay, but the [398] loading did not commence until the 23rd of January, and was completed on the 25th. Vessels were usually loaded in fourteen days after they were ready.

It appeared by the evidence on the part of the defendant that only one ship could be loaded at a time, and that when the plaintiff's ship arrived at the dock there were thirty-one ships "in turn" before her. The "turn book" had been kept for twenty years, and during all that time ships had been loaded according to the order of their entry in the "turn book." It was the practice, however, to enter ships in the "turn book" not only before they were ready to load, but before their arrival at the dock, or even at the port; and if a ship was not ready to load when her turn came, the ship next in turn was loaded, and the other took its turn when ready, before others which had been ready before her. Evidence that this practice was known to ship-owners was tendered and objected to, but admitted by the learned Judge. The Marley Hill coke, which was in great demand, could only be obtained from the Marley Hill Colliery.

The learned Judge left it to the jury to say; first, what was the meaning of the

(a) These words were printed in the charter-party.

words, "regular turn:" did they mean according to the order of entry in the "turn book," or according to the period at which the ship was ready to receive her cargo? secondly, was the vessel loaded in regular turn, and if not, how much time was lost? His lordship said there might also be another question—was the ship loaded in a reasonable time? The jury found that the vessel was loaded according to the practice of the Marley Hill Colliery, but that it was not an established or known custom; and that "regular turn" was the order of readiness, and not the order of entry in the book. The learned Judge then said that upon this finding the question of reasonable time became immaterial, and a verdict was entered for the plaintiff for 85l. He certified that, if it was a question for him, he agreed with the finding.

[399] Manisty, in the following term, obtained a rule nisi for a new trial, on the ground of misdirection in the learned Judge telling the jury that, in deciding whether the ship was loaded in regular turn according to the charter-party, they must have regard to the fact whether the ship was loaded in a reasonable time; or on the ground that the verdict was against the weight of evidence.

Edward James (with whom was Heath) now shewed cause. There was no misdirection. The real question was whether the vessel was loaded in "regular turn" according to the charter-party, and the jury found that "regular turn" meant the order of readiness, not of entry in the turn book; therefore the question of reasonable time became immaterial. If the question is one of fact, it is concluded by the finding of the jury; if one of law, the learned Judge agrees with the finding.

The Court then called on

Manisty and T. Jones, to support the rule. The question is whether the defendants loaded the ship in regular turn according to the charter-party. Now, the ship was to be loaded with a particular kind of coke which could only be obtained at this colliery, and therefore when the parties stipulated that the ship should be loaded "in regular turn," they meant "regular turn" according to the practice of that particular colliery. The plaintiff must have known that, by the practice of the colliery, ships were loaded according to the order of their entry in the "turn book." [Pollock, C. B. The jury have found that it was not a known or established practice.] The ship could not have loaded in any other way. The Marley Hill Company in effect say, "You shall have no coke from this colliery unless you enter [400] the vessel in our 'turn book,' and load in the order of entry." [Martin, B. If so, the defendant entered into a contract which he could not perform.] *Robertson v. Jackson* (2 C. B. 412) is an authority that the practice of the Marley Hill Colliery was a regulation binding on all vessels that loaded coke at the Tyne Dock. [Bramwell, B. If there was only one mode of loading at that colliery, there might be some ground for your argument; but why not load by lighters?]

POLLOCK, C. B. We are all of opinion that the rule should be discharged. It is an application for a new trial on the ground of misdirection; and the question is, what is the meaning of the words "regular turn." By the charter-party the vessel was to load in the customary manner a cargo of Marley Hill coke, and in regular turn. It appears to me that the words "customary manner" mean the mode of loading, whether by a lighter or at the wharf, and whatever was the customary manner was to be pursued on this occasion. Then mention is made of Marley Hill coke, but that is only an intimation of the quality of the coke. Then come the words "to be loaded in regular turn." It appears that considerable delay arose from the Marley Hill Company postponing the plaintiff's vessel to other vessels not ready when his was, but which afterwards were made ready; and in consequence this action was brought for demurrage.

The case on the part of the defendant was that Marley Hill coke was only to be had of one firm; that that firm kept a book in which vessels were entered, whether ready to load or not, and whether in the port or not; and that the practice was that if a vessel was not ready when her turn came she was put aside, and when ready she took her turn before those vessels which had been ready a long time. It was incumbent on the defendant to prove that this practice was well known; and it is a mistake to suppose that there [401] was any evidence that the plaintiff knew of it. The complaint is that the learned Judge left it to the jury whether the vessel was loaded in a reasonable time, but that is not so. The learned Judge left to the jury the question, what was the regular turn. The jury found that the vessel was loaded according to the practice of the Marley Hill Colliery, that is, that she was postponed

to other vessels not ready when she was because her name was not first on the books, but that the practice was not an established or known practice, and that the "regular turn" was the order of readiness, not the order in the book.

Under these circumstances I am of opinion that there was no misdirection, and that the rule ought to be discharged.

MARTIN, B. I am of the same opinion. The declaration is on a charter-party by which the plaintiff's vessel was to load a cargo of coke in regular turn, and the breach is that the vessel did not load in regular turn. Therefore the question which the parties went down to try was, whether the vessel loaded in regular turn. The plaintiff produced the charter-party, by which it was agreed between the plaintiff and defendant that the plaintiff's vessel should proceed to Tyne Dock and there load in customary manner from the agents of the defendant a full and complete cargo of Marley Hill coke, "to be loaded in regular turn." Such being the terms of the charter-party, it was necessary that evidence should be given of the meaning of the words "regular turn;" and the case of *Robertson v. Jackson* (2 C. B. 412) shews that such evidence is admissible.

I entertain no doubt whatever as to the meaning of the words "regular turn," because there is an act of parliament (10 & 11 Vict. c. 27, s. 67) which regulates the loading and unloading of vessels in [402] docks. It was contended, on the part of the plaintiff, that the words "to be loaded in regular turn" meant that the vessel which, in the order of time, arrived first was to be loaded first, provided she was ready to receive her cargo. On the part of the defendant, evidence was given of a practice of the Marley Hill Colliery to enter in a book the names of vessels about to be loaded, and that preference was given to vessels in the order in which they were entered in the book, though not ready to receive a cargo; so that, according to the practice, vessels entered first in the book but not ready to load, loaded before vessels which were ready to load. The question is what is the true meaning of this contract between two persons who are not members of the Marley Hill Colliery, and have no connection with it except that they take coke from it? The learned Judge left it to the jury to say what was the meaning of loading in regular turn, and the jury found that "the vessel was loaded according to the practice of the Marley Hill Colliery;" but they proceeded to say "that it was not an established or known custom." Therefore they negative the allegation that the vessel was loaded in regular turn; and they go on to say, "that 'regular turn' is the order of readiness, not the order in the book." I cannot conceive anything more unreasonable than that, where two persons enter into a charter-party by which a vessel is to load in regular turn, vessels which come in after it should load before it because, by the practice of the colliery, vessels which are entered first in the book, though not ready to load, are loaded before those which are ready. If it was intended that the contract should be according to the practice of the colliery, the parties should have said so: they say nothing of the kind, but merely that the vessel shall be loaded in regular turn. For these reasons I think the verdict right, and that the rule ought to be discharged.

[403] BRAMWELL, B. I am also of opinion that the rule ought to be discharged. This is an action on a charter-party, by which a vessel was to proceed to Tyne Dock, and there load in the customary manner a cargo of Marley Hill coke, "to be loaded in regular turn." Now, merely reading the charter-party, there is nothing which enables us to put a meaning on the words "regular turn." As Tindal, C. J., said, in *Robertson v. Jackson* (2 C. B. 412, 427), the words in themselves bear no precise meaning until they obtain their application by the evidence. No judge or jury, looking at the contract itself, can discover when it is that the ship's turn to deliver will arrive, or, consequently, from what day the demurrage is to be calculated. Evidence, therefore, is necessary to explain how those words apply themselves to the regulations and practice of the port where the delivery of the cargo was to be made. That being so, there are two possible meanings of the words "to be loaded in regular turn;" one, that the vessel was to be loaded according to her regular turn, that expression having a general meaning applicable to any port; the other, that she was to be loaded in regular turn according to the practice of the port where the loading was to take place. Either as one or other of those is the proper meaning the shipowner or charterer is entitled to succeed. The shipowner says "I mean the regular turn in the order of readiness;" the charterer says "I mean the regular turn according to the practice at the particular spot." The learned Judge left it to the jury to say which of the two meanings was

the right one, and they said that the expression "regular turn" has a known meaning applicable to a port generally, the order of readiness,—not the regular turn according to the practice of that particular colliery.

It is manifest that, the jury having so found, there is no occasion for further argument; but I confess that I cannot [404] agree with any criticism upon the practice of the Marley Hill Colliery as unreasonable. Here is a Company for the supply of a particular kind of coke, which is in great demand, and they have made regulations as to the order in which ships are to be loaded with it. It is said that, as regards those who do not know their practice, it is unreasonable; but how can we say that what people find the best mode of conducting their business is unreasonable?

CHANNELL, B. I am also of opinion that the rule ought to be discharged. In order to determine whether there was any misdirection, we must look to the claim, which is for demurrage; and the question which arises between the shipowner and charterer is, whether the vessel loaded in "regular turn." If that is a question of law, I agree with the learned Judge who tried the case. If it is a question of fact, I agree that the evidence was properly received. The contract is to load, in the customary manner, a cargo of Marley Hill coke. It is not "customary order," but "customary manner," and that refers to the mode of loading. The words "Marley Hill coke" are only a description of the coke with which the vessel was to be loaded; then come the words "to be loaded in regular turn." The jury have put a meaning on those words; and I can see nothing wrong in the mode in which the learned Judge left the question to them. This case is distinguishable from *Robertson v. Jackson*. There the usage of the port was not applicable to all vessels trading to it, but only to vessels carrying coals destined for a particular purpose; here it is sought to apply the practice of the Marley Hill Colliery to all vessels loading at that colliery. It may be a very reasonable practice for the Marley Hill Company to keep a book in which they enter vessels to be loaded, in order to know what quantity of coke to provide; but that cannot in this case affect the charterer and shipowner, since it is no [405] part of their contract. The fact that the words "regular turn" are printed in the charter-party, relieves me from any apprehension that I am putting on the contract a construction different from that which the parties intended.

Rule discharged.(a)

STUCLEY, BART. v. BAILY. May 29, 30, 1862.—Where representations, which may amount to a warranty, are contained in letters which constitute a contract of sale, evidence is admissible of the surrounding circumstances for the purpose of shewing that no warranty was contemplated by the parties.—In an action for a breach of warranty of a yacht sold by the defendant to the plaintiff, it appeared that the plaintiff's agent, having entered into negotiations for the purchase of the yacht, told the defendant's agent that he must have the masts overhauled or examined by a shipwright. The defendant's agent subsequently wrote: "I have had a good overhaul of the masts, and find they are all as sound as ever." The plaintiff's agent then wrote to the defendant offering 3000l. for the yacht, and observing that the plaintiff would probably have to spend 500l. in repairs. The defendant wrote in reply declining to take less than 3500l., and saying: "You must, I think, be under some very great error in thinking that 500l. would be required to be spent. Beyond the usual painting, caulking, &c., and perhaps a little repair to the copper, I don't really think there are any necessary repairs. Personally I know her seagoing qualities, and how thoroughly sound she is and tight in every part." In a subsequent letter the defendant said: "Her masts have been examined and found as sound as when put in." After some further correspondence the plaintiff bought the vessel for 3375l., and a bill of sale was executed in accordance with "The Merchant Shipping Act, 1854." Held, that assuming the representations in the letters were some evidence of a warranty, it was competent for the defendant to prove by what passed between the parties both before and after the letters were written that no warranty was contemplated.—

(a) See *Taylor v. Clay*, 9 Q. B. 713.

Semble, that the representations in the letters did not amount to a warranty.—Quære, whether it was competent for the plaintiff to set up a warranty, inasmuch as none was contained in the bill of sale.

[S. C. 31 L. J. Ex. 483; 10 W. R. 720: at Nisi Prius, 3 F. & F. 1.]

The declaration stated that the defendant, by warranting a certain yacht or vessel, called the "Czarina," to be sound and tight, and that her masts were as sound as when put in, sold the yacht or vessel to the plaintiff, to wit, for the sum of 3500l., which sum the plaintiff accordingly paid to the defendant: yet the said yacht or vessel was not at the time of such sale sound and tight, nor were her masts as sound as when put in; but on the contrary, was at such time rotten and in great decay in her masts, and unseaworthy, and in a bad state and condition. Whereby the plaintiff was put to great expense of his monies, to wit, the sum of 217l. 2s. 3d., in removing the said masts, and in [406] replacing them with new ones, and in the necessary expenses attending such repairs, and in rendering the said yacht or vessel seaworthy, &c.

Plea. That the defendant did not warrant the said yacht or vessel as alleged. Issue thereon.

At the trial, before Byles, J., at the last Hampshire Spring Assizes, the following facts appeared:—The plaintiff, being desirous of purchasing a yacht, requested one Captain Main to inquire about one for him. Captain Main having seen an advertisement of a yacht for sale, called the "Czarina," with a reference to the captain of it, Mr. Williamson, of Chatham, wrote to him the following letter:—

" 'Brilliant' Yacht, Northan, Southampton;
" 3rd February, 1860.

"Sir,—I have heard that the 'Czarina' is for sale. If so will you be so good as to send me an inventory of stores to be sold with her, and their general condition; and also to inform me the state of the vessel, whether there is anything absolutely necessary to be done to her to make her fit for a twelve months' cruise abroad?—I remain, &c. "E. W. MAIN."

Captain Williamson sent in reply the following letter:—

"304 High Street, Chatham, 5 Feb. 1860.

"Sir,—In answer to yours, I have sent you an inventory of the 'Czarina's' stores, and they are all as described. The sails having had only a few weeks' sailing about the Channel, the ship would require no more than the usual routine of scraping, cleaning and painting; perhaps, a little overhauling of the copper; the hull of the ship as sound as when launched; boats,—three, the same age as the ship, built in 1853; the price, Mr. Baily, the owner, has told me is 4000l. His address is T. F. Baily, Esq., Hall Place, Ton-[407]-bridge. I shall be glad to answer any further inquiry, or to shew the ship and stores.—Yours truly,

"H. C. WILLIAMSON."

In the inventory which was printed and annexed to the advertisement, the masts were described as one main mast, one fore mast, without any further description. Captain Main communicated with the plaintiff and afterwards went with Captain Williamson to Chatham, to see the yacht. Captain Main stated, in his evidence, that the general appearance of the vessel was satisfactory, but on scraping the paint off the masts, he found they were made of yellow pine, and he told Captain Williamson that he did not like the yellow pine masts. He could not ascertain the condition of the masts where they passed down through the deck, for at that part they were covered with cloths and wedges driven in, and he told Captain Williamson that he must have the vessel examined or overhauled by a shipwright; that the coats of paint must be removed and the mast examined under the wedges, and a report of the examination made; and then he would make an offer for the vessel.

Subsequently Captain Williamson wrote to Captain Main the following letter:—

"304 High Street, Chatham, 15th Feb. 1860.

"Sir,—I have had a good overhaul at the masts, and find that they are all as sound as ever. I wrote to Mr. Baily, and told him you had been to Chatham, and

seen over the ship and stores, and that he might expect a letter from you. Any letter from yourself to me will at once meet the prompt attention of,—Yours truly,
 “H. C. WILLIAMSON.”

This letter was forwarded to the plaintiff, and on the 20th of February, Captain Main, with the plaintiff's sanction, wrote to the defendant offering 3000*l.* for the yacht and stores mentioned in the inventory, observing that the [408] plaintiff would probably have to spend 500*l.* in repairs. The defendant wrote in reply as follows:—

“5 Royal Crescent, Brighton, 21st Feb. 1860.

“Sir,—I have the pleasure to acknowledge the receipt of your favour of yesterday's date. You must, I think, be under some very great error in thinking 500*l.* would be required to be spent in the ‘Czarina’ before she would be fit for sea. Beyond the usual painting, caulking, chintzing, &c., and perhaps a little repair to the copper, I don't really think there are any necessary repairs. I have always kept her afloat, and always had a careful person living on board, and have been indeed most anxious to keep her always in first-rate order. Her sails are next to new, having only been used for a six weeks' cruise. The quality of the materials I know to be first-rate, and the late Mr. Bevis, for many years sailing master of the ‘Dolphin,’ saw every atom of timber which was used in her during her construction; and, personally, I know her seagoing qualities, and how thoroughly sound she is and tight in every part. My sailing master says he named to you 4000*l.* as her price, which was what I originally intended. I do not really think I should be doing justice to myself were I to take a less sum than 3500*l.* for her; indeed, I have refused considerably over 3000*l.* more than once. Lloyd's people also have surveyed her, and their report is most favorable, I hear. I have not seen it. In conclusion, let me add, I think when you take into consideration her state you will find that you have enormously mistaken the required outlay, and that the schooner is fairly worth my price. I have another gentleman who is after the ship now; so please turn this well over and favour me with a line, say at the end of the week.—Your obedient servant,
 “THOS. F. BAILY.”

Subsequently the plaintiff, through Captain Main, offered [409] 3250*l.* for the yacht, and thereupon the defendant wrote to Captain Main the following letter:—

“5 Royal Crescent, Brighton, 4th March, 1860.

“Sir,—I beg to thank you for your favour, to which I have not been able previously to reply. I am sorry you still fancy the ‘Czarina’ will require so much money laid out upon her, and still must say that I cannot help thinking her refitting will not be nearly so costly as you seem at present to imagine. Her masts have been examined and found as sound as when put in,—since I wrote last, I think. Further, I regret that the gentleman who wishes to purchase her thinks my figure of 3500*l.* too much, for honestly I believe she would be a very cheap ship to any one at that price. It is very good of you to recommend her. I am sure you can do so conscientiously, for she is a glorious vessel, and really I quite abhor letting her go. As, however, my military duties will certainly prevent my sailing this summer, at all events, I am willing to meet your offer in what, I hope, both yourself and the intended purchaser will deem a liberal spirit, and am satisfied to ‘split the difference’ between my price and the offered 3250*l.*, which latter sum I really don't think I am justified in accepting. Please let this have all due consideration, and favour me with a line at your earliest convenience; and with thanks for your polite letter,—I remain, Sir, your faithful servant,
 “THOS. F. BAILY.”

The plaintiff replied as follows:—

“8 Eaton Square, London, March 8, 1860.

“Sir,—Captain Main forwarded to me yesterday by post your letter of the 4th. I am pleased to find by it that he has conducted the correspondence with reference to the purchase of the ‘Czarina’ to your satisfaction. Having myself but an imperfect knowledge of the merits of ships as regards their condition and value, I was glad to employ [410] one competent to go into such matters, and a person in whom I could

trust. Mr. Main's private opinion to me was, that I ought not to give more than 3000l. for the 'Czarina.' If I went beyond that sum, it was my intention to build a new vessel, for at the present prices a short step beyond 3000l. would suffice to build a vessel of 200 tons, and old vessels depreciate so very rapidly that what are gains in the first purchase are losses very much more at a subsequent sale. However there was much to make me desirous of buying the 'Czarina.' She appears sound; her stores are good, and her size suitable. With these convictions I advanced my biddings 250l. I cannot undertake to make a further offer of 125l., unless you will throw in the various stores which belong to the vessel but are not named in the catalogue, such as charts, colours, chronometer, pikes and other odds and ends which probably I should not purchase. But they having been a portion of the vessel, it is hardly worth while to separate them from it. I have endeavoured to be very plain and straightforward in this matter, and have represented just what I feel on the subject. Should you think proper to let me have the 'Czarina' upon these conditions, I hope you will allow your captain to work her round to Southampton, and there give her up, stores and all, to Mr. Main for me, I paying all expenses attending such a voyage. Yesterday I went to Chatham to see the 'Czarina' for the first time. I consider she requires all the repairs mentioned by Captain Main, painting throughout; but she is a fine vessel and appears to be well cared for. Should you sell me the vessel, you would very much oblige by informing whether your Captain would then be disengaged. . . . I hope this matter may now be concluded one way or the other, without further delay, as if I build I would set to work immediately.—I remain, Sir, yours faithfully,
 "G. S. STUCLEY."

[411] The defendant wrote in reply accepting the plaintiff's offer, and the plaintiff then wrote to the defendant a letter containing the following passages:—

"8 Eaton Square, March 12, 1860.

"Dear Sir,—I shall be glad to purchase the vessel upon the terms agreed upon. The next matter for arrangement is about the payment. Of course, I shall require a few days for the selling a sufficient sum out of various securities. Will you tell me, when the money is ready, into which bank you desire that it should be paid? I certainly think I could not have purchased a sounder or better ship.—Believe me, dear Sir, yours faithfully,
 "G. S. STUCLEY."

On the 21st of March the plaintiff and Captain Main went to Chatham; and, according to the evidence of the latter, Captain Williamson then stated that he had ripped the mast-coats off, and had the masts regularly surveyed. A few days afterwards the vessel was taken to Southampton, and the purchase money was paid. On the vessel being fitted out for a voyage to the Mediterranean, the masts were found to be rotten. On the 17th May, Captain Main wrote to the defendant stating that it was on the guarantee of Captain Williamson that he had advised the plaintiff to purchase the vessel, but that when about to put on new mast-bolts it was discovered that the masts were quite rotten; and that the vessel's copper was as bad as could be, and that he was compelled to take it off and recopper her all over.

It was objected, on behalf of the defendant, that there was no evidence of a warranty, and that in order to maintain the action the plaintiff was bound to prove a sale and transfer of the vessel, as required by "The Merchant Shipping Act, 1854" (17 & 18 Vict. c. 104).

[412] The plaintiff's counsel then put in the bill of sale, which was dated the 23rd of April, and registered the 29th of May, 1860. It was in accordance with the form prescribed by Schedule E. of the Merchant Shipping Act, 1854.

It was then objected, on behalf of the defendant, that the bill of sale was the actual contract between the parties, and that as it contained no warranty the plaintiff was precluded from setting up a warranty. *Harnor v. Groves* (15 C. B. 667) was referred to. The learned Judge ruled that the letters contained a warranty, and that the plaintiff was not precluded by the bill of sale from setting it up.

The defendant's counsel then submitted that warranty was a mixed question of law and fact, and, for the purpose of shewing that there was no warranty, he tendered evidence of what took place at the interviews between Captain Main and Captain Williamson on the 11th of February, and the plaintiff and Captain Williamson on the

21st of March. The learned Judge ruled that, as the letters contained a warranty, the proposed evidence was not admissible, and a verdict was entered for the plaintiff with 180l. damages.

Karslake, in last Easter Term, obtained a rule nisi for a new trial on the ground of misdirection on the part of the learned Judge in ruling that the letters amounted to a warranty, and excluding evidence on the part of the defendant of all the facts of the case for the purpose of shewing that the letters did not amount to a warranty; and also on the ground that the learned Judge was wrong in ruling that the bill of sale did not contain the whole contract and exclude a warranty; against which

Montague Smith and H. T. Cole now shewed cause. (They argued, first, that the letters contained a warranty. [413] On this point the following authorities were cited:—*Chanter v. Hopkins* (4 M. & W. 399); *Cave v. Coleman* (3 Man. & R. 2); *Hopkins v. Tanqueray* (15 C. B. 130); *Williamson v. Allison* (2 East, 446); *Schneider v. Heath* (3 Camp. 506); Addison on Contracts, p. 126, 4th ed.) Secondly, as the letters constituted the contract, parol evidence was not admissible for the purpose of shewing that they did not contain a warranty. [Pollock, C. B. There is a distinction between an instrument which professes to be a contract, as, for instance, an agreement inter partes, and where certain terms are contained in a number of letters, which are only evidence of a contract.] In *Dobell v. Hutchinson* (3 A. & E. 355), where it was held that letters, written after a sale of land by the vendor to the vendee, might be connected with the particulars and conditions of sale so as to constitute a memorandum in writing within the 4th section of the Statute of Frauds, the decision proceeded on the ground that the letters expressly and distinctly referred to the conditions of sale which were signed by the vendee. [Pollock, C. B. Here there is nothing which professes to be a formal contract, but the contract is to be collected from a number of letters; then why is not parol evidence admissible to shew the real intention of the parties when they wrote them?] The contract being in writing, it is for the Court to construe it. [Channell, B. Evidence is admissible to explain an ambiguity in a written contract: *Smith v. Thompson* (8 C. B. 44).] In *Allen v. Pink* (4 M. & W. 140, 144) Lord Abinger said that it was a general principle, "that if there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked at to ascertain the terms of the contract." *Hamilton v. Terry* (11 C. B. 954) is an authority that these [414] conversations are inadmissible. (They argued, thirdly, that it was competent for the plaintiff to contend that there was a warranty, notwithstanding it was not included in the bill of sale; inasmuch as the bill of sale merely transferred the property, and did not contain the terms of the contract. On this point they cited *Chapman v. Callis* (2 F. & F. 161; 9 C. B. N. S. 769); *Duncan v. Tindall* (13 C. B. 258); the Merchant Shipping Acts, 17 & 18 Vict. c. 104, ss. 55, 57, 18 & 19 Vict. c. 91, s. 11.)

Karslake and Kingdon appeared in support of the rule, but were not called upon to argue.

POLLOCK, C. B. I am of opinion that the rule ought to be absolute for a new trial, on the ground that the evidence of the conduct of the parties should have been submitted to the jury. If it was competent for the jury to consider what the parties wrote to each other, they ought also to have heard what they said to each other,—what was their conduct, what passed between them or came to the knowledge of either, which would shew their real intentions. I do not express any opinion on the point, but I entertain considerable doubt whether the letters can be considered as a warranty, or anything more than a mere representation. But the conduct of the parties, what each said to the other either before or after the contract, ought to be submitted to the jury. If, at an interview before the correspondence, the plaintiff said to the defendant, "I want to buy your vessel," and the defendant replied, "very well; the price so and so," adding, "she is sound," but never intending to warrant her; that, though falling very far short of conclusive evidence, might be important as shewing the meaning of the transaction. It is said that where a warranty is contained [415] in a written instrument it cannot be altered by parol evidence, but that is not so here. There is only a correspondence, and that may be explained by the conduct of the parties.

MARTIN, B. I am of the same opinion. In the absence of knowing what was the exact evidence tendered by the defendant's counsel, it is difficult to say whether it was admissible. Whether parol evidence is admissible or not must depend upon what

it is, and it seems to me that, in case of an objection to such evidence, the most satisfactory way is to take down in writing the question proposed to be put, so that the Court which may have to adjudicate upon its admissibility, may know what it really was. For many years I have made it a practice, whenever an objection is taken to the admissibility of parol evidence, to take down the question in writing, so that the Court above may understand what they have to deal with.

Upon the other point, I entertain a strong opinion that there was no warranty. This is an action on a warranty, properly so called, in respect of the quality of a ship. The best definition of a warranty is that given by Lord Abinger in *Chanter v. Hopkins* (4 M. & W. 399, 404): "A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it." He then goes on to point out that in many of the cases "the circumstance of a party selling a particular thing by its proper description, has been called a warranty; and the breach of such contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a war-[416]-ranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it." Therefore the question is whether there was a warranty within the true meaning of the definition given by Lord Abinger. I think the plaintiff's case was defective, because it was incumbent on him to prove a sale, and, if no bill of sale had been executed, no action could have been maintained for a breach of warranty. It may be that there would have been a breach of the contract to sell, but that would be no ground for an action in respect of a breach of warranty. Nothing is more common than an action in respect of a contract to sell land. Now, if a contract to sell land contained an express undertaking that the land was of a particular quality, or that there was a coal mine under it, if the vendor refused to complete his contract, an action would lie against him for not selling the land, not for a breach of the undertaking that it was of a particular quality or had a mine under it.

The case of *Hopkins v. Tanqueray* (15 C. B. 130) is against the plaintiff's view. I agree with what was there said by Maule, J., and Crowder, J. Crowder, J., said: "A representation to constitute a warranty must be shewn to have been intended to form part of the contract." Here the defendant never intended that his statement as to the soundness of the masts should form part of the contract. For these reasons I think there has been a miscarriage, and that there ought to be a new trial.

With respect to the question whether, after the bill of sale was executed, the plaintiff could insist upon a warranty, I express no opinion. If it should arise on a future trial, I should be glad if it were submitted to a Court of error. The question is whether, where parties have executed a [417] deed to carry out an agreement, and it is found that in the course of the negotiations for that agreement something has been said which led to it, but which has not been embodied in the deed, they can fall back upon the agreement. It would seem that if that could be done it would affect a man's title, for, instead of having a deed as evidence of it, his title would be affected by what took place before the deed was executed. That is undoubtedly a most important point, and I should regret if it were to be ultimately decided by this Court; it is a proper question for a Court of error.

BRAMWELL, B. I am also of opinion that the rule ought to be absolute. As to the last point adverted to by my brother Martin, I say nothing. With respect to the two other points, I think it is due to the learned Judge who may be called upon to try the case again, to state my view of them.

I agree with my brother Martin that there is no evidence of a warranty. I also agree with the definitions he has referred to; and that a representation, to constitute a warranty, must form part of the contract. No doubt there may be a warranty without the word "warrant" or even "undertake" being used: if it can be collected from the documents between the parties, or if any reasonable person would understand, from what was said by them, that they intended that there should be a warranty, there would be one. Now I cannot think that there was any warranty here, but supposing there was any evidence of it, it is manifest that the whole facts ought to be inquired into and the question left to the jury. The evidence begins with a correspondence between Captain Main and Captain Williamson about the purchase

and condition of the vessel. They afterwards met and had some conversation about it, and Captain [418] Main states in his evidence: "I said I did not like the yellow masts. He said they were very stiff and sound. I told him I must have them overhauled or examined by a shipwright." On cross-examination he says: "I told Captain Williamson the wedges must be taken out as well as the mast-bolts for the purpose of examination." Now, suppose Captain Williamson had said in reply, "If you want the wedges taken out, you must have a shipwright," I cannot understand why that would not have been evidence to be laid before the jury. If facts antecedent to the contract may be given in evidence, so also may acts subsequent to it, for they would be evidence of what exists incidentally, and therefore, although subsequent facts could not be given in evidence to alter the contract, they might for the purpose of explaining the antecedent facts.

I wish to make another observation upon these letters for the purpose of justifying the opinion I entertain, that they do not contain any warranty. After the interview to which I have referred, Captain Williamson wrote to Captain Main: "I have had a good overhaul at the masts, and find they are all as sound as ever." Then the defendant in his letter to Captain Main says: "You must, I think, be under some very great error in thinking 500l. would be required to be spent on the 'Czarina' before she would be fit for sea." He does not say: "It cannot be," but merely, "You have expressed an opinion, and I think you are mistaken." He then goes on: "Beyond the usual painting, caulking, chintzing, &c., and perhaps a little repair to the copper, I don't really think there are any necessary repairs." Is not that the language of a man who is doing nothing more than saying, "to the best of my judgment and belief you must be wrong, because I do not think that any other repairs are necessary?" He goes on to say, "Personally I know her seagoing qualities, and how thoroughly sound [419] she is and how tight in every part." That means nothing more than this: "She has no manifest defect: she has not dry rot in any place in which I ever looked." Suppose he had been asked: "Do you undertake to say that she has no dry rot?" He would reply: "No, I will not." Then if the other said, "I will not buy the vessel unless you do," he would say, "I will not undertake so as to render myself liable to damages if it is not so." He only undertakes so far as his personal knowledge and belief extends. Then, in the next letter, the defendant says: "I am sorry you still fancy the 'Czarina' will require so much money laid out upon her, and still must say that I cannot help thinking her refitting will not be nearly so costly as you may seem at present to imagine." What is that but an interchange of opinion between the parties? He then says: "Her masts have been examined, and found as sound as when put in." That is merely a statement that the masts had been overhauled by somebody who was satisfied that they were sound. In answer there is the plaintiff's letter, in which he says: "Yesterday, I went to Chatham, to see the 'Czarina' for the first time. I consider she requires all the repairs mentioned by Captain Main, painting throughout; but she is a fine vessel, and appeared to be well cared for." Under these circumstances, it seems to me that it cannot for one moment be supposed that the defendant entered into any undertaking that the vessel was sound to his knowledge. It is in vain to go through the cases on the subject. No doubt, a representation made at the time of the contract may amount to a warranty. If a man, when he sells a horse, says it is sound, that is a matter of fact; and when he makes a positive statement of that kind, he undertakes that he knows the fact; and if it is not so, he tells an untruth. So, if he does not know the fact, he equally tells an untruth, and there is no reason why he [420] should not be responsible. I should be more inclined to hold a person liable upon a representation as to a matter of fact of that kind than as to a matter out of his ordinary knowledge. For instance, suppose a man says a horse is sound, and it turns out that it has some defect which it was impossible that he could have known, I doubt whether his language ought to be interpreted as a warranty.

For these reasons, I am of opinion that these letters do not contain any evidence of a warranty. But, upon the supposition that they do, it is clear to demonstration that where the alleged warranty is not found in a document which is the contract between the parties, but depends upon the construction of a series of letters and extrinsic circumstances, inquiry must be made into all the surrounding facts, what the parties said and what they did, the facts anterior to the contract, contemporaneous with the contract, and posterior to the contract. Therefore, it must be submitted

to a jury to say, whether, upon the whole evidence, they find that there was a warranty.

CHANNELL, B. I am also of opinion that the rule ought to be absolute. I entirely concur in the views expressed by the Lord Chief Baron and my brother Martin. Some points occurred upon which I express no decided opinion. It seems to me clear that the plaintiff must establish, first, that there was a sale, and next, that the letters not only constitute a contract, but also contain a warranty. If I were called upon to express a definitive opinion, I should agree that the letters do not establish a warranty; but as the case must go down on a new trial upon another ground, it is not necessary to decide that point.

Now, without saying that these letters do not create the contract (though I am not certain that they do), I am of opinion that the learned Judge was not right in rejecting [421] the evidence. But assuming that all that occurred in these letters was preliminary to the contract, and that the sale was effected by the bill of sale, it was a question for the jury whether it proceeded upon the terms contained in the preliminary contract. Where goods are put up for sale by auction under certain conditions prescribed in the particulars of sale, and a person bids, but says, "I will not adopt condition No. 1 or No. 2," he does not purchase under the conditions mentioned in the particulars, and it becomes a question whether he has bound himself by the terms of the sale. I agree with my brother Martin that it would have been more satisfactory if the particular question had been taken down in writing, so that it might have clearly appeared whether or no it was admissible: but, as I understand the nature of the evidence offered, I think that the learned Judge ought to have received it, in order to determine whether the bill of sale proceeded on the preliminary contract contained in the letters.

Rule absolute.

CRESSWELL v. HEDGES. June 11, 1862.—Where, in an action of trespass by one tenant in common against another, the declaration alleges a destruction of and expulsion from the entire common property, the defendant may pay money into Court in respect of the damage to the plaintiff's share, and as to the residue plead *liberum tenementum*, and that it was not the plaintiff's.

[S. C. 31 L. J. Ex. 497; 8 Jur. (N. S.) 767; 10 W. R. 777.]

Declaration. For that the defendant broke and entered certain messuages, buildings and cottages, and certain garden ground of the plaintiff, situate in the parish of Newnham Murren, in the county of Oxford, and abutting on, &c.; and then pulled down, broke down, prostrated and totally destroyed the said messuages, buildings and cottages, and removed all vestiges thereof, and broke down, prostrated and totally destroyed the walls and fences of and [422] belonging to the garden ground and premises, and removed all vestiges thereof, and then expelled, put out and removed the plaintiff from the said messuages, buildings, cottages and garden ground, and kept and continued him so expelled, put out and amoved thenceforth, and during all that time hindered and prevented him the plaintiff from using and enjoying the said premises.

Pleas. First: as to so much of the trespasses mentioned in the declaration as were committed upon, to, or in respect of forty-eight undivided three hundred and fifteenth parts of the said messuages, buildings, cottages and garden ground, the defendant brings into Court the sum of 15l., and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

Second: as to the residue of the trespasses. That two hundred and sixty-seven three hundred and fifteenth parts of the said messuages, buildings, cottages and garden ground, were the messuages, buildings, cottages and garden ground, soil and freehold of the defendant.

Third: to the said residue. That two hundred and sixty-seven three hundred and fifteenth parts of the said messuages, buildings, cottages and garden ground were not the plaintiff's as alleged.

Demurrer to second and third pleas, and joinder therein.

The plaintiff also replied to the second plea: That the said messuages, buildings, cottages and garden ground, were the messuages, buildings, cottages and garden

ground, soil and freehold of the plaintiff and the defendant, as tenants in common thereof, in certain undivided shares; and that the defendant committed the trespasses to which the said second plea is pleaded in his own wrong, as in the declaration mentioned.

Demurrer to replication, and joinder therein.

Phipson, for the plaintiff. The second and third pleas [423] are bad. The defendant admits that he has destroyed the entire messuages, and he has no right to split his defence and justify in respect of his particular share of them. Although there is this difference between tenants in common and joint tenants that the latter are seised per mie et per tout, while the former hold by distinct titles; yet each has an individual interest in the whole subject-matter of the tenancy. In Bacon's Abridg. tit. "Joint Tenants" (A.) (citing Co. Lit. 189 a.), it is said: "And as the essential difference between joint-tenants and tenants in common is, that joint-tenants have the land by one joint title and in one right, and tenants in common by several titles, or by one title and by several rights; this is the reason, says my Lord Coke, that joint-tenants have one joint freehold, and tenants in common have several freeholds, though this property is common to them both, viz., that their occupation is undivided and neither of them knoweth his part in several." [Channell, B. Suppose the defendant had pleaded, "not guilty," would the plaintiff have been bound to prove an entire destruction of the premises?] One tenant in common cannot maintain an action against another unless there is a total destruction of the common property: *Cubitt v. Porter* (8 B. & C. 257). If a tenant in common cuts away the soil of the common property trespass will lie, because that destroys the common property: *Clayton v. Corby* (5 Q. B. 415). In *Murray v. Hall* (7 C. B. 441), where it was held that trespass quare clausum fregit would lie by one tenant in common against his co-tenant, there was an actual expulsion. [Martin, B., referred to Littleton, sect. 322, 323.] Also in Com. Dig. tit. "Estates by Grant" (K. 8), it is said: "If one actually ousts his companion of the possession, the other may maintain an ejectment against him." [424] [Channell, B., referred to *Stedman v. Smith* (8 E. & B. 1).] Where the question is one of title, there is no difficulty in paying money into Court, to the extent of the damage sustained. For instance, in trespass for entering the plaintiff's close and cutting down a tree, the defendant might pay 5s. into Court, and at the trial shew that the plaintiff was tenant for a term which was within one day of its expiration. Again, in detinue for a horse, the defendant might pay 1s. into Court and prove that the horse was only lent to the plaintiff for an hour. So, in this case, any limited interest of the plaintiff in the land might be shewn, and he would only be entitled to recover an aliquot proportion, according to his interest, of the entire damage to the whole land. But these pleas admit that the plaintiff is possessed of an undivided portion of the messuages and land, and the defendant has no right to set up a title in himself as against the plaintiff, which is the effect of the third plea: *Jones v. Chapman* (2 Exch. 803). The declaration shews such a destruction of the common property as amounts to an ouster: *Wilkinson v. Haygarth* (12 Q. B. 837); *Stedman v. Smith* (8 E. & B. 1). This is a novel mode of pleading, which, if allowed, will lead to great inconvenience. The plaintiff is entitled to recover damages in respect of the destruction of the entire premises.

Gray, for the defendant. Formerly it was doubted whether trespass could be maintained by one tenant in common against another for an actual expulsion. In *Cubitt v. Porter* (8 B. & C. 257, 269) Littledale, J., said: "If there has been an actual ouster by one tenant in common, ejectment will lie at the suit of the other. But I am not aware that trespass will lie, for in trespass the breaking and entering is the gist of the action; expulsion or ouster is a mere aggravation of [425] the trespass." But all doubt was removed by *Murray v. Hill* (7 C. B. 441, 454), where Coltman, J., in delivering the judgment of the Court said: "It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And, as it has been further established, in the case of *Goodtitle v. Toms* (3 Wils. 118), that a tenant in common may maintain an action of trespass for mesne profits against his companion, it appears to us that there is no real foundation for the doubts suggested." Therefore trespass will lie wherever one tenant in common has so dealt with the property as to prevent the other from enjoying the whole of it, or where there has been an actual ouster. This mode of pleading may be supported on principle. If, in trespass quare clausum

fregit, the defendant can justify the breaking and entering, he may confine his plea to that, and if the plaintiff relies on an expulsion he must new assign. So, where the locus in quo is described by metes and bounds, the defendant may plead as to one close "not guilty," and as to another liberum tenementum. The defendant is doing no more than that: he does not justify the trespasses, but admits them, and says that the plaintiff has only an interest in part of the subject-matter. There is some analogy between the action of trespass and ejectment, and the more correct mode would have been for the plaintiff to have declared that he was possessed of so many undivided shares in the messuages, in the same way as in ejectment it is usual to describe the extent of the interest the plaintiff claims in the premises, as a moiety or two-thirds. Suppose a judgment in ejectment for a moiety of lands, that would be followed by an action of trespass for mesne profits, in which the plaintiff would describe the extent of his interest and the damages would be limited by [426] that alone. If the defendant had paid money into Court without confining the payment to the trespasses in respect of the plaintiff's shares in the premises, and at the trial sought to prove the plaintiff's limited interest, the latter might contend that as he had claimed damages in respect of trespasses to the entire premises, and the defendant had paid money into Court generally, he was precluded from shewing that the plaintiff was possessed of only a part of the premises. A bonâ fide dispute as to the extent of the plaintiff's interest could not be raised upon an issue as to whether the money paid into Court was sufficient, and therefore the defendant ought to be allowed to plead in such a manner as to shew what the interest of the plaintiff really is. Suppose the trespasses had been committed by a stranger, and each tenant in common had brought a separate action, he could only have recovered in respect of his particular share: *Nelthorpe v. Dorrington* (2 Lev. 113). The same principle applies in an action by one joint tenant against another. There is no inconvenience in this mode of pleading; for if the money paid into Court is not sufficient to cover the damage done to the plaintiff's share of the premises, he will recover more. The defendant in effect says: "So far as the trespass has injured your tenement I admit that I have no defence, and I pay money into Court; but so far as the alleged trespass affects the other tenement, you have no right of action, because it is mine." No doubt each tenant in common is seised of an undivided part of the entirety, but he is only in possession of the whole by reason of his limited interest. It is not contended that the declaration is bad, but only that the plaintiff should have limited his claim to his actual interest in the premises, and the defendant is merely doing what the plaintiff ought to have done.

Phipson replied.

[427] POLLOCK, C. B. I am of opinion that the pleas are good, and that the defendant is entitled to judgment. There is no precedent on the subject, but the reason is that until lately money could not have been paid into Court in such case. It is the duty of the Court, if they can, so to read the pleas as to effect the object and intention of the defendant, and I think the pleas can be so read. The defendant says: "You bring an action of trespass against me, as if you were the owner of the entire premises; and I say in the first place, with respect to your portion, I pay money into Court; and with respect to the residue I say, first, it is mine; secondly, it is not yours." What objection is there to that mode of pleading? Mr. Phipson says that the plaintiff, having a title to forty-eight undivided three hundred and fifteen parts, has a kind of possession of the whole. But that is only a benefit as owner of those parts; there is no right of possession to the whole so as to get the benefit of the whole. If the plaintiff has sustained more damage than the amount paid into Court, he may reply it. There is a distinction between the right of property in the undivided shares and a right of possession to the whole. If the plaintiff goes to trial he will recover every particle of damage he has sustained, not only in respect of his undivided parts of the premises, but also for any incidental advantage in having them in connection with the other parts. For these reasons, I think that the pleas are good, and that our judgment ought to be for the defendant.

MARTIN, B. I am also of opinion that the pleas are good. I think the question turns upon the meaning of the words "in respect of," in the first plea. The declaration is in trespass, and it alleges that the defendant broke and entered certain messuages, buildings, &c., of the plaintiff, and pulled down, prostrated and destroyed them, and expelled, put out and removed the plaintiff from them, and [428] kept him so expelled, put out and removed thenceforth, and prevented him from using the premises.

It is admitted by Mr. Gray that that is a proper form of declaration, and that one tenant in common may maintain an action against another for a trespass to the common property. The pleas demurred to are the second and third, to the residue of the trespasses. In order to ascertain what is the residue of the trespasses, it is essential to ascertain what the first plea is pleaded to. It is "to so much of the trespasses mentioned in the declaration as were committed upon, to, or in respect of forty-eight undivided three hundred and fifteenth parts of the said messuages, buildings," &c. If the plea had been to so much of the trespasses as were committed upon those undivided parts, it would have been bad; because the plaintiff, being tenant in common, has an interest in the remaining shares, and neither the word "upon" nor "to" would be sufficient, for that would limit the trespasses to the forty-eight undivided three hundred and fifteenth parts, excluding the residue. But the plea also uses the words, "or in respect of," so that it speaks of trespasses affecting, or having reference to, or bearing upon the forty-eight undivided parts. If the plea can be read in that sense, every objection is met, because, however the act of the defendant may affect the plaintiff's shares, the defendant says that the money paid into Court is enough. Then, as to the residue of the trespasses, the defendant says that two hundred and sixty-seven three hundred and fifteenth parts of the messuages and buildings were his soil and freehold, and were not the plaintiffs. So reading the pleas, they cover every portion of the plaintiff's interest, and are free from objection, and I think the Judge who tries the case must read them in that sense or there will be a miscarriage.

CHANNELL, B. I am also of opinion that our judgment should be for the defendant. The case is one of novelty, [429] and, for the reasons already given, it cannot be expected that any direct authority should be found; but it is satisfactory to know that in the course of the argument the principles of law which govern it were conceded on both sides. The question turns upon the construction of the pleas, and I agree with my brother Martin that we are not only at liberty, but are bound to read the first and second pleas together; and so doing, it appears to me that the money paid into Court is in satisfaction of all the plaintiff's interest as proprietor of the forty-eight undivided shares, and as being in possession of the entirety; and that it is a compensation for the damage his interest has sustained either in the shape of a proprietary or a possessory interest. It seems to me that the pleas are capable of being read in that way, and if so, there is no difference between the counsel on one side or the other as to their affording an answer to the action. The matter therefore resolves itself into a mere criticism upon the language of the first plea. It might have been worded differently, so as to exclude all doubt, but I think it is so worded as to entitle the defendant to judgment.

Judgment for the defendant.

BAYLEY v. GRIFFITHS. June 17, 1862.—Where interrogatories, administered under the Common Law Procedure Act, 1854, relate as much to the plaintiff's case as the defendant's, the latter is bound to answer them, although the answers may disprove his case.

[S. C. 31 L. J. Ex. 477; 10 W. R. 798.]

Woollett had obtained a rule calling on the defendant to shew cause why an attachment should not issue against him for disobedience of an order of Wilde, B., by which he was ordered to answer interrogatories. The [430] action was on a promissory note made by the defendant for payment of 337l. 9s. 2d. to one William Bayley, and by him indorsed to the plaintiff.

The defendant pleaded: First, that he had executed a deed of arrangement under the provisions of the Bankruptcy Act, 1861, which deed, having been assented to by creditors of the required number and value to make the same binding on all other creditors, was duly registered in the Court of Bankruptcy in London on or about the 25th of February, and a certificate of such filing was duly granted. Secondly, that William Bayley indorsed the promissory note to the plaintiff after he had assented to the said deed, and with the view and for the purpose of avoiding this effect of such assent, and that the plaintiff took the same with notice and without consideration.

The plaintiff joined issue on the pleas, and replied, that divers of the debts of the majority in number of the creditors who assented to the deed were contracted by the

defendant fraudulently and for the sole purpose of creating a body of creditors of small amount, who should make up the majority in number required by the Act to assent to the deed; and that many of the debts were contracted to clerks and servants of the defendant by letting their wages become in arrear, it being intended to pay them, and they had been paid in full after the registration of the deed; and that without the creditors in the replication mentioned there would have been no such majority as in the plea mentioned.

On the 15th of May, 1862, the plaintiff obtained an order for liberty to deliver to the defendant the following interrogatories:—

1. What business did you carry on prior to the 20th of February, 1862; and where was your office or place of business, and where were your manufactories?

[431] 2. Who first suggested the deed mentioned and set forth in the plea in this action; who named the trustees therein, and who applied to them to act? Are they, or is either and which of them, creditors; and if so, for what amount or amounts? Were they or either of them in your employ prior to the 20th of February, 1862, and are they, or either and which of them, now in your employ?

3. Set out when and where you executed the deed, and when and where it was executed by such trustees.

4. Was there any meeting of your creditors held prior to the 20th February, 1862? If you allege there was any such meeting, set out by whom it was called, when and where it was held, and by whom it was attended, and what passed at such meeting.

5. Who applied to the creditors for their consent or approval of the deed? Set out the names, addresses and occupations of the persons who have assented or approved of the said deed, the date of each approval or consent, and the amount of each debt, distinguishing those persons who held security, and setting out the nature of the security held by each.

6. Have you paid to any or either and which of the persons who assented to or approved of the deed the whole or any part of the debts in respect of which they proposed so to assent or approve? If so, set out the date and the amount of each such payment.

7. Have any or either and which of the persons who assented to or approved of the deed, and at that time held security for their debts, realized or received the securities held by them, or otherwise been paid the amount of their debts? If so, set out the amounts received by each such creditor, and the date of such receipt.

8. Have any or either and which of the creditors who [432] assented to or approved of the deed received from any source whatever the whole or any part of the debts in respect of which they so assented or approved? If so, set out the names of the persons who have so received, and the date and the amount of each receipt.

9. Set out a full list of the debts and liabilities due or incurred by you prior to the 20th of February, 1862, with the names, addresses and occupations of each of your creditors, the amount of the debts due to each, and the securities held by each.

10. Had you prior to the 20th of February, 1862, and have you now in your custody, possession or power, or in the custody, power or control of your attorney, solicitor or agents, any books, ledgers, papers, letters, documents, memorandums or writings relating to your business transactions prior to the 20th of February, 1862? If so, set out a full and perfect list of such books, ledgers, papers, documents, memorandums or writings; and if you allege that you had any such matters prior to the 20th of February, 1862, but have since parted with them or either of them, set out when you last saw such document, where, why, and to whom you parted with it, and in whose possession it now is.

11. Set out a list of the papers or writings by which the creditors assented or approved of the deed referred to in the plea.

On the 28th of May the defendant delivered the following answers to the interrogatories:—

In answer to the first interrogatory, I say, on and prior to the 20th February, 1862, I carried on the business of an iron master and also of a metal broker, and my chief office or place of business was at Wolverhampton, in the county of Stafford; and my manufactories were at the Windmill End [433] Furnaces, at Dudley, and the Britannia Ironworks at Oldbury, in the county of Worcester, &c. (naming other places).

In answer to the second and subsequent interrogatories, I say, I am not bound according to the practice of this Court to answer such interrogatories, on the ground that they seek for a discovery of my case and the evidence by which I intend to support it; and are in other respects not in accordance with the practice of the Court.

On the 10th of June, 1862, Wilde, B., made an order that the defendant do answer the second and subsequent interrogatories by eleven o'clock on the 12th of June. The defendant not having answered the interrogatories, the present rule was obtained; against which

Quain shewed cause. The real question is whether the deed of arrangement is valid. The plaintiff has replied to the first plea that the debts of the majority of the creditors who assented to the deed were contracted by the defendant fraudulently; and for the purpose of proving that replication, he seeks to administer these interrogatories. But under the traverse of that plea the defendant is bound to prove a valid deed of arrangement. The second interrogatory contains mere fishing questions, relating exclusively to the defendant's case. Interrogatories should be such as, when answered, will prove the case of the party interrogating, not disprove that of his adversary. [Bramwell, B. I doubt whether you may not search a man's conscience as to his own case. Martin, B. The answers to these interrogatories relate as much to the plaintiff's case as the defendant's. The plaintiff seeks to establish that the deed was not made *bonâ fide*, but fraudulently concocted; and if the jury are satisfied of that, there is an end of it.] In [434] *Hunt v. Hewitt* (7 Exch. 236) it was expressly laid down that a discovery can only be granted where the documents are required to enable the applicant to support his own case, not to find a flaw in his opponent's. The object of these interrogatories is not to support the plaintiff's case, but to find a defect in the defendant's. In Wigram on Discovery, p. 261, 2nd ed., it is laid down that "the right of a plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which the defendant's case is to be established, or to the evidence which relates exclusively to his case." In *Shadwell v. Shadwell* (6 C. B. N. S. 679) the Court refused inspection of a letter, because it was sought, not in order to support the plaintiff's case, but in order to see whether and by what means a defence could be made out against him. [Bramwell, B. Why is not this case within the rule laid down by Lord Redesdale (Redes. Plead. 9), as to which it is said, in Wigram on Discovery (page 285, 2nd ed.), "That a plaintiff is entitled to a discovery of the case on which the defendant relies, that is, that the plaintiff is entitled to know what the case is, admits of no doubt?" Martin, B. For the purpose of shewing that the deed of arrangement was not signed by the requisite number and value of creditors, might not the plaintiff put this question: "Have you not a creditor named J. T. to whom you owe 1000l.?" The defendant is bound to prove a valid deed; and the only object of the question would be to discover a flaw in the defendant's case. Pollock, C. B. The plaintiff has a right to know what facts the defendant intends to prove, in order to meet them. In *Bellwood v. Wetherell* (1 Y. & C. 211, 216) Lord Abinger said: "Now the obvious line to be drawn is this,—that though in general [435] the defendant has no right to a discovery of the plaintiff's title, yet in certain cases he will be entitled to a discovery of the nature though not of the evidence of that title." This case appears to me to fall within that rule. When a defendant pleads a release, the plaintiff has a right to inspect it. So where a defendant pleads a set-off, the plaintiff has a right to know of what items it consists and their dates. I think the defendant is bound to answer these interrogatories.]

Per Curiam.(a) The rule must be absolute, the attachment to lie in the office for a fortnight.

Rule accordingly.

REEVE v. YEATES. June 14, 1862.—To constitute an offence under the 5 Geo. 4, c. 83, s. 4, there must be a running away and deserting a wife or child, and a chargeability to a parish by reason of it. Therefore it is sufficient under the 11 & 12 Vict. c. 43, s. 11, if the information is laid within six months of the

(a) Pollock, C. B., Martin, B., and Bramwell, B.

chargeability, although the running away took place more than six months before the information was laid. Per Pollock, C. B., and Martin, B. Dissentiente Bramwell, B.

[S. C. 31 L. J. M. C. 241; 8 Jur. (N. S.) 751; 10 W. R. 779. Referred to, *Heard v. Heard*, [1896] P. 190; *Ellis v. Ellis*, [1896] P. 254.]

Pursuant to the 20 & 21 Vict. c. 43, the following case was stated by justices of the city of Worcester for the opinion of this Court:—

At a petty sessions of the peace for the city of Worcester, one Edwin Yeates was brought before the said justices, under a warrant, charged in and by a certain information, laid on the 17th of March, 1862, by Reeve, the appellant, by direction of an order of the Board of Guardians of the Worcester Union, “for that Edwin Yeates did, on the 20th day of July, 1861, run away and leave his lawful wife Eliza Yeates, whereby she the said Eliza Yeates, and her infant child, did, on the 13th day of March, 1862, become chargeable to the parish [436] of St. Helen, in the Worcester Poor Law Union, in the said city; and had continued and were then so chargeable to the said parish, contrary to the 4th section of the statute 5 Geo. 4, c. 83, and the said charge having been heard by us, we dismissed the said information, upon the grounds and for the reasons hereinafter stated.

At the hearing of the information, it was proved that the said Edwin Yeates did, on the said 20th of July, 1861, run away and leave his wife, Eliza Yeates, who was then resident in the parish of St. Helen, in the city of Worcester. That the said Eliza Yeates was then in part supported by her friends and in part by her labour, but ultimately, in consequence of her husband so running away, she and her infant child became, on the 13th of March, 1862, chargeable to the said parish, and were, at the time the information was laid, still so chargeable and receiving relief therefrom; and that afterwards, on the 17th of March, the said information was laid by the said Reeve, as such officer duly authorized in that behalf.

It was then contended, by the attorney who appeared on behalf of the defendant, that the information was bad and could not be maintained, inasmuch as it was not laid within six months of the commission of the offence, as required by the 11 & 12 Vict. c. 43, s. 11; and that the offence under the Act, 5 Geo. 4, c. 83, s. 4, was the “running away,” which had occurred eight months before the laying of the information.

It was advanced, on the part of the informant, that the offence consisted in the “chargeability” of the defendant’s wife and child to the parish of St. Helen, arising from the running away of the defendant, and not in the running away itself; and that the information was good, inasmuch as it was laid within six months of the time of such “chargeability.”

[437] We, the justices, were of opinion that the information should have been laid within six months of the date of the defendant’s running away; and, not having been so laid, were of opinion that the objection must prevail, and did allow the same accordingly, and did discharge the defendant.

J. J. Powell, for the appellant. The decision of the justices was erroneous. By the 5 Geo. 4, c. 83, s. 4, “Every person running away and leaving his wife or his or her child or children, chargeable, or whereby she or they or any of them shall become chargeable to any parish, township, or place, shall be deemed a rogue and a vagabond,” &c. By that Act no time is limited for making a complaint or laying an information. Then, the 11 & 12 Vict. c. 43, s. 11, enacts: “That in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the act or acts of parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.” To constitute an offence within the 5 Geo. 4, c. 83, s. 4, two things must concur, a running away and a chargeability in consequence of it. Though there be a running away, there is no offence until there is a chargeability. If it were otherwise, a man who deserted his wife might evade the Act by leaving her sufficient maintenance for six months. [Bramwell, B. According to that argument, if a man deserted his wife, but left her abundant means to support herself for twenty years, and at the end of that time she became chargeable to the parish, he

would have committed the offence within six months. The result would be that a man might be punished for a perfectly innocent act. Mar-[438]-tin, B. The Act says, "every person running away and leaving his wife, &c., chargeable," that is, at the time of running away, "or whereby she shall become chargeable;" therefore until she has become chargeable there is no offence.] Here the matter of complaint did not arise when the defendant ran away and left his wife, because she was then supported partly by her friends and partly by her own labour, but only when she became chargeable in consequence of that running away.

No person appeared for the respondent.

MARTIN, B. I regret that there should be any difference of opinion between my brother Bramwell and myself, but I own it seems to me that the case is clear. The statute, 5 Geo. 4, c. 83, s. 4, which creates the offence, enacts that "every person running away and leaving his wife or his or her child or children chargeable." Therefore in order to create the offence two things must concur, viz., a running away, that is, going away from a wrong motive and with the intention of deserting and leaving chargeable a wife or children. If a person does that, he commits an offence. The statute then proceeds to say: "or whereby she or they, or any of them, shall become chargeable." Therefore they must become chargeable by reason of the running away, and the offence is not complete until they become chargeable. The question is, whether this information, which was laid within six months after the chargeability but more than six months after the running away, was in time, within the meaning of the 11 & 12 Vict. c. 43, s. 11, which requires any complaint or information to be laid "within six calendar months from the time when the matter of complaint or information respectively arose." For the reasons already [439] given, I think that the matter of complaint or information only arose when the defendant's wife became chargeable to the parish.(a)

BRAMWELL, B. I am of a different opinion. The question is, whether the matter of complaint and information arose within six calendar months. Now what was the matter of complaint? In my opinion it was the "running away," that being attended with certain consequences. It is true that when it took place no one could tell whether there would be an offence, because that depended on something which might or might not happen; but when the event happened which made the "running away" an offence, it became an offence at the time when it took place. If that were otherwise, although a pardon was granted for all offences committed within six months, a man might be punished if the chargeability was not within that period, notwithstanding the "running away" was, and although no offence was committed when he did the act, and at the time it could not be predicated whether or no any offence would ever be committed. But, as my brother Martin and the Lord Chief Baron are of a different opinion, the determination of the justices must be reversed.

Determination of justices reversed.

[440] MARY KENDALL, Executrix of Alfred Kendall v. WEBSTER. June 11, 1862.

—To an action by a trustee, on a deed of separation between husband and wife, for nonpayment by the husband of the wife's annuity, it is no defence, on equitable grounds, that the husband and wife were induced to live apart by the undue influence, persuasion and threats of the trustee, who unlawfully harboured the wife; and that, at the time the deed of separation was executed, the wife was pregnant, of which fact she and the trustee kept the husband in ignorance, and thereby induced him to execute the deed; and that he has always been willing to receive back and cohabit with his wife.

[S. C. 31 L. J. Ex. 492.]

Declaration. That by an indenture, dated, &c., between the defendant of the first part, Mary Webster, the wife of the defendant, of the second part, and Alfred Kendall of the third part, and which was duly executed by, and was and is the deed of the defendant and the said Alfred Kendall; reciting, that on account of incompatibility of temper, and for divers causes and considerations, the defendant and Mary Webster

(a) His lordship stated that the Lord Chief Baron, who had left the Court, was of the same opinion.

had agreed to live separate and apart from each other upon the terms and conditions thereafter contained, and the said Alfred Kendall had concurred in and approved such terms and conditions. And that there was issue of the marriage of the defendant and Mary Webster one child only, namely, John Webster, an infant of eleven months old : It was witnessed, that in pursuance and performance of the said agreement on the part of the defendant, he, the defendant did thereby, for himself, covenant and agree with the said Alfred Kendall, his executors, administrators and assigns, in manner following, that is to say : that notwithstanding the marriage which had been had and solemnized between the defendant and Mary Webster, it should be lawful for her, the said Mary Webster, from thenceforth and at all times thereafter to live separate and apart from the defendant, in the same manner as if she was sole and unmarried, in any part of Great Britain or elsewhere she might think proper, in such way as she might think fit ; and that the defendant would not compel or seek to compel her to cohabit or live with him by any proceeding instituted in any Court or otherwise [441] howsoever. And also, that she, the said Mary Webster, should absolutely be free from all command, restraint or authority of the defendant, who should not from thenceforth under any pretence whatsoever prosecute or sue any person or persons whomsoever for harbouring, protecting or assisting the said Mary Webster, or in any way interfere with or disturb her in her way of living or in her liberty of going to, remaining in or returning from such place or places as she might think proper. And also, that the defendant should and would permit the said Mary Webster to have the sole charge, custody, care, and education of the said John Webster, so long as the said Mary Webster should without expense to the defendant maintain, support, lodge, clothe, and educate the said John Webster, but subject to such right of access by the defendant to the said John Webster as was thereafter provided and covenanted for. And further, that he, the defendant, should and would yearly and every year, during the joint lives of himself and the said Mary Webster, pay unto the said Alfred Kendall, his executors, &c., the yearly sum of 40l., by twelve equal monthly instalments, on the fourteenth day of each and every month in each year without any deduction or abatement whatsoever, the first of such monthly payments to be made on the 14th day of June, 1860. And it was thereby declared and agreed by and between the parties to that deed, that the said Alfred Kendall, his executors or administrators, should stand possessed of the said yearly sum of 40l. so covenanted to be paid as aforesaid, when and as the same should be received, upon trust to pay the same into the proper hands of the said Mary Webster for her sole and separate use, free from the debts, control or engagements of the defendant, but without power for her to lien or anticipate the growing or future payments thereof, and to be applied for and towards the maintenance and support of herself and [442] the maintenance, support, education, and clothing of the said John Webster. And that indenture further witnessed, that in pursuance of the said agreement on the part of the said Alfred Kendall, and in consideration of the covenants thereinbefore contained on the part of the defendant, he, the said Alfred Kendall, did thereby, for himself, his heirs, executors, and administrators, covenant and agree with the defendant in manner following, that is to say : that during all such time as the defendant and Mary Webster should continue to live separate and apart from each other, the defendant should not be in any manner liable to pay for the maintenance, support, lodging, or clothing of the said Mary Webster ; or the maintenance, support, lodging, clothing, or education of the said John Webster ; or to pay any debt or debts the said Mary Webster should or might at any time or times thereafter contract during the said separation. And also, that the said Alfred Kendall, his heirs, executors or administrators, should and would from time to time and at all times thereafter well and sufficiently protect, defend and save harmless, and keep indemnified the defendant, his heirs, executors and administrators, and his and their lands, tenements, goods and chattels of, from and against all and every the debt or debts, sum or sums of money which the said Mary Webster should or might at any time thereafter during the said separation contract with any person or persons whomsoever, and also of, from and against all actions, suits, claims, and demands on account thereof ; and also of, from and against all such costs, damages and expenses as might be recovered against or sustained or expended or become payable by the defendant, his heirs, executors or administrators, through or on account or by reason of the nonpayment by the said Mary Webster of any such debt or sum of money. And

also, that the said Mary Webster, or any other person or persons on her behalf, [443] should not nor would at any time or times thereafter commence or prosecute any suit or suits, or any other proceedings in any Court or Courts whatsoever, to compel the defendant to cohabit or live with the said Mary Webster, or to allow her any support, maintenance or alimony whatsoever. And also, that she the said Mary Webster should and would duly and properly support, maintain, lodge, clothe, and educate the said John Webster until he should attain the age of nine years, provided the defendant and the said Mary Webster should both so long live. And also, that the said Mary Webster should and would, at least once in every week for the space of two hours, between the hours of one and ten of the clock in the afternoon, and at all other reasonable times when the said John Webster should be afflicted with serious illness, permit the defendant to have access to the said John Webster unmolested by the said Alfred Kendall. And also, that the said John Webster should not, without the license in writing of the defendant, for a longer space of time than one month in each year whilst he remained under nine years of age, be removed to a greater distance than ten miles from the General Post Office, London. Provided always, and it was thereby declared, that in case any monthly payment of the said yearly sum of 40l. should be in arrear and unpaid for the space of three calendar months after any day upon which, according to the true intent and meaning of the said deed it ought to be paid, having been demanded, then and immediately after the expiration of the said space of three calendar months, the covenants thereinbefore contained on the part of the said Alfred Kendall, his heirs, executors and administrators, should determine and be void. Breach: that although the said Mary Webster and John Webster are both living, and all things have been done and happened and existed, and all times elapsed requisite to entitle the said Alfred Kendall [444] and the plaintiff, as executrix as aforesaid since his death, to have the instalments or monthly payments on account of the said annuity or sum of 40l. hereinafter mentioned to be unpaid, paid before this suit, yet the defendant has not paid the said annuity or yearly sum in manner aforesaid, &c.

Plea on equitable grounds. That before and up to the time of the execution of the said deed, the said Mary Webster, the defendant's wife, was living with the said Alfred Kendall (who was her father), separate and apart from the defendant her then husband without his consent and against his will, as the said Alfred Kendall then well knew; and the said Alfred Kendall without the defendant's consent unlawfully harboured his said wife, and the defendant thereupon repeatedly before the execution of the said deed endeavoured to induce the said Mary Webster, his wife, to return to his, the defendant's, house, and to resume cohabitation with the defendant as his wife, as the said Alfred Kendall then also then well knew; and the said Alfred Kendall by means of such harbouring and by undue influence, threats and persuasions, induced the said Mary Webster, the defendant's said wife, who was willing to return to the defendant's said house and to resume cohabitation as aforesaid, to refuse to and not to return to the defendant's said house and resume such cohabitation as aforesaid, and to insist upon continuing to live apart from the defendant her said husband, and to demand of the defendant the execution of the said deed in the declaration mentioned, in order to enable her so to continue to live separate and apart; and the said Alfred Kendall by such unlawful harbouring of the defendant's said wife, and by so inducing her by undue influence, threats and persuasions to continue to live separate and apart from the defendant her said husband, and to refuse to return to his house and to cohabitation with him as aforesaid, prevailed upon and induced the defendant [445] and his said wife to execute the said deed as they otherwise would not have done; and the said Mary Webster was induced to consent to the said deed and to execute the same, and to require the execution thereof by the defendant, by the undue influence, persuasion and threats of the said Alfred Kendall, who so then unlawfully harboured the said Mary Webster and prevented her from returning to the house of the defendant and to cohabitation with him as aforesaid; and the defendant by such refusal of the said Mary Webster to return to his house and to such cohabitation as aforesaid, and by her so requiring the execution by him of the said deed as aforesaid, so unlawfully brought about by the said Alfred Kendall as aforesaid, was induced to execute the said deed, as he otherwise would not have done. And the said Alfred Kendall, by the means aforesaid, unlawfully endeavoured to bring about, and did bring about, the separation of the defendant and his said wife by means of the said

deed ; and but for the aforesaid unlawful conduct of the said Alfred Kendall the said deed never would have been executed by the defendant or his said wife, nor would they have become separated thereby or thereunder, and the defendant's said wife would have returned to his house and to cohabitation with him as aforesaid. And the defendant further saith that, before and at the time of the execution of the said deed by the defendant, the said Mary Webster was pregnant with a child by him the defendant, her said husband, whereof she was afterwards delivered, of which said pregnancy he the defendant at the time of the execution of the said deed was wholly ignorant or he would not have executed the said deed, which said pregnancy was well known to the said Alfred Kendall and to the said Mary Webster, the wife of the defendant, and they also well knew that he, the defendant, was ignorant of the same, and that had he known the same he would not have executed the said deed ; and the said Alfred Kendall persuaded and induced the said Mary Webster not to inform the defendant of the said pregnancy lest he, the defendant, should not execute the said deed, and the said Alfred Kendall and the said Mary Webster agreed to keep the defendant in ignorance, and they did keep the defendant in ignorance of the said pregnancy until after the execution of the said deed, in order that the defendant might be induced by such ignorance, and he was induced by such ignorance, to execute the said deed. That at the time that he and his said wife and the said Alfred Kendall executed the said deed, which recited that there was issue of the marriage of the said defendant and Mary his wife one child only, namely, John Webster, an infant of eleven months old, he, the defendant, supposed and believed, and the said Alfred Kendall and Mary Webster knew that he supposed and believed, that the said Mary Webster was not pregnant of any other child, whereas the said Alfred Kendall and Mary Webster then well knew that she, the said Mary Webster, was then pregnant of another child by him, the defendant her said husband ; and the defendant was thereby induced to make and execute, and did make and execute the said deed by the means aforesaid, as he would not otherwise have done. And the defendant also says, that during all the time that the said alleged arrears of the annuity were accruing due, and at the time of the making and executing of the said indenture, and at all times thereafter and hitherto, the defendant was and has been ready and willing and offered, and still is ready and willing to receive back his said wife and children to his house, and to maintain them and cohabit with his said wife as her husband, whereof his said wife and the said Alfred Kendall and the plaintiff, during all the time aforesaid, had notice ; but the said Alfred Kendall and the plaintiff, during all the times aforesaid, prevented the de-[447]-fendant's said wife and children from returning to the defendant, and they during all those times against the will of the defendant remained living apart from him.

Demurrer, and joinder therein.

Phipson, in support of the demurrer. The facts alleged in the plea afford no defence to the action, either at law or in equity. [Pollock, C. B. Is there any authority that under these circumstances a Court of equity would set aside the deed?] None can be found. The authorities relating to deeds of separation are collected in Roper on Husband and Wife, vol. 2, p. 269, 2nd ed., and Bright on Husband and Wife, vol. 2, p. 313. A Court of equity, in decreeing specific performance of a deed of separation, does not inquire into the cause of the separation: *Wilson v. Wilson* (1 H. L. Cas. 538 ; 5 id. 40). Where the separation is for the lives of the parties, the offer of the husband to take back his wife will not determine her separate allowance, since it is founded on an express contract, and therefore requires the same mutual agreement to dissolve it: Roper on Husband and Wife, vol. 2, p. 314, 2nd ed. Where the deed of separation is between the husband and wife and a third party acting for the wife, she has the same right as any other cestui que trust to enforce the execution of a trust created in her favour: Roper on Husband and Wife, vol. 2, p. 296, 2nd ed. It will be said that there was an equitable fraud in the concealment of the wife's pregnancy, but apart from the difficulty of supposing that the trustee, who has indemnified the husband against his wife's debts, obtained the deed fraudulently, the answer is, that fraud would not render the deed void, but voidable only.

The Court then called on

[448] Morgan Lloyd, for the defendant. Agreements for separation of husband and wife have always been considered as against public policy, since they destroy all the duties and obligations of the marriage contract, not only as respects themselves

but their children also. The doctrine laid down in *Westmeath v. Westmeath* (1 Dow. N. S. 519, 544) still prevails, viz., that a deed between husband and wife for future separation cannot be supported. But upon that doctrine has been engrafted this qualification, that where differences exist between husband and wife, they may covenant for immediate separation, and such a covenant will be enforced at law or in equity, though considered illegal by the Divorce and Matrimonial Court: *Mortimer v. Mortimer* (2 Hagg. C. C. 318). It is an established rule in equity that family arrangements cannot be supported unless there has been a full disclosure of all material circumstances: *Gordon v. Gordon* (3 Swanst. 400). The defendant, when he entered into the contract, supposed that the issue of his marriage was one child only, and that his wife was not pregnant. That fact was concealed from him, and thereby he was induced to execute the deed. [Pollock, C. B. The defendant was willing to sign a deed of separation, having an only child eleven months old; why should it be supposed that he would have been unwilling to sign it if he had known that he was likely to have another child?] The deed provides that the defendant shall have access to his child, and that he shall not be liable for its maintenance, but there are no such provisions in respect of the child unborn. The facts disclosed by the plea amount to a conspiracy between the plaintiff and the defendant's wife to keep him in ignorance of her pregnancy, in order that he might be induced to execute the deed. [Martin, B. If the defendant means to impute [449] fraud, why not say so?] The statements in the plea shew a fraud in equity, if not at law. At all events, the declaration is bad. By this deed the defendant and his wife are not only compelled to live apart so long as they live, but she may live in such a way as she may think fit, absolutely free from all restraint and authority of her husband. That clause is clearly against public policy, because it enables the wife, if she thinks fit, to live in a state of adultery, or at a house of ill fame. [Pollock, C. B. If those circumstances had happened, I do not say what would be the consequence, but they have not. Martin, B. Is not this deed in the ordinary form; and must it not be assumed that the wife will conduct herself properly? Channell, B. Though the contract may be illegal in some respects, the covenant to pay the money may be good.] Where there are independent covenants, a deed may be good in part and bad in part, but where the covenants are mutual and go to the whole consideration on both sides, if any one is illegal the deed is altogether void.

Phipson, in reply. A stipulation, in a deed of this kind, though illegal, does not avoid a covenant by the husband with a trustee to pay money for the wife's maintenance. In *Worrall v. Jacob* (3 Meriv. 256, 268) Sir W. Grant, M. R., said: "The object of the covenants between the husband and the trustee, is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law. It has, however, been held that engagements entered into between the husband and a third party shall be held valid and binding, although they originate out of and relate to that unauthorized state of separation in [450] which the husband and wife have endeavoured to place themselves." The consideration for the husband paying money for his wife's maintenance is the covenant by her trustees to indemnify him against his wife's debts: Roper on Husband and Wife, vol. 2, p. 296, 2nd ed.: *Wilson v. Wilson* (14 Sim. 405). A contract induced by fraud is not void, but voidable at the option of the party defrauded; and where he has received a benefit under it, so that the parties cannot be restored to their original condition, he has no right to rescind it: *Clarke v. Dickson* (E. B. & E. 148). "A deed cannot be avoided on the ground of a fraudulent misrepresentation, unless the matter misrepresented was a material inducement to the execution of the deed; in other words, unless the matter was such as, in case of a simple contract, would be substantially the consideration for the contract:" per Erle, J., in *Mallalieu v. Hodgson* (16 Q. B. 689). In *Geddes v. Pennington* (5 Dow. 159) it was held that a false representation as to the place from which a horse came did not invalidate the sale.

Per Curiam.(e) We are all of opinion that the plaintiff is entitled to judgment.

Morgan Lloyd then applied for leave to amend, by alleging fraud, which was refused.

Judgment for the plaintiff.

(e) Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.

[451] DAVIES, Executor of Elizabeth Davies, Deceased v. DAVIES. June 11, 1862. —After counts by the plaintiff, as executor, for an excessive distress and for distraining for more rent than was due, the declaration proceeded thus: "And the plaintiff as such executor as aforesaid, also sues the defendant for money paid by the plaintiff as such executor as aforesaid, for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on an account stated between them. And the plaintiff as such executor as aforesaid claims 50l. Held, on demurrer, that the declaration was bad for misjoinder.

[S. C. 31 L. J. Ex. 476.]

Declaration. For that the said Elizabeth Davies during her lifetime was tenant to the defendant of a certain messuage at a certain rent, payable by the said Elizabeth Davies to the defendant; and the defendant, after the death of the said Elizabeth Davies, wrongfully distrained for certain arrears of the said rent, goods belonging to the plaintiff as such executor as aforesaid, of much greater value than the amount of the said arrears and of the charges of the said distress and of the appraisement and sale thereof, although part of the said goods were then of sufficient value to have satisfied the arrears and charges, and might then have been distrained by the defendant for the same; and the defendant thereby made an excessive and unreasonable distress for the said arrears, contrary to the statute in such case made and provided.

And for that the defendant wrongfully seized and took the said goods and chattels of the plaintiff, as such executor as aforesaid, as a distress for certain arrears of rent, to wit, the sum of 11l., then claimed and pretended by the defendant to be due and in arrear for rent of the said premises, and wrongfully remained in possession of the said goods and chattels, under colour of the said distress, until the plaintiff, as such executor as aforesaid, was compelled to pay and did pay to the defendant the said pretended arrears of rent and a further sum, to wit, the sum of 15s. 6d., for the costs and charges of the said distress, in order to regain possession of the said goods and chattels: whereas at the time of the making of the said distress and during all the time aforesaid, part only, the sum of 10l., of the said pre-[452]-tended arrears of rent so distrained for, was due to the defendant for rent of the said messuage.

And the plaintiff, as such executor as aforesaid, also sues the defendant for money paid by the plaintiff, as such executor as aforesaid, for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on an account stated between them. And the plaintiff, as such executor as aforesaid, claims 50l.

Demurrer, and joinder therein.

Murray, in support of the demurrer. (He argued, first, that the second count did not disclose any cause of action, citing *Glynn v. Thomas* (11 Exch. 870); *Stevenson v. Newnham* (13 C. B. 285): secondly, that the counts for money paid and received were bad for not shewing a present debt, citing *Place v. Potts* (8 Exch. 705); *Wilkinson v. Sharland* (10 Exch. 724).) Thirdly, the declaration is bad for misjoinder. The counts for money received and money due on an account stated disclose causes of action which accrued to the plaintiff in his own right, and they cannot be joined with causes of action which accrued to him in his representative character. The 41st section of the Common Law Procedure Act, 1852, does not allow the joinder of causes of action where they are in different rights. The test is whether the money recovered on each of the counts would be assets; if so, they may be joined. It is not enough to say that the debts accrued to the plaintiff "executor" or "being executor," but it must be averred that they accrued to him "as executor:" Williams on Executors, vol. 2, p. 1698, 5th ed. In *Lancefield v. Allen* (1 Bligh, N. S. 592) a count stating that the defendants had accounted with the plaintiffs, "executors as aforesaid," was joined with counts stating promises [453] to the testator, but the objection was not taken until after judgment, and it was held that if there was any misjoinder it was cured by the verdict.

McDonnell, contra. (He argued, first, that although, on the authority of *Glynn v. Thomas* (11 Exch. 870), in order to support the second count actual damage must be proved, the count was good on demurrer. Secondly, that the indebitatus counts were good, although the words "for money payable by the defendant to the plaintiff" were

omitted; that *Fagg v. Nudd* (3 E. & B. 650) was an express authority that a count on accounts stated is sufficient although it does not contain those words; and that by the 91st section of the Common Law Procedure Act, 1852, the legislature had provided that "nothing therein contained shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity.") Thirdly, there is no misjoinder. Reading the declaration with its commencement and conclusion, no one can doubt that the plaintiff is suing in his character of executor. *Lancefield v. Allen* (1 Bligh, N. S. 592) is an authority in point.

Murray replied.

POLOCK, C. B. We are all of opinion that the demurrer must be allowed for misjoinder; but the plaintiff may have leave to amend on the usual terms.

MARTIN, B., BRAMWELL, B., and CHANNELL, B., concurred.

Amendment accordingly; otherwise judgment for the plaintiff.

[454] M'CREIGHT, Official Manager of the State Fire Insurance Company v. STEVENS. June 16, 1862.—To an action, commenced by a Joint Stock Company and continued by the official manager under the Winding-up Acts, for calls on shares held by the defendant in the Company, he pleaded that he was induced to become the holder of the shares by fraud, and within a reasonable time after he had notice of the fraud, and before he received any benefit from the contract, he repudiated it. Held, that the plaintiff was entitled to particulars of the acts of fraud and repudiation.

[S. C. 31 L. J. Ex. 455; 10 W. R. 798; 6 L. T. 503.]

This was an action commenced by a Joint Stock Company, called "The State Fire Insurance Company," and continued by the official manager, under the Winding-up Acts, 1848, 1849. The declaration stated, that the defendant, as holder of 100 shares in the Company, was indebted to the Company in the sum of 50l. for instalments of capital then due and payable by him in respect of the said shares.

The defendant pleaded (with "never indebted") that he was induced to become the holder of the said shares and to contract as in the declaration mentioned by the fraud of the said Company; and within a reasonable time after he first had notice of the said fraud, and before he had received any benefit as such holder or under the said contract, he repudiated the same and disclaimed being such holder, and has never at any time received any benefit from the said shares, or from being such holder.

Murray had obtained a rule calling on the defendant to shew cause why he should not deliver to the plaintiff's attorney or agent particulars in writing of the acts of fraud relied upon by the defendant in support of his plea, and the acts constituting the repudiation and disclaimer relied upon in support of the same plea, or why the order allowing the plea should not be rescinded. (a) The affidavit of the [455] plaintiff, in support of the application, stated, that "the defendant appears by the books of the Company to have become a shareholder therein, and to have been treated as such by the said Company; and to have executed the deed of settlement of the Company in respect of 100 shares on the 17th September, 1855: that deponent has no knowledge of what the fraud is that the defendant intends to allege in support of such plea, or in what way the defendant intends to make out the same; neither is there among the books and papers of the Company anything that will give deponent any information on the subject: that he has no present personal knowledge of the transactions of the Company prior to his appointment as official manager thereof, and does not know on what ground the defendant will endeavour to support such plea of fraud: that the defendant does not appear from the books and papers of the Company, so far as the deponent has been able to ascertain, ever to have repudiated the shares held by him therein, and deponent has no knowledge in what way the defendant intends to make out, in support of his said plea, that he has repudiated the shares held by him in the said Company, or of what the acts of repudiation are on which he relies."

There was also the affidavit of the secretary of the Company previous to the

(a) A similar application had been made to Bramwell, B., at Chambers, who refused an order, and suggested an application to the Court.

winding-up order, who deposed that he "had never heard any statement or suggestion made by any person whomsoever that the defendant had been induced to take shares in the Company by fraud, and deponent was not aware of anything which would give a pretence for such a plea: that defendant never to deponent's knowledge repudiated being a shareholder; and that deponent was not aware of any acts or circumstances which he could allege to justify an allegation by him of having repudiated being a shareholder in the Company."

[456] Philbrick now shewed cause. This is not a case in which the plaintiff could administer interrogatories or have a discovery, and therefore he is not entitled to particulars. Whether in equity a discovery can be had of matters which relate solely to the defendant's case, is not clearly established; but Courts of law have considered that a party has no right to interrogate as to matters which relate exclusively to the case of his opponent. It may be said that this is an action by an official manager, who can know nothing of the alleged fraud; but the plaintiff is not in a worse position than if the Company were suing. Suppose there had been no winding-up order, and the action had been carried on by the Company, the fact that the defendant had been induced to become the holder of the shares by the fraud of any one of the directors would be a defence, although the Company had no knowledge of it. This is an attempt to obtain a discovery as to whether the defendant has any and what grounds for supporting his plea. An order for the delivery of the particulars sought for would be in effect an order upon the defendant to disclose his case before trial. [Martin, B. The defendant is not asked by what proof he intends to support his plea; all that the plaintiff wants is a bonâ fide statement of the nature of the fraud.] The application is novel and without precedent. [Martin, B. I have made orders of the kind at Chambers, either absolutely or as a condition for allowing the plea. Bramwell, B. When the case was before me two difficulties occurred to my mind. One was, that the application was novel, but it now appears that it is not; the other was, how to enforce the order.] [Murray. The rule is in the alternative, to disallow the plea.] [Bramwell, B. If the only plea had been that of fraud, it could not have been got rid of in that way.]

Murray was not called upon to support the rule.

[457] POLLOCK, C. B. We are all of opinion that the rule should be absolute.

MARTIN, B., and BRAMWELL, B., concurred.

Rule absolute. (a)

THE ATTORNEY GENERAL *v.* PARTINGTON. June 17, 1862.—Probate duty is payable in respect of interest which has accrued between the time of the death of an intestate and the grant of administration, whether such interest is due by contract or recoverable in the nature of damage.—In 1819 S., a widow, died intestate, and the Solicitor of the Treasury took out administration to her estate, and received under it 23,821l. In 1823 I. C., the wife of E. C., applied to the Crown, claiming to be next of kin of S., but died in 1825 without establishing her claim. In 1830 E. C. died intestate without having taken any steps to recover the money, and without having administered to his wife. In 1855 administration to the estate of I. C. and the estate of E. C., on behalf of their children, was granted to P., who instituted a suit in equity to administer the estate of S., when it was found that I. C. was the sole next of kin of S., and it was ordered that the Solicitor of the Treasury pay to P., as the representative of I. C., the money in his hands with interest at 4l. per cent., which amounted to 34,124l. Held: First, that probate duty was payable upon the value of the estate of I. C., as increased by the interest, at the time administration was granted.—Secondly, that no probate duty was payable in respect of the estate of E. C.

[S. C. 10 Jur. (N. S.) 617: affirmed 1864, 3 H. & C. 193; 1869, L. R. 4 H. L. 100.]

By consent and order of a Judge, under the 22 & 23 Viet. c. 21, s. 10, the following case was stated, without pleadings, for the opinion of this Court:—

1. In 1819 Mrs. Frances Shard, widow, died intestate, leaving personal assets to a

(a) See *Pitts v. Chambers*, 1 F. & F. 684.

considerable amount, and upon her death the Crown, by Mr. Maule, the then Solicitor of the Treasury, took out administration to the estate.

2. The property of the intestate, at the time of her death, consisted of the sum of 16,000*l.*, 4 per cent. bank annuities, cash in the house 210*l.* 4*s.*, and a leasehold house in Harley Street, together with the furniture &c. therein, and a leasehold house called Torbay House, at Peignton, in the county of Devon, together with the furniture, plate, linen, china, and carriages, and which were sold by Mr. Maule.

[458] The following is the account of his receipts:—

May 1819.	Cash in the house	£210	4	0
	Sundry articles of jewellery	80	0	0
February 1823.	Proceeds of sale of furniture, carriages, &c.	4,153	9	7
	Proceeds of sale of lease of house, fixtures, and furniture in Harley Street	3,030	10	4
January 1824.	Proceeds of sale of 16,000 <i>l.</i> , 4 per cent. bank annuities	16,300	0	0
„ 1829.	Proceeds of sale of house at Torbay, and fixtures therein	280	0	0
	Total estate of Frances Shard at the time of her death	£24,054	3	11
	Payments made by Mr. Maule during his administration, up to August, 1829, when Torbay House was sold	3,432	19	6
	Balance	£20,621	4	5

3. Mr. Maule also received, in February, 1823, 2560*l.* for dividends on the 16,000*l.* 4 per cent. up to 15th October, 1822, and 640*l.*, one year's further dividend, due October, 1823, making a total of 3200*l.*, which, added to the 20,621*l.*, makes a total of 23,821*l.* 4*s.* 5*d.*

4. Isabel Cook, the wife of Ellis Cook, both of whom were domiciled and had always resided in the United States of America, about the year 1823, applied to the Crown, claiming to be next of kin; her claim was not recognized, and she died in 1825 without taking any steps to establish her claim.

5. The estate of Mrs. Shard, at the time of the death of Isabel Cook, was as follows, no interest having been received by Mr. Maule upon monies which had come to his hands:—

The balance before set forth	£23,821	4	5
Deduct legacy duty on same at 6 per cent.	1,417	5	7
	£22,403	18	10

[459] 6. In the year 1830 the said Ellis Cook died intestate without having taken possession of or taken any steps to recover the money in the hands of Mr. Maule, and without having administered to his wife. After the death of their father, the children of Mr. and Mrs. Cook, who have always resided and been domiciled in the United States, applied to Mr. Partington, the defendant in this case, to take proceedings to recover the money from the Solicitor of the Treasury, which he proceeded to do, and, a personal representative to Isabel Cook's estate being necessary, a power of attorney was made by James Cook, one of the said children of Isabel Cook and Ellis Cook, authorizing the defendant, Charles Partington, to take out administration to the estates of both Ellis Cook and Isabel Cook.

7. A grant of administration to Ellis Cook's estate was accordingly made by the Prerogative Court of Canterbury to Mr. Partington on the 23rd day of July, 1855. It contained the following clause:—“We do grant full power and authority to you to administer and faithfully dispose of the said goods, chattels, and credits, which, whilst living, and at the time of his death, did any way belong to his estate; and we do constitute you administrator of all and singular the goods, chattels, and credits of the said deceased, for the use and benefit of the said James Cook, now residing at Brandon, in Vermont, in North America, and until he shall apply for and obtain letters

of administration of the goods of the said deceased to be granted to him." The assets were sworn under 20l.

8. On the same day a grant of administration to the estate of Isabel Cook, the wife of Ellis Cook, was made to the defendant, Charles James Partington, for the use and benefit of James Cook. It contained the following clause:—"We do grant full power and authority to you to [460] administer and faithfully dispose of the said goods, chattels, and credits, which, whilst living, and at the time of her decease, did any way belong to her estate, and we constitute you administrator of all and singular the goods, chattels, and credits of the said deceased for the use and benefit of James Cook, now residing in Vermont, in North America, one of the natural and lawful children of the said Ellis Cook, deceased, and until he shall duly apply for and obtain letters of administration of the goods of the said Ellis Cook to be granted to him, the said Ellis Cook having survived the said deceased, but died without having taken upon him letters of administration of her goods, chattels, and credits." The assets were sworn under 20l.

9. A suit was instituted in the Court of Chancery under the title of *Partington v. Reynolds*, by summons taken out before Vice Chancellor Kindersley (the defendant in this case, as the personal representative of the said Isabel Cook, being the plaintiff), to administer the estate of the said Frances Shard, and an order was made therein on the 8th day of November, 1855, referring it to the chief clerk to inquire who were the next of kin of Frances Mary Shard according to the Statute of Distributions, and directing an account to be taken of the personal estate and effects of the said Frances Mary Shard.

10. The chief clerk, on the 26th of June, 1857, by his separate certificate, found that Isabel Cook was the sole next of kin of the said intestate, Frances Shard, and by his general certificate, filed 30th March, 1858, he certified, inter alia, that George Maule, Esquire, the late Solicitor of the Treasury, as administrator of the said Frances Shard, received personal estate of the said intestate to the amount of 27,317l. 19s. 1d., and that the said George Maule paid, and the defendant Henry Revell Reynolds, as the present [461] Solicitor of the Treasury and successor to the said George Maule, was entitled to be allowed on account thereof sums to the amount of 3432l. 19s. 6d., leaving a balance due from the said Henry Revell Reynolds as such successor as aforesaid of 23,884l. 19s. 7d. on that account, and he further found that the personal estate consisted of the before mentioned balance of 23,884l. 19s. 7d., and that there was not any personal estate then outstanding.

11. A summons was taken out for further consideration, with the view, amongst other things, of charging the solicitors for the Crown with interest on the aforesaid balance of 23,884l. 19s. 7d., but it was adjourned into Court and came on to be heard before the Vice Chancellor on the 26th June, 1858, when the Court, by an order dated the said 26th June, 1858, declared that Mr. Reynolds ought to be charged with interest at 4 per cent. per annum on all sums, in respect of the estate of Frances Shard, from time to time retained by him and by the said Mr. Maule, and directed an inquiry to be made as to what balances he had retained in his hands from time to time, and to calculate the amount of interest at the rate of 4 per cent. per annum. It having been suggested that, as the Court had decided the principle, the parties could fix the amount of interest without the reference, and that it would amount, on the basis of his Honor's decision, to 34,124l., the Court declared that to be the amount which ought to be charged, and ordered it to be paid by the defendant, Henry Revell Reynolds, to the said Charles James Partington, as the representative of the said Isabel Cook.

Of this sum 1190l. was in respect of the time antecedent to Isabel Cook's death, and

l. represented the time subsequent to that event, and up to the date of the said letters of administration. The Court also directed the taxa-[462]-tion of costs of the plaintiff and defendant in the suit, and ordered the same to be paid out of the sum of 24,528l. 17s. 2d., 3 per cent. consols, in which, under a previous order made in the said cause, the said balance of 23,884l. 19s. 7d. had been invested. The Court also ordered that the deficient duty on the letters of administration to Isabel Cook, and the legacy duty on the residue of the intestate Frances Shard's estate (the amounts respectively to be verified by affidavit) should also be paid out of the said stock, and the ultimate balance, after the payments in the order mentioned, together with any dividends which might accrue on the stock, was ordered to be transferred

and paid to the plaintiff, Charles James Partington, as the personal representative of the said Isabel Cook.

12. The total amount of costs taxed under the said order was 3395l. 0s. 3d., and the legacy duty on the residue 3282l. 17s. 1d.; a further sum of 525l. was paid to Mr. Ewbank, as the solicitor for the administrator, for the purpose of paying the probate or administration duty on Isabel Cook's estate, and the balance amounting to 17,055l. 1s., 3 per cent. consols, and 364l. 5s. 4d. cash, was transferred and paid to the plaintiff, Charles James Partington.

13. The residuary account of Frances Shard's estate was made out and passed, and the legacy duty, amounting to the aforesaid sum of 3282l. 17s. 1d., paid.

14. Mr. Partington then applied to the Commissioners of Inland Revenue to put additional duty on the administration granted to him of Isabel Cook's estate.

15. The Commissioners claimed that the stamp duty should be on a value, including all accretions from the death of Isabel Cook to the date of the administration, viz., 23rd of July, 1855, and also claimed that the grant of adminis-[463]-tration for the effects of the late Ellis Cook, who survived his wife, should be stamped at the same rate.

16. Mr. Partington submits to pay the increased duty on the aforesaid sum of	£22,403 18 10
Add interest received from Henry Revell Reynolds up to Mrs. Cook's death	1,190 0 0
	£23,593 18 10
Deduct taxed costs of <i>Partington v. Reynolds</i> for recovery of estates	3,395 0 3
	£20,198 18 7
Subsequent costs of administering the estate amounting to 259l. 16s. 4d., would also have to be deducted	259 16 4
	£19,939 2 3

17. The question as to Ellis Cook's estate has this in addition. The property of Frances Shard was ordered to be paid to the defendant Partington as the administrator of Isabel Cook, and by the grant of administration to Isabel Cook's estate, is for the use and benefit of James Cook. Mr. Partington having so as aforesaid received the money, proceeded with it to America, where it was paid over by him to James Cook, who gave a release for the same both in regard to Isabel Cook's estate and also as the administrator in America of Ellis Cook, he having taken out administration to Ellis Cook in America for the purpose of administering the estate in that country.

18. Judgment is to be entered for the Crown, without costs, for such an amount of duty as shall appear to be due, according to the opinion of the Court upon the above facts, and according to the principle on which the Court shall be of opinion that the same ought to be charged.

The questions for the opinion of the Court are :—

First. What probate duty is payable in respect of the estate of Isabel Cook ?

Secondly. Whether any, and if so, what probate duty is payable in respect of the estate of Ellis Cook ?

[464] Sir F. Kelly (with whom were the Attorney General, the Solicitor General, Locke, and Beavan), for the Crown (June 12). The question is whether probate duty is payable in respect of the interest which has accrued up to the time of the grant of administration. It is conceded that the Crown is entitled to duty on the principal sum, 23,821l. 4s. 5d., but there are three other sums in respect of which the duty is claimed. First, a sum of 1190l., being interest at 4 per cent. from the time of the receipt of the principal sum by the then Solicitor of the Treasury up to the death of Isabel Cook in 1825; secondly, a sum of 5000l. for interest from the time of the death of Isabel Cook to the death of her husband Ellis Cook in 1830; and thirdly, a sum of 28,000l. for interest from the time of the death of Ellis Cook until the grants of administration to the defendant in the year 1855. The question, which applies to

all those sums, is whether, upon a grant of administration at any period after the death of an intestate, probate duty is payable upon the amount or value of the estate at the time of his death, or at the time of the grant of administration. Not only upon principle but authority, and by the words of the statute, 55 Geo. 3, c. 184, the duty is payable upon the amount or value of the estate at the time of the grant of administration. By the 55 Geo. 3, c. 184, Sched., part III., tit. "Letters of Administration," duty is charged upon the estate and effects for or in respect of which letters of administration are granted; and they are granted in respect of that estate which exists at the time of the grant, and which it enables the administrator to recover. Then what was that estate in this case? In the year 1855, when administration was granted to the defendant, it consisted of 23,884*l.* principal and 34,124*l.* interest, and upon those amounts the duty attached. By the 38th section of the 55 Geo. 3, c. 184, no ecclesiastical Court shall grant probate or letters of adminis-[465]-tration without an affidavit, "that the estate and effects of the deceased for or in respect of which probate or letters of administration is or are to be granted, &c., are under the value of a certain sum to be therein specified." The legislature has used the word "are" in the present tense as indicating the time when administration is granted. [Pollock, C. B. A bond, upon which no interest had been paid for nineteen years after the death of the obligee, might then be the subject of probate; is there any authority that the duty is only payable on the principal sum secured by the bond.] There is no direct authority, though the case must frequently happen; for instance, where stock rises or is increased by the dividends, after the death of the owner and before probate. In *Doe d. Richards v. Evans* (10 Q. B. 476), a person died possessed of a leasehold estate which was then of less value than 100*l.*, but at the time of the grant of administration it was worth more than 100*l.* Duty was paid upon 100*l.* only, and is was held insufficient. That decision proceeded on the broad principle that a Court of law cannot entertain the question of difference in value of an estate at the time of the owner's death and of the grant of administration. *Hunt v. Stevens* (3 Taunt. 113) is also an authority, that if an administrator sues for a greater value than is covered by the ad valorem stamp, he cannot recover. It is immaterial whether the sum sought to be recovered is principal or interest, the duty must be paid on the full value at the time administration is granted. An administrator is bound to take out the grant to the extent of the sum he expects to receive: *Butler v. Butler* (2 Phil. Eccl. C. 39). [Martin, B. Suppose an administrator brought an action for money lent, and proved his case, could the defendant say "You are entitled to interest, which renders the stamp insufficient, [466] and therefore you can recover nothing?"] In *The Attorney General v. Brunning* (8 H. L. Cas. 243, 261) Lord Wensleydale points out that all difficulty in fixing a precise amount is remedied by the statute, which provides that, if too high a duty is imposed in the first instance, the difference is to be returned; if too little duty is imposed the difference is to be made good. The question is, what is the value of the estate which the grant of administration enables the administrator to obtain? *The Attorney General v. Brunning* (8 H. L. Cas. 243, 261) is an authority that all monies recoverable by virtue of a grant of administration, in whatever form recovered, whether by the agency of a Court of law or equity, are part of the estate and effects of the intestate, and liable to duty. Also that all rights of action for unliquidated damage vest in the person to whom administration is granted. At common law the Ordinary might have taken possession of the principal money and the interest which accrued after the death of the intestate; and by the grant of administration he conveyed to the defendant all the rights which he possessed. [Martin, B. referred to *Matson v. Swift* (8 Beav. 368).] That case is distinguishable on the grounds stated by Lord Campbell in *The Attorney General v. Brunning*, viz., that the executor did not receive the money qua executor, by virtue of the probate; and at the time of the testator's death the property was de facto land, although the proceeds of it, when sold, were to be distributed as personalty. [Martin, B. *The Attorney General v. Brunning* has no bearing on this case, because here the question is whether the duty is payable on the value of the estate at the time of the intestate's death or of the grant of administration. It is an authority to this extent, that it is immaterial whether the remedy for the recovery of the money is by action at law or a bill in equity, or whether the money sought to be recovered is a sum certain or unliquidated [467] damages. [Bramwell, B. Suppose a person died intestate, leaving nothing in money but only a judgment recovered for 1000*l.*; if no administration was taken out for ten years, must it be for the 1000*l.* and 4 per cent. interest?] For the value of

the judgment at the time of probate. The practice is to require all rents, interests and dividends from the death of the testator or intestate to the date of the probate or letters of administration to be included in the estimate upon which duty is paid: Gwynne on the Law relating to the Duties on Probates and Letters of Administration, p. 25, 3rd ed. In *The Attorney General v. Brunning* (8 H. L. Cas. 2243, 61), Lord Wensleydale said: "The right to enforce the contract of sale entered into by the testator belongs to his executor. That right is part of his estate and effects, and the probate is a necessary instrument to support his claim at law or in equity." So, here, the right to this interest belonged to the Ordinary at common law, and it passed by the grant of administration to the defendant, as part of the estate and effects of the testator. If the duty was payable on the value of the estate at the time of the death of the testator or intestate, great injustice might be done. For instance, suppose a person died possessed of a ship worth 10,000l., with a cargo on board worth 20,000l., but before administration was granted the ship and cargo were lost at sea, could it be contended that the duty must be paid upon their value? [Pollock, C. B. Or suppose a house with its furniture was destroyed by fire.] The word "estate" means the whole estate which passes by the grant of administration. The defendant admits that he is bound to pay duty, not only on the value of the estate at the time of Frances Shard's death, but also on the sums, which added to that value, between the death of Frances Shard and the year 1823, when the whole was realised; and the interest which accrued between the year 1823 and 1825, [468] when Isabel Cook died. Then upon what principle can it be contended that he is not liable to pay duty upon the interest which accrued between the year 1825 and the death of Ellis Cook in 1830, and between that time and the grant of administration? [Bramwell, B. The Court of Chancery must be taken to have decided that the Solicitor of the Treasury was a trustee for Isabel Cook, and ought to have paid her 22,403l. principal and 1190l. interest, which was the value of her estate at her death. The defendant says that he is only liable to pay duty on that.] The defendant is also administrator of Ellis Cook who at the time of his death was entitled to 5000l. interest. The Crown claims duty on each devolution. If Ellis Cook had taken out administration to Isabel Cook, he must have paid duty, and a further duty is payable on the administration of Ellis Cook.

Lush (Milward with him), for the defendant. First, no duty is payable upon the grant of administration to Ellis Cook, because the defendant took no estate under it. [Bramwell, B. Only one estate is obtained by the two administrations.] The defendant's title is derived from Isabel Cook, not from Ellis Cook. He was entitled to take out administration to his wife, and reduce her choses in action into possession. If he had done so the estate would have been his, and the administrator of his wife would have taken nothing under the grant. But having died without obtaining administration to his wife, her property cannot be recovered by his representative, but only under the administration to the wife: Williams on Executors, vol. 1, p. 778, 5th ed.

Secondly, it is said that the duty must be assessed on the value of the estate recoverable under the administration; but that is not so. The test is, what, at the time of the intestate's death, was the value of his estate which the Ordinary [469] might then have administered. If, at the time administration is granted, the value of the estate has increased, duty must be paid upon the increased value; if, on the other hand, the value is diminished, duty is only payable on the diminished value. But in estimating the value no subsequent accretion can be taken into account. There is no authority against that proposition, and the case of *Doe d. Richards v. Evans* (10 Q. B. 476) is in accordance with it. By the 55 Geo. 3, c. 186, Sched., tit. "Letters of Administration," the duty is assessed upon the estate and effects for or in respect of which the administration is granted. Administration is granted for and in respect of the goods which at common law, the Ordinary would have administered. By the letters of administration of Isabel Cook's estate, the Ordinary granted to the defendant full power and authority to administer the goods, chattels and credits, "which, whilst living, and at the time of her death, did in any way belong to her estate." There is this distinction between probate and legacy duty, that the former is confined to goods which belonged to the deceased at the time of his death, and which at common law the Ordinary would have administered. Legacy duty is payable on whatever amount a legatee receives. In the case of *In re Ewin* (1 C. & J.

151) it was held that American, Austrian, French, and Russian stock, the property of a testator domiciled in this country was liable to legacy duty; but in the case of *The Attorney General v. Dimond* (1 C. & J. 356), it was held that probate duty was not payable in respect of property in a foreign country belonging to a testator dying in this country, although the property be brought into and administered in this country. The principle of that decision was that probate duty is only payable in respect of that estate which the Ordinary could have administered. *The Attorney [470] General v. Hope* (1 C. M. & R. 530, 560) is an authority to the same effect. There Lord Brougham, C., said: "The words of the Act refer, not to the use eventually made of the probate, but distinctly to the purpose for which the probate was granted." Regard must be had to the value of the estate and effects at the time of the death, and nothing ought to be taken into account of which the intestate did not die possessed. Suppose an intestate died possessed of a leasehold estate, and nineteen years afterwards administration was granted of his effects, when a large sum would be due for rent, and the administrator brought ejectment, he might state his title on the day after the death of the intestate, and recover in his own right as mesne profits the rent which subsequently accrued. As a trustee he would be bound to account for those rents, but they would not be assets in respect of which probate duty would be payable, because they were not part of the estate of which the intestate died possessed. In *Doe d. Richards v. Evans* (10 Q. B. 476), the estate in respect of which the duty was payable was the identical estate which passed by the letters of administration. [Pollock, C. B. In the case of a bond, payable with interest, if administration was not taken out until nineteen years after the death of the obligee, would it be sufficient to pay duty on the amount of the principal only?] *Prima facie*, the stamp duty must cover the amount sought to be recovered; but it need not in every case where a person is obliged to sue as executor. In *The Attorney General v. Hope* (1 C. M. & R. 530, 560), if the executors had brought an action in respect of the property in the foreign country at the time of the testator's death, but afterwards brought to this country, upon production of the probate the stamp duty would appear too little, but when it was proved that the property was in a foreign country when the testator died, the objection would be removed. [Martin, [471] B. Suppose a person died possessed of a chattel annuity, and probate of his will was not granted until ten years afterwards, would duty be payable on the sum which accrued after his death?] The annuity would be capitalised, and its value ascertained at the time of probate. [Bramwell, B. Then there would be the value of the years to run and also the subsequent accretion.] The valuation would be of that which existed as a chattel and of which the testator died possessed. [Channell, B. When an executor applies for probate, or an administrator for administration, must he not be considered, for the purpose of probate duty, in the same position as the testator or intestate would have been if he had lived up to that time? Then, what would have been the value of Isabel Cook's estate if she had lived up to the time when probate was granted to the defendant?] Suppose a wrongdoer took possession of a leasehold estate, of which an intestate died possessed, and carried away the crops for five years, at the end of which time administration was taken out; probate duty would not be payable on the value of the crops, for the intestate was never possessed of them, and the administrator's title would relate back to the time of the death of the intestate: Williams on Executors, vol. 1, p. 558, note (p), 5th ed. [Pollock, C. B. Suppose an intestate dies possessed of a leasehold estate of the value of 1000l. a year, and of which five years are unexpired, and a pauper takes possession of it, but at the end of the five years, when the term has expired, administration is taken out, is probate duty payable on the value of the estate at the time of the death?] It would not. Here there was no contract to pay interest, but it was awarded by the Court of Chancery as a penalty for the misapplication of the principal. That cannot in any sense be considered as goods of which the intestate died possessed. In the case of stock which has increased in value at the time administration [472] is granted, probate duty is payable on that increased value, because it is the present value of the identical thing of which the intestate died possessed. So, if the stock has decreased in value, duty is only payable on the decreased value. [Bramwell, B. Suppose the case of a bill of exchange for 2000l., upon which an administrator does not sue until five years after the death of the intestate and the jury give 400l. for interest by way of damages, ought the probate to be for 2000l. or 2400l.?] There the interest is inseparable from the

principal, as, in *Doe d. Richards v. Evans*, the improved value of the land by building upon it: here the interest is not anything annexed to the principal, but an accidental accretion. The Statute of Distributions, 22 & 23 Car. 2, c. 10, s. 1, requires an administrator to exhibit in the Ecclesiastical Court an inventory of "the goods, chattels and credits of the deceased at the time of his death," but this interest need not be included in the inventory as part of the goods of which Isabel Cook died possessed. In *Pitt v. Woodham* (1 Hagg. Eccl. C. 250) it was held that the Ecclesiastical Court could not call for an account of the profits which the administratrix made on the intestate's business subsequently to his death. It can make no difference whether the administrator makes a profit out of the assets in his hands, or whether a third person gets possession of the assets and is ordered to pay them over to the administrator with interest; neither the profits nor the interest are part of the goods of which the intestate died possessed. This interest is in the nature of damages for the detention of the principal, and not assets for the purpose of probate duty.

Sir F. Kelly replied.

Cur. adv. vult.

[473] POLLOCK, C. B., now said,—The question in this case is, whether probate duty is payable on the value of the property as increased by the interest; or whether it is payable without reference to such increase. I am of opinion, upon the authority of the cases cited, especially that of *The Attorney General v. Brunning* (8 H. L. Cas. 243) and *Doe d. Richards v. Evans* (10 Q. B. 476), that the value at the time of the grant of administration is the value upon which the duty is payable.

It is true, as my brother Martin observed, the question in *The Attorney General v. Brunning* was not the same as that now before us; but the opinion of the House of Lords, although not absolutely binding on us as an authority unless the question is the same, is still of considerable weight as the opinion of eminent and learned persons. In *The Attorney General v. Brunning* Lord Campbell, C., said: "I am clearly of opinion that all monies which the executor recovers by virtue of the probate must be considered part of the estate and effects of the testator, and subject to probate duty." Now, here, the interest was increasing for about thirty years, and amounted to upwards of 34,000l. which was undoubtedly recovered by virtue of the probate; so that there is the express authority of Lord Campbell that it must be considered as part of the estate and effects of the intestate and subject to the probate duty. Lord Cranworth and Lord Wensleydale also expressed an opinion, though not in such distinct terms, that whatever an executor or administrator recovers by the probate must be considered as part of the estate and subject to probate duty. Our judgment will, therefore, be for the Crown.

MARTIN, B., said,—I do not feel sufficient confidence in my own opinion to differ from the rest of the Court; but I consider the point by no means clear. The question turns [474] upon the meaning of the words in the 55 Geo. 3, c. 184, Sched., part III., tit. "Letters of Administration," "estate and effects, for or in respect of which such letters of administration shall be granted." The 38th section does not in my opinion carry the case further; it merely requires an affidavit of the value of the "estate and effects" within the meaning of the Schedule. Now, a grant of administration is a power and authority to administer and dispose of the goods, chattels, and credits which at the time of the death of the intestate belonged to his estate; but this increase, in respect of which the duty is claimed, accrued years after the death of the intestate. I do not think that the cases of *Doe d. Richards v. Evans* (10 Q. B. 476) and *The Attorney General v. Brunning* (8 H. L. Cas. 243) govern this. *Doe d. Richards v. Evans* was the case of a chattel interest in land which was improved in value by building after the owner's death and before the grant of administration; and it was properly held that the probate duty was payable on the value of the land at the time administration was granted. That case is clearly distinguishable from this. As, however, the other members of the Court are of opinion that probate duty is payable upon this property, although the right to it did not exist until more than thirty years after the intestate's death the Crown is entitled to judgment.

BRAMWELL, B., said,—I am of opinion that the Crown is entitled to judgment for the amount claimed. The question is, what probate duty ought to be paid. It was rightly conceded by Mr. Lush, that probate or administration duty is a duty which attaches upon the estate and effects of the testator or intestate at the time

of his death, but is to be calculated upon the value of the estate at the time probate or administration is granted. I think he was well warranted [475] in that concession, for the 38th section of the 55 Geo. 3, c. 184, says that "no Ecclesiastical Court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, &c., that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, &c., are under the value of a certain sum to be therein specified," speaking in the present tense of the time when probate or administration is granted.

Now, in order to ascertain the value of this estate, we must first see what it is. Isabel Cook was sole next of kin to a person who in the year 1819 died intestate, of whose estate and effects the then Solicitor of the Treasury took out administration, and received under it a large sum of money. Isabel Cook was entitled to that money and something more, which arose in this way. The Solicitor of the Treasury ought to have paid the money received by him to her; or, if he did not, he ought to have protected himself by proceedings in Chancery, during the pendency of which the money would have been invested in the public funds; or at all events, if he retained the money, he ought to have invested it in some security bearing interest. Therefore the amount due from him was the principal sum with an accessorial sum, according to the way in which he used the money, that is to say, if he made a proper use of it by investing it, the interest; if he kept it and made a profit out of it, damages for that profit. That was the estate to which Isabel Cook was entitled at the time of her death; and at that time it would have been represented by the principal sum and about six years' interest. Upon her death that estate became the property of her administrator, and in my opinion he was [476] entitled to that—neither more nor less. But, thirty years afterwards, when administration of the estate of Isabel Cook was granted to the defendant, it had grown to be of thirty years' more value, that is to say, the accessorial sum, the interest, had increased, but the estate was the same estate as she had, and no other. I confess I do not see any difference between this case and that of a bill of exchange due at the time of the death of an intestate, and which continues unpaid for five years afterwards, when, administration of his estate being taken out, considerable arrears of interest would have accumulated, and the administrator would be entitled to compensation in the nature of damages. In that case the duty ought to be calculated on the sum payable. Mr. Lush admitted that was so, but attempted to distinguish this case. There is one test, which to my mind is irresistible. If, in the case of a bill of exchange, the principal sum was released, the accessorial sum would be gone with it. So here, if the administrator had granted to the Solicitor of the Treasury a release of the principal sum, all damages in respect thereof would have been gone. That seems to me to shew that it was the same estate, and no other. Therefore Mr. Lush was warranted in admitting that in the case of a bill of exchange probate duty ought to be calculated on that principle; but, first, he attempted to distinguish this case, and failed; and next, he contended that the defendant had a mere claim for compensation in the nature of damages which was not interest on the estate, but that seems to me no more so in the present case than in that of a bill of exchange.

With great deference for my brother Martin's doubt, I think that the claim of the Crown is well founded. The case of *Doe d. Richards v. Evans* (10 Q. B. 476) decided that an increase in the value of the estate subjected it to a higher rate of duty [477] than if probate had been taken out shortly after the death. It does seem at first a hardship that a person should have to pay a higher rate of duty in consequence of a delay in taking out administration, which was no fault of his; but the Crown might say, "If you had been alive to your rights, and had taken out administration sooner, we should have had the money in our hands long ago."

For these reasons I am of opinion that the Crown is right; and my brother Channell, who heard the case argued, entertains the same opinion.

Sir F. Kelly, in the following term (Nov. 12), asked the Court whether judgment was to be entered for the Crown for the duty claimed upon both estates. The Court, on a subsequent day (30th April), said that the judgment should be entered for the

amount claimed in respect of the estate of Isabel Cook only, and that no duty was payable in respect of the estate of Ellis Cook.

Judgment accordingly.

[478] **WOODS AND OTHERS v. THIEDEMANN.** June 16, 1862.—The defendant, a merchant at Newcastle, was a customer of the plaintiffs, bankers at Newcastle, whose London agent was the Union Bank. H., a merchant at Wolgast in Prussia, wrote to the defendant stating that he was inclined to consign to him a cargo of wheat, and asking for how much and at what date the defendant would open for him a credit in London. The defendant wrote in reply:—"You may draw against transmittal of bill of lading at 30s. to 32s. per quarter in advance for your best yellow wheat on our account at 14 days, 1, 2 or 3 months' date, on the Union Bank of London." H. afterwards wrote to the defendant, stating that he was about to consign to him 8320 scheffels of wheat shipped by the vessel "Anna," Captain K.; and that he annexed duplicate bill of lading. On the same day H. wrote to the Union Bank stating that he had drawn on them six bills of exchange for 400l. each, for account of defendant. The Union Bank, having no instructions, sent the letter to plaintiffs. Messrs. B. and C. afterwards presented to the Union Bank for acceptance six bills of exchange for 400l. each drawn and indorsed by H., together with a paper writing purporting to be a bill of lading indorsed by H. in blank. The plaintiffs having sent to the defendant the letter which H. addressed to the Union Bank, the defendant came to the plaintiffs' Bank and had some conversation with the manager respecting the cargo of wheat supposed to have been shipped by H., when defendant said "it was a large amount and that they must only accept against the bill of lading." The defendant then wrote to the plaintiffs as follows:—"We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. H., of Wolgast, for 2400l. against properly indorsed bill of lading of 8320 scheffels of wheat per 'Anna,' F. K. master, on our account." The Union Bank, at the request of the plaintiffs, accepted the drafts, and the plaintiffs debited the defendant with the amount. Before the drafts became due, it was discovered that the bill of lading was forged, and that no cargo was shipped on board the "Anna." H. was afterwards convicted of uttering a forged bill of lading. The Union Bank having paid the bills and debited the plaintiffs with the amount: Held, that the plaintiffs were entitled to recover the amount from the defendant on an implied contract to indemnify them.

[S. C. 10 W. R. 846.]

The first count of the declaration stated, that before and at the time of making the promise &c., the plaintiffs carried on business in copartnership as bankers in the town of Newcastle-upon-Tyne, and certain persons carrying on business in copartnership as bankers, under the name and style of the Union Bank of London, were the agents and correspondents, in the city of London, of the plaintiffs in their business of bankers; and the defendant was a merchant in Newcastle-upon-Tyne, and a customer of the plaintiffs in the way of their said business of bankers. And whereas, before the making of the promise &c., one Otto Homeyer had sent to the defendants, and the defendants had received from the said Otto Homeyer, a paper writing, purporting to be a bill of lading, the same being written in the German language, and which, being translated into [479] English, was and is of the meaning, and to the purport, tenor and effect following. (The declaration then set out the bill of lading, see post, p. 482.) And thereupon in consideration that the plaintiffs at the request of the defendant would request and procure the said Union Bank of London, so being their agents and correspondents as aforesaid, to accept on account of the defendant, upon the credit and responsibility of the plaintiffs, drafts or bills of exchange of the said Otto Homeyer for 2400l. against the bill of lading of 8320 scheffels of wheat, per "Anna," F. Kell master (being the bill of lading before set forth), when properly indorsed by the said Otto Homeyer, the defendant agreed with and promised the plaintiffs to provide for the payment of the said drafts or bills of exchange, or to repay the plaintiffs and indemnify them against the said amount of the said drafts or bills of exchange, and all such monies as the plaintiffs should thereby become liable to pay, and allow to the said Union Bank by reason of their accepting the same drafts

as aforesaid. Averment: that the plaintiffs, relying on the said promise and agreement of the defendant, did afterwards request and procure the said Union Bank of London, so then being their agents and correspondents as aforesaid, to accept, and the said Union Bank of London did accept, on account of the defendants, and upon the credit and responsibility of the plaintiffs, the drafts or bills of exchange of the said Otto Homeyer for 2400l., to wit, six drafts, &c., against such bill of lading as aforesaid, the same being then properly indorsed by the said Otto Homeyer, and the same bill of lading so indorsed was delivered by the indorsees and holders of the said drafts or bills of exchange to the said Union Bank of London, and was kept and retained for a reasonable time in that behalf by the said last mentioned bank, and by the plaintiffs on behalf and for the security and benefit of the defendant, and was afterwards [480] and at the expiration of the said reasonable time, and before the commencement of this suit, delivered to the defendant, according to the true intent and meaning of the said agreement between the plaintiffs and the defendant; and afterwards the said drafts or bills of exchange became due and payable; of all which premises the defendant then had notice. And the defendant did not provide for the payment of the said drafts or bills of exchange. And the said Union Bank of London, as such acceptors of the same, were thereupon compelled to pay and did pay the same to the indorsees and holders thereof, and also certain charges and commission thereon. And the plaintiffs were forced and compelled to pay and allow, and have paid and allowed, to the said Union Bank of London, so being their agents and correspondents as aforesaid, the said sum of 2400l., being the amount of the said drafts, &c. And the plaintiffs did all things necessary, &c., to entitle them to be by the defendants repaid and indemnified against the amount of the said drafts, &c. Breach: that the defendant has not repaid or indemnified the plaintiffs, &c. There were also counts for money lent, money paid, money received, &c.

Pleas, to first count. First: Non assumpsit.

Second. That the bill of lading against which the plaintiffs were, according to the alleged contract, to request and procure the said Union Bank of London to accept drafts or bills of exchange on account of the defendant, was not the said document purporting to be a bill of lading, which is in the first count set forth, nor was that document a bill of lading of (8320) eight thousand three hundred and twenty scheffels of wheat, per "Anna," F. Kell master.

Third. That the said Union Bank of London did not, at the request or by the procurement of the plaintiffs, accept the said drafts or bills of exchange, or any of them, against any bill of lading against which, according to the alleged [481] contract, the plaintiffs were to request and procure the said Union Bank to accept drafts or bills of exchange on account of the defendant.

To indebitatus counts (except as to 27l. 12s. 8d. paid into Court), the defendant pleaded never indebted, payment, and set-off.

The replication joined issue on all the pleas.

The cause came on for trial, before Pollock, C. B., at the London Sittings after Hilary Term, 1861, when a verdict was found for the plaintiffs for 2016l., subject to the opinion of the Court upon a special case (so far as material) as follows:—

1. The plaintiffs are and were, in June 1858, bankers at Newcastle-upon-Tyne. Their agents and correspondents in London are the Union Bank of London.

2. The defendant is, and in June 1858 was, a merchant at Newcastle-upon-Tyne, and a customer of the plaintiffs in their business of bankers.

3. Previously to June 1858, the defendant knew and had some business transactions with one Otto Homeyer, a merchant at Wolgast in Prussia. On the 9th day of June 1858, the said Otto Homeyer sent from Wolgast a letter to the defendant, of which the following is a translation:—"During the spring I had the pleasure of seeing your traveller with me, and in consequence of the conversation I had with him I am rather inclined shortly to consign a cargo of wheat to you. I therefore beg to ask for how much, and at what date, you will open for me a credit in London?"

4. On the 12th June 1858, the defendant wrote in answer: "You may draw against transmittal of bill of lading, 30s. to 32s. per quarter in advance for your best yellow wheat on our account at fourteen days, one, two or three months' date, on the Union Bank of London. Insurances we can effect you at Lloyd's at half per cent. premium in toto."

[482] 5. On the 26th June, 1858, Homeyer sent from Wolgast a letter to the

defendant as follows:—"In answer to your letter of the 12th, I have made up my mind to consign to you the 8320 scheffels (being about 1500 quarters) wheat shipped by the vessel 'Anna' Captain Kell; for which I annex duplicate bill of lading. At the same time I take the liberty to make use of your kindness, and to draw 2400l. for your account on the Union Bank of London at two months' date, requesting you to provide due protection for those drafts. The insurance you will please effect there at the premium stated."

6. There was inclosed in the last mentioned letter a paper purporting to be an unindorsed bill of lading (being one of a set of four), of which the following is a translation:—"I, F. Kell, of Wolgast, captain of the vessel 'Anna,' now loading in Wolgast, and bound for Newcastle, acknowledge having received on board the said vessel from Mr. Otto Homeyer, well, good conditioned, 8320 (eight thousand three hundred and twenty) scheffels of good sound wheat and 350 mats, in order to deliver the same after completed voyage to his order, on paying freight of 1s. 6d. per delivered imperial quarter of wheat, average according to custom. For the fulfilment of this, I pledge my person, goods and the vessel, with all apparel; for which I have signed four bills of lading of the same tenor only good for one.

"Wolgast, 26 June, 1858.

"F. KELL."

7. A vessel called the "Anna," commanded by one Captain Frederick Kell, was at Wolgast on or about the said 26th June.

8. The last mentioned letter and document were received by the defendant on the 29th June, 1858, and on that day he wrote to his insurance broker in London, directing him to effect an insurance at Lloyd's upon the wheat in question.

[483] 9. On the same 26th June, Homeyer sent from Wolgast to the Union Bank of London a letter as follows:—"For account Messrs. R. Thiedemann & Co., in Newcastle. I have taken the liberty to value upon you

£400	} in first and seconds to my own order at two months' date,
£400	
£400	
£400	
£400	
£400	

and I beg that you will give prompt protection to them for account of said friends."

10. This letter was on the 29th June, 1858, received by the Union Bank of London, who, having then no instructions, sent it on the same day to the plaintiffs.

11. On the 30th June, Messrs. Bischoffsheim & Goldschmidt, merchants in London, presented to the Union Bank of London for acceptance six drafts or bills of exchange for 400l. each, drawn by the said Homeyer, dated 26th June, 1858, payable at two months after date to his order, and at the same time presented to and left with the said Union Bank of London a paper writing, purporting to be a bill of lading of the same tenor and effect and one of the same set as the document before set out, and which the defendant had received unindorsed from Homeyer; but the said document, purporting to be a bill of lading, so left with the Union Bank of London, was indorsed in blank by the said O. Homeyer, and by him only. Messrs. Bischoffsheim & Goldschmidt, in presenting these bills of exchange and the document purporting to be a bill of lading, acted simply as agents of the Berlin Discount Company, bankers at Berlin, to whom the said Homeyer had indorsed the seconds of the said bills, and who then held the same for value to the full amount thereof.

12. On the said 30th June, the plaintiffs sent to the [484] defendant the letter which Homeyer had addressed to the Union Bank of London, and requested his instructions thereon.

13. Defendant came afterwards, on the same day, to the plaintiffs' bank and saw Mr. Spence their manager, who had already seen Homeyer's letter to the Union Bank of London, and the letter of the latter enclosing Homeyer's. Some conversation took place between the defendant and Mr. Spence respecting the cargo of wheat supposed by the defendant to have been shipped by Homeyer. Defendant observed that business had been dull lately, but that this was a large transaction, and the defendant had no doubt but that it would be a good one. Defendant then added

that it was a large amount, and that they must only accept against the bill of lading. The defendant then handed the following letter, signed by him, to Mr. Spence:—

“Newcastle, 30th June, 1858.

“Messrs. Woods, Parker & Co.

“Gentlemen,—We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. Otto Homeyer, of Wolgast, for 2400l. (two thousand four hundred pounds) against properly indorsed bill of lading of 8320 scheffels of wheat, per ‘Anna,’ F. Kell master, on our account.—We are, gentlemen, &c., “R. THIEDEMANN & Co.”

14. On the same day (30th June) the plaintiffs, having received the above letter, sent to the Union Bank of London the following letter, written by Mr. Spence:—
“Gentlemen,—Please accept the drafts of O. Homeyer, of Wolgast, for 2400l. against properly indorsed bill of lading of 8320 scheffels of wheat per ‘Anna,’ F. Kell master, % Rudolph Thiedemann & Co., and debit us for the same. We enclose the letter from Mr. Homeyer.”

15. On receipt of this letter the Union Bank of London, [485] on the 1st July, 1858, in good faith, and believing the said document to be a genuine bill of lading, accepted the six drafts or bills of exchange for 400l. each, which had been presented by Messrs. Bischoffsheim & Goldschmidt, and retained the aforesaid document, purporting to be a bill of lading which had been so left with them indorsed in blank as aforesaid, and continued so indorsed in blank; and on the same day sent a letter to the plaintiffs, stating that they had accepted Homeyer’s draft against the said bill of lading, and enclosing the same. This document so indorsed was sent by the plaintiffs on the 2nd July, 1858, to the defendant inclosed in a letter stating: “We debit you 2400l. for Homeyer’s drafts on the Union Bank of London on your account, due 29th August, against the inclosed bill of lading.”

16. As the bills for 2400l. related to the defendant’s foreign transactions, that sum, together with 9l. 1s. for the plaintiff’s commission on the acceptance of the bills was debited to the defendant’s “foreign banking account” on the 2nd July, 1858.

17. Defendant wrote and sent three letters to Homeyer on the 30th June and 3rd and 6th July, 1858, containing the following passages:—30th June. “Out of your favour of 26th we took duplicate bill of lading for 8320 scheffel’s wheat per ‘Anna,’ and the Union Bank will promptly honor your drafts for 2400l. against the properly indorsed original.” 3rd July. “We confirm ours of 30th ultimo, and your drafts, together of 2400l. on the Union Bank, in anticipation of the cargo per ‘Anna,’ have now been duly honored. . . . If the ‘Anna’ should arrive soon, we trust to effect a good sale of the cargo.” 6th July. “We are anxiously looking out for the ‘Anna’ with such good markets.”

18. On the 12th July, 1858, defendant first discovered that a fraud had been committed by Homeyer, and that the [486] alleged bills of lading were forgeries; that they had not been signed by F. Kell, but had been forged by Homeyer; that no wheat had been shipped on board the “Anna,” and that she had sailed from Wolgast in ballast. On the same day the defendant informed Mr. Spence of the discovery.

19. On the 13th July, 1858, the defendant personally informed the authorities of the Union Bank of London of the fraud and forgery, and gave notice to them not to pay the bills for the defendant’s account.

(The case then proceeded to state the following facts:—On the 14th July, 1858, the defendant filed a bill in Chancery against Messrs. Bischoffsheim & Goldschmidt and O. Homeyer and the Berlin Discount Company, to restrain them from prosecuting any action against the defendant, or the Union Bank of London, on the bills. An interim injunction was obtained, but afterwards dissolved, and the bill dismissed, (a) whereupon the Union Bank paid Bischoffsheim & Goldschmidt the amount of the bills and expenses, and debited the plaintiffs with the same in account. Homeyer absconded from Wolgast, and on the 17th July arrived in London, where he was apprehended at the instance of the defendant, and tried and convicted of uttering the forged bills.)

30. From the 2nd July, 1858, when the plaintiff debited the defendant’s banking

(a) See report of proceedings in Chancery, 1 Giffard, 142; 1 De Gex, F. & J. 4.

account with the amount of Homeyer's drafts, and their commission for accepting the same, down to the 18th of November, 1859, the defendant continued to deal with the plaintiffs as his bankers, paying in and drawing out monies to an amount far exceeding the amount of those debits.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the amount for which the verdict was entered, or any part thereof. If the Court [487] shall be of opinion that the plaintiffs are entitled to recover, the verdict shall stand for such amount as the Court shall direct. If the Court shall be of opinion that the plaintiffs are not entitled to recover any part of such amount, then the verdict is to be entered for the defendant.

Montague Smith (with whom were Manisty and Heath), for the plaintiffs.(a) The plaintiffs are entitled to recover. The defendant treated the bill of lading as a genuine document, and requested the plaintiffs to procure the Union Bank of London to accept Homeyer's draft, properly indorsed, against it. The plaintiffs complied with his request, and on the 2nd of July informed the defendant that they had debited his account with the amount of the drafts; and his subsequent payments discharge that item. The defendant by his conduct induced the plaintiffs to believe that a bill of lading of the wheat did exist. [Bramwell, B., referred to *Roberts v. Tucker* (16 Q. B. 560).] It could not be expected that the plaintiffs would take more trouble than the defendant to ascertain whether the bill of lading represented a cargo. [Martin, B. It is impossible to say that the payment of the bills was not assented to by the defendant.] The defendant is estopped by his conduct from denying that this was the bill of lading against which the drafts were to be accepted.

The Court then called on

[488] Lush, for the defendant. The first question is what was the authority or mandate from the defendant to the plaintiffs. On the 20th of June, Homeyer informed the defendant that he intended to consign to him a cargo of wheat, and he annexed a duplicate bill of lading. On the 30th the defendant wrote the letter to the plaintiffs, in which he asks them to request the Union Bank of London to accept the drafts of Homeyer for 2400l. against properly indorsed bill of lading, the defendant having previously told the manager of the plaintiffs' bank that as the amount was large they must only accept against the bill of lading. The plaintiffs undertook to do so, and they charged the defendant a commission on the transaction. [Pollock, C. B. It is preposterous to suppose that the plaintiffs took upon themselves the risk of the bill of lading being genuine.] The document against which they accepted was not a bill of lading, for it was not signed by the captain of the vessel. If he had signed it, it might have been a bill of lading, although no cargo was on board. In *Roberts v. Tucker* (16 Q. B. 560) it appeared that it was the practice of the Company, before accepting a bill of exchange, to examine it with a view of ascertaining whether the signatures of the payers were genuine, but, as that practice was not communicated to the bankers, it was held that the Company had given them no authority to pay the bill with the forged acceptances upon it. Here, what passed between Homeyer and the defendant was not communicated to the plaintiffs, and therefore does not affect their liability. [Martin, B. In *Roberts v. Tucker* (16 Q. B. 560), whose duty was it to see that the bankers only paid upon presentation of a bill having genuine indorsements upon it? The bankers. In this case, whose duty was it to see that the bankers in accepting Homeyer's drafts were dealing with an honest man? The defendants. Bramwell, B. In *Roberts v. Tucker* the bankers had a [489] remedy over against the persons who presented the bill, for a false representation that they had a right to payments. In this case, could the Union Bank of London recover back the amount of the bills from Messrs. Bischoffsheim and Company? They did no more than present the bills for acceptance, with the bill of lading; they did not warrant it genuine.] The defendant did nothing to mislead the plaintiffs, he asked them to accept only against a properly

(a) The plaintiffs' points in substance were, that the contract between them and defendant was with respect to the document inclosed in Homeyer's letter, and which defendant treated as genuine. Also that defendant had acquiesced in being debited with the amount of the bills of exchange, and had by general unappropriated payments discharged the same; and that the amount now sued for was a general balance of a banking account arising out of items as to which there was no dispute.

indorsed bill of lading. [Pollock, C. B., referred to *Young v. Grote* (4 Bing. 253).] The defendant must have meant a genuine bill of lading, and the plaintiffs must have so understood him. [Pollock, C. B. The defendant meant a bill of lading referring to a cargo of wheat which he supposed was shipped by Homeyer; neither party contemplated that he would commit a fraud. [Martin, B. In the conversation between the defendant and the manager of the plaintiffs' bank, the statement of the defendant "that it was a large amount, and that they must only accept against the bill of lading," was not a direction to the plaintiffs, but only a part of the conversation. They did not say "mind, if there is anything wrong in the transaction, you must bear the loss."] Here, there was no more authority to accept the bills against a forged bill of lading, than the authority in *Roberts v. Tucker* (16 Q. B. 560) was to pay upon a forged indorsement. [Bramwell, B. Suppose the authority had been to accept the bills against a bill of lading of a box of diamonds, would the plaintiffs have been bound to examine the contents of the box?] If the plaintiffs objected to the responsibility, they should have inquired of the defendant whether the document presented was the bill of lading he meant, and if he answered in the affirmative, he must have borne the loss. [Martin, B. The defendant, in his letter to Homeyer on the 30th of June, treats the bill of lading as a genuine document.] The contents of that letter were not commu-[490]-nicated to the plaintiffs. Secondly, there was no adoption by the defendant of the payment. The plaintiffs debited him with the amount when they accepted the bills, and he could not properly object to the payment until after the decision of the Court of Chancery.

Montague Smith was not called upon to reply.

POLLOCK, C. B. We are all of opinion that the plaintiffs are entitled to recover. The only argument for the defendant is, that the words "bill of lading" import a genuine bill. I am of opinion that they meant such a document as Homeyer might send, or which was in the course of coming, professing to represent a cargo of wheat. If the facts were stated by way of recital, in the letter of the defendant to the plaintiffs of the 30th June, all doubt would be removed. The recital would be to this effect: "Whereas I, the defendant, expect a cargo of wheat, accompanied by a bill of lading, and Mr. Homeyer, my correspondent abroad, has requested me to allow him to draw against it, which I have consented to do; therefore I request you, my banker, at Newcastle, to procure your London agents to accept the drafts of Mr. Homeyer for 2400l., against bill of lading of 8320 scheffels of wheat, but you must take care that the bill of lading is properly indorsed." That is the meaning of the contract, not that the plaintiffs were to take upon themselves the risk of the bill of lading being a genuine document. The authority was to accept bills against a bill of lading properly indorsed, and no one supposed that the document produced would be a forgery. Suppose the captain had signed a bill of lading, there being no cargo on board the vessel. Such a bill of lading would no more bind the owner than this bill of lading; and could it be said that the bankers would be responsible? The transaction is simply this: The defendant having entered into a com-[491]-mercial speculation, and wishing to accommodate the person with whom he was dealing, and for whose honesty he ought to be responsible, requests the plaintiffs to procure their London agents to accept drafts against a properly indorsed bill of lading. It seems contrary to all usage to assume that the plaintiffs undertook to be responsible if it should turn out that the bill of lading was not signed by the captain, or no goods were on board.

It is not necessary to express any opinion as to the adoption by the defendant of what was done by the plaintiffs. For the reasons I have stated, I think that our judgment ought to be for the plaintiffs.

MARTIN, B. I should be sorry if it were supposed for a moment that I thought the case of *Roberts v. Tucker* was not rightly decided. I believe it to have been perfectly rightly decided, but it has no bearing on this case. I think the plaintiffs are entitled to judgment on two grounds, first, upon the transaction itself; secondly, upon the adoption of the payment. But I am also of opinion that both are questions of fact, which ought properly to have been submitted to a jury, and the first question would have been, were the plaintiffs justified in accepting these bills, for, having accepted them, they were bound to pay them? I say the plaintiffs, because no difference has been made between the Union Bank of London, who actually accepted the bills, and the plaintiffs themselves, who are bankers at Newcastle.

Now, what are the facts? One Homeyer, a merchant at Wolgast, in Prussia,

opened a correspondence with the defendant, and by his first letter, of the 9th June, he asks, "for how much, and at what rate, will you open for me a credit in London?" On the 12th June, the defendant wrote in answer, "You may draw against transmittal of bill of lading, 30s. to 32s. per quarter, in advance for your best yellow wheat, on our account, at 14 days, 1, 2, or three months' [492] date, on the Union Bank of London." That was followed by another letter of the 26th June, in which Homeyer states his intention to do so; and he sends an annexed duplicate bill of lading. It is not in the same form, but it is a similar document to the ordinary bill of lading, and it purports to be signed by the captain of the "Anna," a vessel then at Wolgast. On the same day Homeyer communicated directly with the Union Bank of London, and I presume they were aware that the defendant was a customer of the plaintiffs, for, having no instructions, they sent Homeyer's letter to the plaintiffs. The plaintiffs sent the letter to the defendant, and on the 30th June he came to the plaintiffs' bank and had some conversation with the manager about the cargo of wheat, supposed by the defendant to have been shipped by Homeyer, the result of which was that the defendant wrote a letter to the plaintiffs, saying, "We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. Otto F. Homeyer, of Wolgast, for 2400l., against a properly indorsed bill of lading of 8320 scheffels of wheat, per 'Anna,' F. Kell master, on our account." The question is, what is the meaning of that document? For the purpose of ascertaining its meaning, we must look at the defendant's letter, of the same date, to Homeyer, which is to this effect: "Out of your favor of the 26th, we took duplicate bill of lading for 8320 scheffels wheat, per 'Anna,' and the Union Bank will promptly honor your drafts for 2400l. against the properly indorsed original." Therefore there was evidence for a jury that the contract was that the bill of lading which the Union Bank had got should be treated as a genuine original bill of lading. If the jury should be of that opinion, there would be money paid by the plaintiffs for the defendant's use, and which they would be entitled to recover. Secondly, I think there was strong evidence of the adoption of the payment. There was a pass book kept by the defendant and the plain-[493]-tiffs; and upon the 2nd July, when the plaintiffs were no doubt advised of the acceptance of the bills by the Union Bank of London, they debited the defendant's account with 2400l. The account goes on, without any intimation to the plaintiffs of anything wrong, until nearly two years afterwards. It is plain that in this pass book it was intimated that the defendant should be charged with this 2400l., and I apprehend the plaintiffs had a clear right to treat the money paid in afterwards by the defendant as paid in discharge of that debt. That they did by the entries in the pass book. It would be a question for the jury whether the defendant did not assent to the plaintiffs' appropriating the money paid in on account in discharge of the 2400l.; and if the jury so found, there would be an end of the case. In my opinion, those two questions would have been properly left to the jury, and if they had found a verdict for the plaintiffs I should have thought it right. For these reasons, I think that the verdict for the plaintiffs ought to stand.

BRAMWELL, B. I am of the same opinion. Whether this be a matter of law or of fact, importing one's knowledge of commercial affairs I come to the conclusion that the plaintiffs are entitled to recover. I agree with the Lord Chief Baron that the defendant's letter to the plaintiffs of the 30th June should be expanded a little (as no doubt it would have been, if written to persons unacquainted with the facts), and then it would have been to this effect: "Mr. Homeyer, of Wolgast, has shipped on board the 'Anna,' 8320 scheffels of wheat on our account, and he has got a bill of lading for the same. He will draw on the Union Bank of London drafts to the amount of 2400l., to be accompanied by that bill of lading; we shall feel obliged by your requesting the Union Bank to accept these drafts, the bill of lading being properly indorsed." If the defendant had done that, could he afterwards have said, "I [494] thought we meant that the bill of lading should be a genuine bill of lading, and consequently I never intended you to accept the drafts unless it was?" He could not have said so, because he assumed that a genuine bill of lading was in existence; and he never could have been heard to say it was the plaintiffs' duty to see whether the instrument was genuine or not. In truth, though the defendant has not written in the terms which I have supposed, he has done very much the same thing; because what he says is this: "We shall feel obliged by your requesting the Union Bank of London to accept the drafts of Mr. Homeyer for 2400l. against

properly indorsed bill of lading of 8320 scheffels of wheat per 'Anna.' That assumes the bill of lading to be in existence and the shipment to have taken place.

Now, if we look at the good sense of the matter, it seems entirely with the plaintiffs. Where a bill of exchange is drawn on a banker, and made payable to the drawer or his order, and a third person presents it at the bank for payment, the banker indeed has not much opportunity of ascertaining for himself whether the person presenting is the bonâ fide holder of the document, but still the customer of the banker who has requested him to accept the bill is not the holder, and therefore there is something in favour of the liability of the banker. But in a transaction of this description the banker has not the slightest opportunity of ascertaining whether the bill of lading is genuine, whereas the customer may always make himself safe, for he need never give an order to pay the bills till he has satisfied himself that the goods have been shipped and a genuine bill of lading has issued, and I am sure there would be no practical difficulty in that. Another way of testing the matter is this: Suppose the plaintiffs had no claim against the defendant, then the Union Bank of London would have none against the plaintiffs, and are without remedy. [495] That ought not to be. Could they claim against Bischoffsheim & Co.? I apprehend not. Bischoffsheim & Co. did not represent anything, except that they were holders of the bills of exchange. It appears, from the case of *Roberts v. Tucker*, that a person who presents a bill of exchange for payment impliedly represents that he is the bonâ fide holder of it and entitled to receive the amount. It seems that in that case there was a right over against the parties who presented the bill, whereas here there is none against Bischoffsheim & Co.

I come therefore to a conclusion in favour of the plaintiffs, whether I regard the question as a matter of law or fact. Being placed in the position of jurymen we are entitled to draw inferences, and when I take into consideration the facts I in no sense dissent from *Roberts v. Tucker*. I think that decision right, but distinguishable from the present case on the grounds I have adverted to.

With respect to the other point, I own I have some difficulty in saying that the defendant has made himself liable by recognising the payment if he was not originally liable; but I express no definitive opinion upon that. I will only make one observation upon what Mr. Lush says was the intention of the parties. I think my Lord has given the proper answer. Something happened which neither party contemplated, and therefore on which neither party had any definite intention. I cannot help thinking, that if the plaintiffs had said to the defendant: "Do you expect us to ascertain whether the bill of lading is a genuine document?" the defendant would have replied: "I do not. I know you would not act on any document which was obviously not a bill of lading. I am satisfied with Homeyer, and will undertake the risk." Upon the grounds I have stated, I am of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

[496] MEDWAY v. GILBERT. May 29, 1862.—Neither the Common Law Procedure Act, 1852, nor the rules of Hilary Term, 1853, have altered the previous practice by which a plaintiff had the whole of the term next after appearance, whether in term or vacation, to declare.—Notice to declare may be given either in term or vacation.—An action was brought against the drawer, and also against the acceptor of a bill of exchange. In Trinity Vacation, a Judge ordered that the defendant in the action against the drawer be bound by the result of the verdict in the action against the acceptor. That action stood for trial in the following Michaelmas Term, when, by consent a *stet processus* was entered. In Michaelmas Vacation, the defendant in the action against the drawer served the plaintiff with a notice to declare in four days, and, he not having done so, the defendant in the following term signed judgment. Held, that the judgment was irregular, inasmuch as the plaintiff had the whole of that term to declare.

[S. C. 32 L. J. Ex. 30; 10 W. R. 670; 6 L. T. 218.]

This was an action by indorsee against the drawer of a bill of exchange. The plaintiff also brought an action against the acceptors. On the 4th October, 1861, the defendant and also the acceptors obtained an order for leave to appear and defend.

A summons having been taken out to consolidate the actions, on the 19th October, 1861, Martin, B., made the following order:—"I do order that the action against the acceptors do proceed, and that the defendant in the other action be bound by the result of the verdict in the action against the acceptors, the acceptors to admit the acceptance; and that the plaintiff be at liberty to sign judgment for debt and costs against the drawer, if he obtains judgment against the acceptors." The action against the acceptors was set down for trial at the third Sittings in Michaelmas Term, 1861, when it was agreed between the plaintiff and the defendants that a *stet processus* should be entered and the bill of exchange delivered up to the defendants to be cancelled, which was done. On the 24th of December, the defendant gave notice to the plaintiff to declare in this action within four days, otherwise judgment. The plaintiff not having declared, on the 15th of January, 1862, the defendant signed judgment of non pros. An order having been made by Channell, B., at Chambers, that the judgment of non pros. be set aside,

Francis obtained a rule nisi to rescind the order of Channell, B.; against which

[497] Prentice shewed cause, in last Easter Term (May 12). First, the Judge's order, by which the actions were consolidated, virtually stayed the proceedings in the action against the drawer until the action against the acceptor was tried and determined; and therefore the notice to declare was irregular. Secondly, the plaintiff had the whole of the next term after the notice was given to declare, and consequently judgment of non pros. was signed too soon. Under the old practice, "it was settled agreeably to the statute 13 Car. 2, stat. 2, c. 2, § 3, that upon all process returnable the first or any other return in any term, the plaintiff shall have liberty to the end of the next ensuing term to deliver his declaration to the defendant's attorney, or leave the same in the office." Tidd's Prac. p. 422, 9th ed. By the 53rd section of the Common Law Procedure Act, 1852, "rules to declare or declare peremptorily, and rules to reply, and plead subsequent pleadings, shall not be necessary; and instead thereof a notice shall be substituted requiring the opposite party to declare, reply, rejoin, or as the case may be, within four days, otherwise judgment." That enactment has not altered the time for declaring, but has merely substituted a notice for the former rule to declare. (He argued, thirdly, that the notice to declare should have been given in term time, or within sixteen days after it.)

Francis, in support of the rule. The former practice has been altered by the 53rd section of the Common Law Procedure Act, 1852. In Arch. Prac. p. 222, 11th ed., it is said that "the plaintiff has the whole of the term next after the appearance is entered to declare in, and this whether it be entered in term time or vacation." Therefore, in this case the plaintiff was bound to declare in Michaelmas Term, 1861, and the defendant was at liberty to serve the four days' notice to declare in the ensuing vaca-[498]-tion. [Wilde, B. The question depends on the effect of the order of the 19th October, 1861.] On the 24th of December, when the notice to declare was given, there was nothing to prevent the plaintiff from proceeding in this action. [Pollock, C. B. The order of the 19th of October stayed the proceedings until the result of the other action was ascertained, so that, in considering this question, the intermediate time cannot be taken into account.]

Cur. adv. vult.

MARTIN, B., now said,—This was a rule to rescind an order of my brother Channell, setting aside a judgment of non pros. We are of opinion that the order was correct, and that the rule must be discharged.

The circumstances are these: The plaintiff, who was indorsee of a bill of exchange, brought this action against the defendant, the drawer of the bill, and also an action against the acceptors. Upon an application to me at Chambers, I ordered that the two actions be consolidated, and that, in the event of the plaintiff being successful in the action against the acceptors, he should be at liberty to sign judgment in the action against the drawer. The action against the acceptors stood for trial, when a *stet processus* was entered. The defendant afterwards served the plaintiff with notice to declare in this action within four days, and he not having done so, the defendant signed judgment of non pros., and the question is whether that judgment is regular. We think it is not.

The old rule was, that a plaintiff had the whole of the next term after the defendant's appearance to declare. That practice was not altered by the rules of Hilary Term, 1853. The rule, being one of practice, ought to be acted upon; and the pro-

ceedings in this action having been stayed to abide the verdict in the other action, the plaintiff [499] had the whole of the term after the *stet processus* was entered to declare in this action. The defendant gave the plaintiff the notice which, by the 53rd section of the Common Law Procedure Act, 1852, is substituted for the former rule to declare; and it was contended that the notice was not only too soon, but that the four days required by that section should be four days in term. We think that the notice was given too soon, but that it is not necessary that the four days should be in term. There is nothing to require it, and for this purpose the days out of term and in term are the same.

The result is that my brother Channell's order was right, and the rule must be discharged; but, as it was a matter fit to be discussed in Court, the costs of the rule must be costs in the cause.

Rule discharged.

[500] TRINITY VACATION, 26 VICT.

SARAH BUSH AND ANOTHER v. BEAVAN. June 28, 1862.—A claim to a writ of mandamus under the 68th section of the Common Law Procedure Act, 1854, cannot be sustained if there is any other equally effectual remedy. In an action by executors against the clerk of Commissioners for putting into execution a Town Improvement Act (2 & 3 Vict. c. lxiii.), and in which action the plaintiffs claimed a writ of mandamus under the 68th section of the Common Law Procedure Act, 1854, the declaration stated that the Commissioners were indebted to the testator for the "agreed salary" payable by them to him for services rendered by him as clerk to the Commissioners; and also for other work by him "as the attorney of and otherwise for" the Commissioners in and about the business of the Commissioners. The declaration then alleged "that the said debts became and were a charge on any monies which might be in the hands of the Commissioners, and which should have been collected by them under and by virtue of the said Act;" and if the Commissioners should not have in their hands any monies sufficient to pay the said debts, "then such debts became a charge and were chargeable on a rate leviable and to be levied by the Commissioners under the Act." The defendants pleaded to so much of the debts as became due on simple contract, the Statute of Limitations, and to the debts, except the agreed salary, that no signed bill was delivered: also that the Commissioners had no funds whereout they could pay the debts. Held: First, that the declaration was bad, inasmuch as assuming that the services in respect of which the "agreed salary" was claimed were payable out of the rates, the others might be services for which the Commissioners were personally liable, and consequently the remedy was by action, not by claim of mandamus.—Secondly, that on the same principle the two first pleas were good.—Semble, that the last plea was also good.

[S. C. 32 L. J. Ex. 54; 8 Jur. (N. S.) 1015; 10 W. R. 845; 7 L. T. 106. Followed, *Reg. v. Lyons*, 1869, Ir. R. 3 C. L. 484. Referred to, *Morgan v. Metropolitan Railway*, 1868, L. R. 4 C. P. 97; *Peebles v. Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 393; affirmed nomine *Pasmore v. Oswaldtwistle Urban District Council*, [1908] A. C. 387.]

Declaration by the plaintiffs, executors of John Bush, deceased, against the defendant, as and being the clerk to the Commissioners for putting into execution the provisions of an act of parliament made and passed, &c. (2 & 3 Vict. c. lxiii.), intitled "An Act for paving, lighting, watching and improving the town of Bradford in the county of Wilts:." For that after the making and passing and coming into force of the said act of parliament, and in the lifetime of the said J. Bush, deceased, the said Commissioners became and were indebted to the said J. Bush, deceased, in debts and monies for the agreed salary of the said J. Bush, payable by the said Commissioners to the said J. Bush in his lifetime, for the services of the said J. Bush by him in his lifetime done and rendered for the said Commissioners as the clerk to the said Commissioners duly nominated and appointed in that behalf by the said Commissioners under the provisions of the said Act, and

[501] upon retainer of the said Commissioners and at their request. Also for other the work and labour, journeys and attendances of the said J. Bush by him in his lifetime done, performed, made and given, as the attorney and solicitor of and otherwise for the said Commissioners on their retainer and at their request, in and about the business of the said Commissioners, and for fees due and of right payable to the said J. Bush in his lifetime, in respect thereof, by the said Commissioners, and for money and materials and necessary things by the said J. Bush in his lifetime provided and expended, and used in and about the said work and labour and journeys for the said Commissioners and at their request. And for money paid by the said J. Bush in his lifetime for the use of the said Commissioners at their request. And for money found to be due from the said Commissioners to the said J. Bush on accounts in his lifetime stated between the said J. Bush and the said Commissioners of and concerning the monies due to the said J. Bush for the aforesaid work and labour, monies expended, materials provided and monies paid, which said debts and monies before and at the time of the death of the said J. Bush were and remained due and owing to him, and still remain due and owing to the plaintiffs as such executors as aforesaid. And the plaintiffs say that, the same debts and monies being and remaining so due and owing to them as such executors as aforesaid, the same debts and monies became and were and are a charge and chargeable upon any monies funds which might be in the hands of the said Commissioners, and which should have arisen and been collected by them under and by virtue of the said Act, and if the said Commissioners should not have in their hands any such monies and funds sufficient to pay and satisfy such debts and monies so due and owing to the plaintiffs as such executors as aforesaid, then the said debts [502] and monies became and are a charge and chargeable upon a rate and assessment leviable and to be levied and collected by the said Commissioners under the provisions of the said Act. And the plaintiffs further say that, by reason of the said debts and monies being still owing to them as such executors as aforesaid, they became and were and are, as such executors, personally interested therein, and also personally interested in any such monies and funds which may be in the hands of the said Commissioners, and which should have arisen and been collected by them under and by virtue of the said Act, and if the said Commissioners should not have any such monies and funds sufficient to pay and satisfy such debts and monies to the plaintiffs as such executors as aforesaid, personally interested in the rating and assessing, and collecting and levying a rate to be charged and chargeable with the payment to the plaintiffs as such executors as aforesaid of the said debts and monies so due and owing to them as aforesaid, within the meaning of the Common Law Procedure Act, 1854, to wit, to the amount of all the monies so due and owing to them as executors as aforesaid. And the plaintiffs say that, being so interested, afterwards and within a reasonable time in that behalf before the commencement of this suit, they demanded of and requested the said Commissioners to pay and satisfy the plaintiffs as such executors as aforesaid the said debts and monies so due to them out of any such monies or funds as aforesaid, if any, in their hands available for that purpose, and if the said Commissioners had not any such monies or funds in their hands available for such purpose, then the plaintiffs demanded and requested the said Commissioners to levy a rate under the powers of the said first mentioned Act for the purpose of the payment of such debts and monies so due and owing to them as aforesaid, but that the said [503] Commissioners have wholly neglected and refused so to do, and the plaintiffs as such executors as aforesaid, by reason of the nonperformance by the said Commissioners of their duty in that behalf, have sustained damages to the amount of all the debts and monies so due and owing to them as aforesaid, and therefore the plaintiffs claim a writ of mandamus commanding the said Commissioners to pay and satisfy the plaintiffs, as such executors as aforesaid, the said debts and monies so due and owing to them as aforesaid out of any such monies or funds as aforesaid, if any, in their hands available for that purpose, and if the said Commissioners have not any such monies or funds as aforesaid in their hands available for such purpose, then commanding the said Commissioners to assess and levy a rate under the powers in the said first mentioned Act for the purpose of the payment of the said debts and monies so due and owing to them as such executors as aforesaid.

Third plea. The defendant, to so much of the plaintiff's alleged debts and monies as became due upon simple contract, says that the said cause of action hereby

pleaded to did not arise or accrue within six years before the commencement of this suit.

Fourth plea. The defendant, as to the debts and monies claimed, except the said agreed salary, says that this action was commenced after the passing of the Act of Parliament, passed in the seventh year of the reign of Queen Victoria for consolidating and amending several of the laws relating to attornies and solicitors practising in England and Wales, and is, so far as it is pleaded to by this plea, maintained for the recovery of fees, charges and disbursements for business done by the said J. Bush, deceased, as an attorney and solicitor for the said Commissioners, and the plaintiffs did not nor did the said J. Bush one calendar month before action deliver to the said Commissioners (being the party [504] to be charged therewith), or send by post to or leave for them at their counting-house, office of business, dwelling-house or last known place of abode, any bill of such fees, charges and disbursements, subscribed with the proper hand of the plaintiffs, or either of them, or of the said J. Bush, deceased, either with their or his name, or with the name or style of any partnership, or enclosed in or accompanied by a letter subscribed in like manner referring to such bill as required by the said statute.

Tenth plea. The defendant, to so much of the declaration as relates to the said claim for a mandamus, says, that the debts and monies in the declaration mentioned accrued due many years before the commencement of this suit, that is to say, part thereof, to wit, 15l. 4s. 9d. accrued in or prior to the year 1841, other part thereof, to wit, 266l. 13s. 2d., in or prior to the year 1850, and the residue thereof, to wit, 145l. 16s. 8d., in or prior to the year 1857. And the defendant further says, that the said Commissioners had not, at the time of the accruing of the said debts and monies, nor have they at any time since had, any funds or monies in hand applicable to the plaintiff's claim, and that they have duly collected, as far as it is possible to collect the same, all monies and rates which they are authorized to levy and collect, and that they have duly applied and expended all funds and monies which have ever come to their hands as such Commissioners as aforesaid, in and according to the manner provided by the said act of parliament, except a small part thereof, and that such monies and funds so remaining in their hands are required by and have, in the bonâ fide exercise by the said Commissioners of their discretion, been set apart for the purpose of satisfying, according to the said act of parliament, other just claims upon the said Commissioners which have arisen and accrued long since the debts and [505] monies in the declaration mentioned, and which the said Commissioners are bound, under the said Act, to pay and satisfy out of such funds and monies as far as the same will extend. And the defendant further says, that the whole amount of any funds or monies that could be raised and collected by the said Commissioners by any rate heretofore made, or to be made and levied, as in the declaration mentioned, would be required by the said Commissioners to meet the said just claims, and the interest and current costs, charges and expenses of the year in which such rate might be made and levied, and other than the claim, debt and causes of action in the declaration mentioned. And the defendant further says, that the monies which by the said Act the said Commissioners are empowered to raise in any one year, have not been at any time, and will not be, more than sufficient to pay and satisfy the aforesaid interest and necessary current costs, charges and expences of the year, and that there never has yet been, and is not likely to be, any surplus in the hands of the said Commissioners or receivable by them, whereout the said Commissioners could pay or satisfy the debts and monies in the declaration mentioned.

Demurrer to so much of the declaration as relates to the said claim for a mandamus. Joinder therein.

Demurrer to the pleas. Joinder therein.

Phipson (H. Bullar with him), for the defendant. The claim for a mandamus is bad. With the exception of the "agreed salary," payable by the Commissioners to the testator for his services as their clerk, the alleged debts are in respect of services, not chargeable on the rates, but for which the Commissioners are personally liable. By the 68th section of the 17 & 18 Vict. c. 125, the plaintiff in any action, except replevin and ejectment, may endorse on the [506] writ that he intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration "a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." Here there is no duty on the part of the

Commissioners which may not be enforced by action; for this is merely a case of nonpayment of simple contract debts. By the 13th section of the 2 & 3 Vict. c. lxiii., the Commissioners may appoint a clerk and other officers; and may, out of the monies which shall arise and be collected by virtue of that Act, allow and pay to such officers such salaries or allowances as the Commissioners shall think reasonable. By the 16th section, the Commissioners may sue and be sued, for or in respect of any matter or thing relating to that Act, in the name of their clerk. By section 69, "for raising money to defray the expenses attending the obtaining of that Act, and of carrying into execution the several purposes thereof," the Commissioners are empowered to make an equal rate, not exceeding 2s. 6d. in the pound, upon the occupiers of all houses, &c., within the town; but the 71st section empowers the ratepayers, in case it is not sufficient, to increase it to 5s. The 94th section prescribes the mode in which the rates shall be applied; viz., in the first place, in paying the interest of monies due and owing on the credit of the rates, then in defraying the costs, charges, and expenses of paving, cleansing, lighting, draining, and watering the several streets, &c., and of carrying the several other purposes of the Act into execution, and afterwards of paying off the principal of monies due and owing on the credit of the rates, "and for no other use, intent, or purpose whatsoever." Then how are the plaintiffs in a different position from any other creditor? If the debts were incurred by the Commissioners within the scope of their authority, the plaintiffs have a remedy by action against their clerk: *Kendall v. [507] King* (17 C. B. 483), *Hall v. Taylor* (E. B. & E. 107), and a judgment against him would create a duty which might be enforced by mandamus; *Regina v. The Local Board of Health of Rotherham* (8 E. & B. 906). But there is no instance of a mandamus having been granted where the sum claimed might be recovered by action of debt. If it were, the Statute of Limitations might be defeated, for that statute is no bar to a writ of mandamus: *Ward v. Lowndes* (1 E. & E. 940). In *Regina v. The Hull and Selby Railway Company* (6 Q. B. 70), the Court refused to grant a mandamus because the party had an equally effectual remedy by action of debt. The claim to the writ is in respect both of the agreed salary and the services for which the Commissioners are personally liable, and therefore the declaration, being bad as to part, is bad altogether. Moreover, assuming that the agreed salary might be paid out of the rates, there is no specific fund charged with the payment of it. In *Hall v. Taylor* (E. B. & E. 107) the Act expressly authorized the Commissioners to pay the wages, salary and allowances of their officers out of monies to be raised. Here there is no obligation on the part of the Commissioners to pay any particular creditor, or to levy rates for that purpose, at all events until judgment has been obtained in an action of debt against their clerk. (He reserved the argument in support of the pleas until the question as to the mandamus was disposed of.)

Coleridge (with whom was Lush and Lopez), for the plaintiffs. First, the claims of the plaintiffs are, in effect, charges on the rates, and therefore enforceable by mandamus. This case is distinguishable from *Kendall v. King* (17 C. B. 483). There the "Committee of Visitors" were authorized by the 8 & 9 Vict. c. 129, to contract for plans for the erection of a [508] lunatic asylum, and they were enabled to sue and be sued in the name of their clerk. Therefore, the proper remedy for a breach of contract was by an action against them in the name of their clerk; and, when judgment was obtained, that would create a duty to pay which might be enforced by mandamus. But here there is no occasion for such a circuitous mode of proceeding, because the 69th section of the 2 & 3 Vict. c. lxiii., has created a duty on the part of the Commissioners within the meaning of the 68th section of the Common Law Procedure Act, 1854. [Martin, B. A landlord might as well ask for a mandamus to compel a tenant to pay his rent.] It is not contended that mandamus will lie where the debt might be recovered by action, but it is no objection to an application for a mandamus, that the object is to enforce payment of a debt. Secondly, the Statute of Limitations does not apply. The writ of mandamus given by the 68th section of the Common Law Procedure Act, 1854, is founded on the same principle as the prerogative writ of mandamus, viz., that there is a duty which the party is bound to perform; and in such a case the Statute of Limitations cannot be pleaded: *Ward v. Lowndes* (1 E. & E. 940). [Martin, B. In that case there was a duty, properly so called.] The relation of debtor and creditor existed as much in that case as in this. Thirdly, the same observation will apply to the plea that no signed bill was delivered. Fourthly, as to the plea that the rate would be retrospective, the

cases of *Regina v. Read* (13 Q. B. 524) and *Harrison v. Stickney* (2 H. L. Cas. 108) are authorities that such a rate may be made.

Phipson, in reply, was stopped by the Court.

Cur. adv. vult.

The judgment of the Court was now delivered by

[509] CHANNELL, B. This was an action brought by the executors of one John Bush, against the defendant, "as and being the clerk to the Commissioners for putting into execution the Act for improving the town of Bradford," in which action the plaintiffs claimed a writ of mandamus under the Common Law Procedure Act, 1854. The declaration stated that, in the lifetime of the testator, the Commissioners became and were indebted to him for the "agreed salary" payable by them to him for services rendered by him as clerk to the Commissioners, and also for other work, &c., by him "as the attorney of, and otherwise, for" the Commissioners in and about the business of the Commissioners. The declaration alleges that the said debts became and were a "charge on any monies which might be in the hands of the Commissioners, and should have been collected by them under and by virtue of the said Act." And if the Commissioners should not have in their hands any monies sufficient to pay the said debts, "then such debts became a charge, and were chargeable, on a rate leviable, and to be levied, by the Commissioners under the Act." There is no allegation of matter of fact than as above, to shew that the debts became so chargeable. The declaration then, after an allegation that the plaintiffs, as executors, were "personally interested" in the rates (which of course they would be assuming such a charge, but which rests entirely on the same legal ground as the allegation of the charge itself), goes on to aver a request to the Commissioners to pay or to levy a rate to pay the said debts, and their neglect and refusal so to do, and then claims a writ of mandamus to compel them to pay out of any funds in their hands or to make a rate for the purpose.

To this declaration the defendant pleaded (*inter alia*) a plea, as to so much of the debts as became due on simple contract, that the cause of action did not accrue within six [510] years, and a plea of the Attornies Act, and also a plea to raise the question whether the Act allows of a retrospective rate. These pleas have been demurred to by the plaintiffs,—the two former on the ground that the statutes pleaded do not apply to the "action of mandamus."

The declaration is objected to on the ground that it shews no right to a mandamus. It is manifest that this is the main question in the case.

The Local Act, 2 & 3 Vict. c. lxxiii., by section 13, provides that the Commissioners, at any meeting, may nominate and appoint a clerk, . . . and such other officer for the execution of the Act, and may, out of the monies to be collected under the Act, pay to such officers such salaries and allowances as the Commissioners think reasonable. As the Commissioners in the execution of the Act would or might have to build sewers and other works, pave streets and keep them in repair, provide engines, lamps, &c., it is obvious there would or might be a necessity for various other officers besides those specially mentioned in the Act, and of a permanent character, such as an engineer, a surveyor, a superintendent of firemen, a scavenger, and the like; and there is a distinction between the employment of such "officers" and the casual services of others, such as attornies, who might be from time to time employed by the Commissioners, more or less, for the purposes of the Act or other business arising out of their acts as Commissioners.

Beyond the agreed salary of the clerk, who may or may not be an attorney, there is no power to pay out of the rates for the services of an attorney, simply as such, save so far as it may be gathered from the section referred to, and the general terms of the rating clause (sect. 69), to make rates to defray the expense of "carrying into execution the several purposes of the Act;" or from a subsequent [511] clause (sect. 94) in "paving, cleansing, lighting, draining and watering the streets and places of the town, and otherwise improving the same, and of carrying the other purposes of the Act into execution."

In respect to the power of the Commissioners to make sewers, provision is made, by sect. 28, for compensation to persons injured or damaged by the necessary works; and, in sect. 31, there is a power to take stone on lands not garden ground, &c., paying compensation. Of course the legal expenses in proceedings within the powers of the Act would as much be within the scope of the rating clause, "as

expenses of carrying the Act into execution," as the payment of the compensation itself.

But in cases of works by which parties were unnecessarily injured, and for which they might maintain actions, or in cases of materials unlawfully taken, the Commissioners might be liable, or such of them as authorized the Acts; and the expenses thereby incurred could not be charged on the rates as the expenses of carrying "into execution the purposes of the Act."

So, as to their powers under sect. 41 to lay gas pipes; they are, under sections 42 and 43, expressly made liable for letting gas escape, or letting foul liquid run into the river, &c., and so, in sect. 44, as to contamination of water by gas; and sect. 46 expressly provides that nothing in the Act is to prevent the Commissioners from being indicted for a nuisance. Expenses incurred by the Commissioners in defending such indictments or other proceedings for wrongful acts of theirs not authorized by the Act, could hardly be deemed expenses of carrying out the purposes of the Act, and therefore could not be paid out of the rates.

It is not necessary to notice any more of the provisions of the Act except that, in sect. 16, it is provided that the Commissioners "may sue and be sued, for or in respect of any matter or thing relating to this Act, in the name of their [512] clerk for the time being," the clerk to be paid out of the monies to be raised by virtue of the Act all such damages, costs and charges as he shall be put to, by reason of his being so made plaintiff or defendant, and shall not be personally answerable or liable for the payment of the same unless the suit shall arise in consequence of his own wilful neglect or default, or shall have been brought or defended without the order or direction of the Commissioners.

This proviso implies, we think, what has already been intimated, namely, that there may be cases in which wrongful acts had been done, which the Commissioners as a body disclaimed or might disclaim, and which had not been done in pursuance of any directions or order of theirs; nor by any one engaged in the carrying out of their directions and for which, therefore, the persons, Commissioners or others, who had done or directed such acts would be personally liable, and for the same reason, the clerk, as representing the Commissioners, could not be rightly sued, and so could obtain a verdict and his costs; or, even if it should appear that the Commissioners were by reason of the assent of any five of them liable for the acts complained of, the effect of the Commissioners, as a body, declining to direct the clerk to defend, would be, practically, that as the costs and damages could not then come out of the rates, they would be thrown upon such Commissioners as had directed the acts, and who therefore would be made personally liable both for the damages and the costs of the defence.

There are then various ways in which we think the Commissioners might retain the services of an attorney in matters relating to their duties and their business as Commissioners, and yet for such services they could not charge the rates and would be personally liable.

The allegation in the declaration on which the whole depends is, that the Commissioners became indebted to the testator for agreed salary as their clerk and also for services [513] as attorney and otherwise rendered by him on their retainer and in and about their business, that is, the retainer and business and request of "the Commissioners" not saying as such Commissioners.

Now, as regards the first head of claim, the "agreed salary as clerk to the Commissioners duly nominated and appointed in that behalf," that might probably be brought within the express power to pay salaries of officers out of rates; but there is a great distinction between that and the other head of claim for services to the Commissioners which might have been services for which they would have no authority to pay out of the rates, and for which they would only be personally liable. The pleas proceed on this distinction, the plea of the Statute of Limitations being to so much of the said debts as are on simple contract, whilst the plea of the Attornies Act is except as to the agreed salary.

The claim for services as distinct from agreed salary is one for which the Commissioners might only be personally liable and for which the rates might not. Assuming this distinction to be correct, the argument on the part of the defendants was that the claim of the writ being entire and referring to both the debts, the declaration must be deemed entire, and if bad in part was bad in toto.

But it was further argued, on the part of the defendant, that although, as to the claim for the agreed salary, it might be one that could be paid out of the rates, yet no specific fund was charged with the payment of the debts claimed by the plaintiff, and there was no obligation to pay any particular creditors nor to raise rates for the purpose, and that there would be no such duty or obligation at least until the Commissioners had been sued by their clerk in an action of debt and judgment recovered against them.

In *Benson v. Paul* (6 E. & B. 273) it was held that the right to a [514] mandamus does not extend to the fulfilment of duties arising from mere personal contract. And though, in the subsequent case of *Norris v. The Irish Land Company* (8 Q. B. 512), it was held that the remedy is not restricted to cases where the old writ of mandamus would have lain, no case seems to have done away with, in respect of the action of mandamus, the doctrine which always applied to the writ of mandamus, that it does not lie where there is any other remedy.

Thus, in the case cited and relied on by the counsel for the defendant, *Kendall v. King* (17 C. B. 483), where an action was brought by an architect against a committee of visitors of county asylums in the name of their clerk, on a contract entered into by a former committee, it was held that the action would lie, and, per Williams, J., that the judgment would be enforceable by mandamus, the clerk not being personally liable. The case of *Hall v. Taylor* (E. B. & E. 107) tends to the same conclusion.

In *Ward v. Lowndes* (1 E. & E. 940, 956) the debt had been originally incurred by Commissioners under a local Act, and their property had been by statute transferred to the Board of Health, and, by implication, the debt was thus charged on the rates; and though the Commissioners might originally have been personally liable, clearly the Board of Health was not, and as regards them the debt was only a charge upon the rates. That was the ground of the decision in the Court of error that mandamus would lie. The Court held in effect that it was not a charge or expense incurred by the Board, and, per Byles, J., "mandamus lies where there is a duty to perform and no means of enforcing it by action."

It was further said, "the debt was there charged on the rates by statute, and an implied power was given to make a [515] rate to raise the money." Of course, where the statute had created the charge, it created a duty to liquidate it and to levy rates for the purpose, and, as was said per Erle, C. J., "there are no means to enforce the levying of a rate but by mandamus." And if the only remedy is by enforcing the levying of a rate, of course the remedy must be by mandamus.

But as regards a portion of the present claim there is nothing sufficient to shew that it could be lawfully levied out of the rate. And even as regards the claim for salary, which perhaps might be, it by no means follows that it could not be recovered by action of debt, and that there was no other remedy than by enforcing the levying of a rate.

As regards the claim for services as an attorney, assuming them to have been retained by the Commissioners within the scope of their authority as such, then, as in *Kendall v. King*, an action would lie against their clerk on their behalf, and on the judgment a mandamus would lie, for the judgment would affirm a debt or duty from the Commissioners as such. But until then non constat that there is any such debt or duty; but only a claim of it, the proper remedy for which is the action of debt. And although, no doubt, in *Ward v. Lowndes* it was held that where a debt is of such a nature that a mandamus will be granted to enforce it, and is the proper remedy, the amount may be ascertained in the action of mandamus, neither that nor any other case has, that we are aware, determined that the claim to the debt or duty may be litigated therein. On the contrary, the language of the Common Law Procedure Act, 1854, sect. 68, rather excludes this view, for it enacts that an action of mandamus shall lie to compel the performance of a duty, and it thus assumes and implies that the duty exists when the action is brought and the [516] claim to a mandamus is inserted in the writ. Now, the mandamus in this case is to pay out of the rates, or to levy rates for the purpose. It is objected that the writ is bad for being in the alternative. But passing this by, both branches of the alternative assume and imply a legal duty, when the writ of mandamus issued, to pay these claims out of the rates, or levy rates for the purpose, and this without even alleging that the services were rendered to, or on the retainer or request of the Commissioners as such, or for business in carrying out the purposes of the Act. Assuming the services not

to have been "in execution of the powers of the Act," then they would not be even payable out of the rates.

As the Commissioners are a fluctuating body, and it is possible that the present Commissioners know not whether the services now claimed for were in execution of the purposes of the Act, and so payable out of the rates, there could hardly be a legal duty on them to pay for those services out of the rates, and make rates for the purpose before that had been legally determined.

It is true that in the declaration there is an averment that the Commissioners were indebted for services rendered in their retainer in and about the business of the said Commissioners, but it is nowhere alleged that they were indebted as such Commissioners for services done in carrying the Act into execution; and, even if it were so, that would only be uniting in one and the same claim an action of debt with one of mandamus.

It is clear, according to *Kendall v. King*, that an action would lie against the clerk of the Commissioners, assuming the services such as would be properly payable out of the rates; and then that a remedy by mandamus may be had on the judgment: but if the services were not such as would be payable out of the rates, it is clear that no action [517] would lie against the Commissioners by their clerk at all, and that there could be no recourse to the rates, and of course in that case no remedy by mandamus.

It seems to us to follow that the declaration is bad, and on the same principle that the two former of the pleas demurred to are good.

In *Ward v. Lowndes* it was held that there is no statute of limitations which can be taken as applying to the action of mandamus (and a similar remark would apply to the plea of the Attornies' Act). If we hold the case to be one for a mandamus, when, until a judgment has been recovered, the remedy is by action of debt, we deprive a party of defences which, whilst the debt is in dispute, he has a right to resort to.

Taking the view we do, that the declaration is bad, we think it unnecessary to determine as to the last of the three pleas demurred to, which raises the question whether the rate might be retrospective. Probably that question would be found very much to resolve itself however into that which we have already determined.

In the opinion of the Lord Chief Baron and myself the judgment of the Court should be for the defendant. My brothers Martin and Bramwell were not present during the whole of the argument, and therefore decline taking any part in the judgment.

Judgment for the defendant.

[518] *LEWIS v. PEACHEY*. June 25, 1862.—Where there is a contract of apprenticeship by deed, and the apprentice unlawfully quits the service, the master can only recover damages up to the time of action brought, and not prospective damage up to the time when the term of apprenticeship would end.

[S. C. 31 L. J. Ex. 496; 10 W. R. 797.]

Declaration on an indenture, whereby the defendant covenanted that his son should faithfully serve the plaintiff, as an apprentice, for the space of five years. Breach: that the son, during the term, unlawfully absented himself from the service of the plaintiff.

Plea (inter alia). That the defendant's son did not unlawfully absent himself as alleged.

At the trial, before Channell, B., at the last Shropshire Spring Assizes, it appeared that the plaintiff was a grocer, and that, by indenture (in the usual form), the defendant's son was bound apprentice to him for five years from the 1st May, 1860. The son remained in the plaintiff's service until the 18th of January, 1862, when, disputes having arisen between them, he left with the defendant's sanction, but against the will of the plaintiff, and had not since returned. The writ in the present action issued on the 10th of February, 1862.

It was submitted, on behalf of the defendant, that the plaintiff was only entitled to damages for the loss of service from the time the apprentice absented himself until the time the writ issued. It was contended, on the part of the plaintiff, that the absence of the apprentice was not of a temporary nature, but that the defendant

intended to determine the apprenticeship, and therefore the plaintiff was entitled to damages for the absence from the time the apprentice left until the service would terminate by the indenture.

The learned Judge directed the jury to assess the damage for the respective periods separately. The jury found 10s. damages for the absence up to the time the writ issued, and [519] 35l. damages for the remainder of the term. A verdict was then entered for the plaintiff for 35l. 10s., leave being reserved to the defendant to move to reduce the damages to 10s.

Pigott, Serjt., in the following term, obtained a rule nisi accordingly, on the ground that prospective damages for the remainder of the term of the apprenticeship were not recoverable. He cited *Hambleton v. Veere* (2 Saund. 169).

Gray (Huddleston with him) now shewed cause. The plaintiff is entitled to recover the full amount of damage found by the jury. The defendant having allowed his son to absent himself from the plaintiff's service, the plaintiff has a right to treat the indenture of apprenticeship as at an end, and sue for damages up to the time the apprentice contracted to serve. It will be said that the plaintiff ought not to recover prospective damages, because the apprentice may return to the service. But in that case the plaintiff would have to wait during the whole term before he could fill up the vacancy. A party to an executory agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract, and an action will lie for such breach before the time for the fulfilment of the agreement: *Hochester v. De la Tour* (2 E. & B. 678). If the plaintiff recovers the full amount claimed, the judgment in this action will be a bar to any future action; whereas, if he only recover damages up to the time the writ issued, he might bring successive actions at different periods.

W. H. Cooke, for the defendant. The case of *Hughes v. Humphreys* (6 B. & C. 680) is an authority that the deed is not determined by the apprentice quitting the service; and so long [520] as it remains in force, the plaintiff can only recover damages up to the time the writ issued. The plaintiff might at any time compel the apprentice to return to his service. Moreover, the declaration is only framed so as to recover damages for the loss of service up to the time the action was brought.

POLLOCK, C. B. This case is altogether different from that of a servant who is engaged under a parol contract which the master refuses to perform, in which case the servant may recover damages for the entire term. Here the contract is by deed, which remains in force notwithstanding the apprentice has absented himself from the service. The rule must therefore be absolute to reduce the damages to 10s.

BRAMWELL, B. I am of the same opinion. The action is brought to recover the damage occasioned by the apprentice having absented himself from the service of his master, and the question is whether the master is entitled to recover damages up to the time when the service would terminate. In my opinion, he is not at liberty to give up the service of his apprentice and recover damages instead. If, indeed, the parties had gone to trial with an admission that the deed of apprenticeship was at an end, the case might have been different. But, looking at all the circumstances, I think that the plaintiff is only entitled to recover for the loss of service up to the time the writ issued.

CHANNELL, B., concurred.

WILDE, B. I am of the same opinion. The difficulty is created by this being a contract by deed, which is still in force. If it had been a parol contract, our judgment might have been the other way. But the plaintiff cannot recover [521] damages for the absence of his apprentice up to the end of the term while, at the same time, he has a right to his services.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

BRADLEY v. DUNIPACE. June 25, 1862.—A flour Company abroad shipped on board a vessel, of which the defendant was master, 1676 bags of rye meal, some of which weighed twelve stone each and some eight stone each. They were shipped from lighters, all mixed together, and the master knew nothing of their relative

capacity. The master signed two bills of lading, one for 1200 bags and the other for 467 bags, deliverable to order. The latter bill of lading was for 467 bags rye meal, gross 35 tons, 9 cwt., and at the foot of it was "contents unknown and not responsible for weight." The bags were all marked alike, and no means were taken to identify by marks in the bills of lading any particular bags, and there was nothing on the face of the bills of lading from which the master could see that they were intended for different consignees. When the ship arrived the defendant by mistake delivered to the plaintiff, who was consignee of 467 bags of twelve stone each, several bags which weighed only eight stone.—Held, in the Exchequer Chamber, that the master was responsible for the non-delivery of 467 bags of the proper weight.

[S. C. 32 L. J. Ex. 22. Referred to, *Parsons v. New Zealand Shipping Company*, [1901] 1 Q. B. 548.]

This was an appeal against the decision of the Court of Exchequer in discharging a rule to enter the verdict for the defendant, pursuant to leave reserved at the trial (reported 7 H. & N. 200). The case stated on appeal was (so far as material) as follows:—

1. This was an action by the plaintiff, as indorsee of a bill of lading, against the defendant, as master of a ship called "The Hawk," for not delivering the proper quantity of goods according to the bill of lading.

2. "The Hawk" was a steam vessel trading between Stettin and Hull with general cargoes, and on the 7th of June, 1860, whilst at Stettin taking in a general cargo there, a flour Company, at Stettin, called "The Stettin Steam Mill Company," shipped on board the said vessel 1676 bags of rye meal. These bags weighed some of them twelve stone each and some eight stone each. But except what is stated in the bills of lading hereinafter referred to, or might be [522] gathered from the appearance of the bags, the master was told nothing of their relative weight and capacity.

They were not weighed when put on board, and it was admitted that no weighing ever takes place on board steam ships on taking in cargoes. They were all sent on board together in lighters and mixed up together as one lot without reference to their size, and all the bags were marked with the same mark, the mark of the Flour Company.

3. Nothing was said or done at the time of shipment to indicate that the 1676 bags were intended to be separated into two lots or that they were intended for different consignees, except as appears by the bill of lading. They were accordingly stowed as they were delivered on board, having only regard to the trimming of the ship. Before sailing, the master had two separate sets of bills of lading put before him for signature, one for 1209 bags, weighing 65 tons gross, and the other for 467 bags, weighing 35 tons 9 cwt. gross English weight, making together the 1676 bags before mentioned.

The bill of lading for the 467 bags, and on which this action was brought, was in the following words:—

"I, Dunipace, from Hull, captain of the steamer ship called the 'Hawk,' which is now loading in Stettin in order to sail to Hull (where my discharge is to take place), certify that I have received in the hold of the said ship from the Directory of the Steam Mill Joint Stock Company (467) four hundred and sixty-seven bags rye meal or bran, gr. 35 t. 9 cwt. gross, thirty-five tons and nine hundred weight English weight under the subjoined marks, good and well conditioned, in order (if God give me a safe voyage) to deliver them in the like good condition at Hull to order, on payment of the freight of (15) fifteen shillings British sterling per ton in full, and average accustomed. For the fulfilment hereof I pledge my person, goods and the ship with all [523] appurtenances, whereof I have signed two bills of lading of like contents only availing as one.

"Stettin, 7 June, 1860.

"ROBERT DUNIPACE.

"The goods to be taken out within twenty-four hours after the ship's arrival or to pay ten pounds per day demurrage, and the goods may be discharged and landed by the broker at the risk and expense of the receivers; contents unknown, and not responsible for weight, measure, leakage, breakage or damage."

5. The bill of lading for the 1209 bags was in a similar form, the weight being stated therein as follows:—

“65 tons gross, sixty-five tons English weight.”

6. There were no means taken by the shippers to identify, by marks in the bills of lading or otherwise, any particular bags as the subject of either bill of lading particularly, and nothing took place from which the master could see they were intended for different consignees.

7. When the ship arrived at Hull the defendant delivered 465 bags to the plaintiff as indorsee of the bill of lading mentioned in this action.

This was two bags short of the plaintiff's number, but the defendant paid into Court the sum of 1l. 10s. to cover their value, which was admitted to be sufficient for that purpose.

8. Of the 465 bags delivered to the plaintiff some were twelve stone bags and others eight stone bags, and the whole in the aggregate weighed only 30 tons 9 cwt. and 12 lbs. And this action was brought by the plaintiff for the value of the difference in quantity between that weight and the weight stated in the bill of lading to have been received on board.

13. The Court is to be at liberty to draw all inferences [524] that a jury would be justified in drawing from the facts above stated.

14. The question for the opinion of the Court is, whether or not the defendant is entitled to have the verdict entered for him; if the Court shall be of opinion in the negative, then the verdict for the plaintiff to stand, and judgment to be entered for him for the damages assessed by the jury, with costs of suit. If the Court shall be of opinion in the affirmative, then the verdict for the plaintiff to be set aside and entered for the defendant, with judgment for the defendant accordingly.

Overend (with whom was Quain) now argued for the defendant. (a) The contract which the defendant entered into by the bill of lading was to deliver 467 bags, under the subjoined marks, and he has fulfilled that duty. There was nothing to indicate that any particular bags were the subject of either bill of lading. [Crompton, J. The 467 bags are described in the bill of lading as of 35 tons, 9 cwt., and he should have taken care to deliver bags of that weight.] The contract was not to deliver by weight but according to marks. [Blackburn, J. Was it not the defendant's duty to inquire what particular bags were intended to apply to each bill of lading?] He was only bound to deliver the right number of bags with the right marks. He has expressly stipulated that he is not to be responsible for weight or measure. If he delivered 476 bags of 12 stone each, the weight would not exactly correspond with that stated in the bill of lading.

Archibald (Edward James with him), for the plaintiff. [525] This is not a question as to the duty of the master, but one of contract, and depends on the meaning of the bill of lading. The defendant was bound to deliver 467 bags weighing in the gross 35 tons, 9 cwt. He could only do that by delivering 467 bags of 12 stone each. Freight is payable upon the tonnage mentioned in the bill of lading. Though 467 bags of 12 stone each may not exactly correspond with the weight mentioned in the bill of lading, the defendant has undertaken to deliver them. If there is any difficulty, it arises from the negligence of the defendant in signing bills of lading without ascertaining the particular bags which were intended to apply to each. The stipulation that the defendant shall not be responsible for weight is merely for his protection in case of diminution of weight by evaporation or consumption by vermin.

Overend replied.

WIGHTMAN, J. We are all of opinion that the judgment of the Court below ought to be affirmed. No doubt the captain of the ship acted very imprudently in signing bills of lading in this form, and the consignors are in some respects to blame; but the question is whether the captain ought to have delivered to the plaintiff 467 of the larger bags. In the bills of lading no particular bags are indicated by marks; and the only indication from weight is the words “467 bags rye meal bran, gross 35 tons, 9 cwt.,” and they are to be delivered on payment of the

(a) Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

freight of 15s. per ton. It appeared from the parol evidence, which was admissible to explain the bill of lading, that bags of two sizes were shipped on board, some of 12 stone each and some of 8 stone each, and it is obvious that the master could only fulfil his contract by delivering to the plaintiff 467 bags of the larger size. It may be that the weight of [526] those bags was not exactly that mentioned in the bill of lading, but by the terms of it the captain was not responsible for weight, or measure. If the 467 bags did not exactly weigh what was stated, the plaintiff could not refuse them; but the weight is mentioned for the purpose of indicating what bags the master was bound to deliver and the plaintiff was bound to accept, viz., the larger bags.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

LIMPUS v. LONDON GENERAL OMNIBUS COMPANY. June 23, 1862.—The driver of the defendants' omnibus drove it across the road in front of a rival omnibus belonging to the plaintiff, which was thereby overturned. In an action against the defendants, the driver of their omnibus said that he pulled across the plaintiff's omnibus to prevent it passing him. The defendants had given instructions to their driver not to obstruct any omnibus. The Judge directed the jury that a master was responsible for the reckless and improper conduct of his servant in the course of the service: that if the jury believed that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, acted recklessly, wantonly, and improperly, but in the course of the service and employment, and doing that which he believed to be for the interest of the defendants, then they were responsible: that if the act of the defendants' driver, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers, and so to interfere with the trade and business of the other omnibus, the defendants were responsible: that the instructions given to the defendants' driver were immaterial if he did not pursue them; but if the act of the defendants' servant was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible. Held, in the Exchequer Chamber, that the direction was right: Wightman, J., dissentiente.

[S. C. 32 L. J. Ex. 34; 9 Jur. (N. S.) 333; 11 W. R. 149; 7 L. T. 641. Distinguished, *Poulton v. London and South Western Railway*, 1867, L. R. 2 Q. B. 540. Followed, *Ward v. London General Omnibus Company*, 1873, 21 W. R. 358; 27 L. T. 761: affirmed 42 L. J. C. P. 265; 28 L. T. 850. Adopted, *British Mutual Banking Company v. Charnwood Forest Railway*, 1887, 18 Q. B. D. 717. Not applied, *Harding v. Barker*, 1888, 37 W. R. 79; *Byrne v. Londonderry Tramway Company*, [1902] 2 Ir. R. 457; *Cullimore v. Savage South Africa Company*, [1903] 2 Ir. R. 589. Applied, *Farry v. Great Northern Railway of Ireland*, [1898] 2 Ir. R. 352; *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600; *Smith v. Martin*, [1911] 2 K. B. 782. Approved, *Lloyd v. Grace*, [1911] 2 K. B. 507: reversed [1912] A. C. 716. Referred to, *Wigan Election case*, 1870, 21 L. T. 123; *Burns v. Poulson*, 1873, L. R. 8 C. P. 570; *Ruben v. Great Fingall Consolidated*, [1906] A. C. 441.]

Error on a bill of exceptions. The declaration stated that before and at the time of the committing of the grievances, &c., the plaintiff was lawfully possessed of an omnibus and harness, and of horses drawing the same, which were in a certain public highway. And the defendants were then possessed of another omnibus, and of horses drawing the same, which were then under the care, government and direction of a servant of the defendants, who was then driving the same in and along the same highway. Nevertheless the defendants, by their said ser-[527]-vant, so carelessly, negligently, and improperly drove, governed, and directed their said omnibus and horses, that by and through the mere carelessness, negligence, and improper conduct of the defendants by their said servant in that behalf, the said horses and omnibus of the defendants ran against and came in collision with the horses and omnibus and

harness of the plaintiff, and overturned and broke to pieces and damaged the said omnibus and harness of the plaintiff, and bruised, wounded, and injured one of the horses of the plaintiff. By means whereof the plaintiff was put to and necessarily incurred expense in and about endeavouring to cure his said horse and repairing the damage done to his said harness and omnibus, &c.

Plea. Not guilty. Issue thereon.

The cause was tried, before Martin, B., at the Middlesex Sittings after Michaelmas Term, 1861. The bill of exceptions set out the Judge's note of the evidence, which was (in substance) as follows:—

The driver of the plaintiff's omnibus stated that on the 27th August he left the Bank for Hounslow. After he had passed Sloane Street and was going towards Kensington, he stopped, about the barracks at Knightsbridge, to take up two passengers. The defendants' omnibus then passed him, and got ahead, eighty to a hundred yards. In passing, the driver eased his pace, and witness went on at his regular pace and overtook him. There was room in the road for five or six omnibuses. When witness got up to the defendants' omnibus, it was on the off side of the road rather than the near; but there was plenty of room to pass. As witness was going to pass, the driver of the defendants' omnibus pulled across the road, and one of the hind wheels touched the shoulder of witness's near horse. Witness called out and tried to pull up, but could not. There was a bank there, and the defendants' driver forced the witness's off horse on to the bank. The wheels of plaintiff's omnibus went on the bank and threw the omnibus over. On cross-examination the witness stated that the defendants' driver pulled his horses towards the witness's horses to prevent him passing.

Another witness stated that the defendants' driver drove across the road purposely to prevent the progress of the plaintiff's omnibus, and that he considered it a reckless piece of driving.

On behalf of the defendants, the driver of their omnibus stated that he passed the plaintiff's omnibus, when the driver pulled up on his near side to take up the two passengers. Afterwards the plaintiff's driver put his horses into a gallop to overtake the defendants' omnibus. The witness proceeded to say: "I pulled across him to keep him from passing me, to serve him as he had served me. His omnibus ran upon the bank and turned over on its side. I pulled across on purpose."

The witness stated that he was furnished with the following card:—

"London General Omnibus Company (Limited).

"Attention is particularly directed to the following regulation of the Company, and the drivers are desired to act in accordance therewith.

"During the journey he must drive his horses at a steady pace, endeavouring as nearly as possible to work in conformity with the time list. He must not on any account race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof in his business whether such omnibus be one belonging to the Company or otherwise.

"By order.

"A. G. CHURCH, Secretary,
"31 Moorgate St."

Another witness, who was a passenger on the defendants' [529] omnibus, stated that at Knightsbridge there was a contention between the conductors of the two omnibuses which should have three ladies, who got into the plaintiff's omnibus. The defendants' driver wished to go on; the plaintiff's drove him across the road, so that he could not go on. The defendants' driver said: "I will serve you out when I get on the road." The plaintiff's omnibus went on first, and stopped at the barracks to take up two passengers, when the defendants' omnibus passed it. When near Gore Lane, the defendants' driver maliciously and spitefully drove his horses suddenly to the footpath, not allowing the after omnibus any space at all.

Martin, B., directed the jury "that, when the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service; and that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course

of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant: that if the act of the defendants' driver, in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers and so to interfere with the trade and business of the other omnibus, the defendants were responsible: that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment; and the instructions given to the defendants' driver, and read in evidence to the jury, [530] were immaterial if the defendants' driver did not pursue them: but that if the true character of the act of the defendants' servant was, that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible."

The defendants' counsel excepted to the said ruling, for that the said Baron misdirected the jury in telling and directing them as aforesaid; and, further, that, the learned Baron ought to have told the jury that, if they believed that the defendants' driver wilfully drove across the road as aforesaid, even for the purpose of merely obstructing the plaintiff's omnibus, the defendants were not responsible, and he ought to have told and directed the jury that for an act wilfully done by the servant of the defendants against the orders of his employers contained in the said paper or card, even though at the time of doing it he was in the course of driving for his employers, the defendants were not responsible: that the learned Baron ought to have told the jury that there was no evidence to justify them in finding that the driver of the defendants' omnibus, in doing the act complained of, was acting in the course of his employment; and he ought to have told them that there was no evidence to warrant them in finding for the plaintiff, and ought to have directed them to find their verdict for the defendants. The jury gave a verdict for the plaintiff, with 35*l.* damages.

Mellish (Matthews with him) now argued (*a*) for the plaintiffs in error (the defendants below). The direction of the learned Judge was erroneous. There was evidence that the defendants' driver wilfully and recklessly drove across the plaintiff's omnibus for the purpose of impeding its progress. It is not contended that the fact of the [531] servant having committed a wilful trespass necessarily, of itself, absolves the master from responsibility, but it is submitted that a master is not liable for a wilful trespass committed by his servant, unless it was done in obedience to the master's orders, or was within the scope of the servant's employment. Here the defendants' servant was employed to drive his omnibus, and if the wrongful act had been done in the course of that employment the defendants would be liable, but they are not if the act was done by the servant for some purpose of his own. The learned Judge made it an essential part of his direction, whether the defendants' driver was doing that which he believed to be for the interest of his employer; whereas the real question was whether the driver thought the act necessary for carrying out his masters' orders. The true rule is laid down in *Croft v. Alison* (4 B. & Ald. 590): "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." [Williams, J. If a driver in a moment of passion vindictively strikes a horse with a whip, that would not be an act done in the course of his employment; but in this case the servant was pursuing the purpose for which he was employed, viz., to drive the defendants' omnibus. Suppose a master told his coachman not to drive when he was drunk, but he nevertheless did so, would not the master be responsible?] Here the defendants' driver recklessly and purposely obstructed the plaintiff's omnibus. That was not an act within the scope of his employment, and [532] was contrary to the orders given to him by his master. If the action had been against the servant, it must have been in trespass, not case. [Blackburn, J. If the defendants' driver did the act to effect some purpose of his own, the case would fall within the latter part of the direction.] The doctrine laid down in *Croft v. Alison* was recognised and adopted in *Seymour v. Greenwood*

(a) Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

(7 H. & N. 355). [Crompton, J. Was not the driver carrying out his masters' purposes in attempting to get before the other omnibus and pick up passengers?] He states that he drove across the plaintiff's omnibus to prevent it from passing him, and to serve the plaintiff's driver as the plaintiff's driver had served him. [Wightman, J. Would the master have been responsible if the servant had thought it for his master's interest to drive against the other omnibus and overturn it?] *Lyons v. Martin* (8 A. & E. 512) decided that a master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service; but not so if the act is in itself unlawful and is not proved to have been authorized by the master. Here the servant wilfully did an act which he knew he had no right to do, and which he was instructed by his master not to do; and it can make no difference that he believed it to be for the benefit of his master, since it was not within the scope of his employment.

Lush, for the defendant in error (the plaintiff below). The direction was right. The true test is whether the servant, in doing the particular act, ceased to be the agent of his master and did it solely for his own purposes. If the defendants' driver had wilfully driven against the other omnibus and overturned it, the jury could not have found that he did it in the course of his employment or for the benefit, or supposed [533] benefit, of his master. The object of the defendants was to get as much traffic as they could on the road, and their driver, in doing the wrongful act, was attempting to carry out that object. [Crompton, J. It was merely an act of wrongful driving.] Suppose the defendants had told their driver not to drive faster than seven miles an hour, but he did so, would not the defendants be liable for damage resulting from it? The defendants' driver drove across the other omnibus, not for any purpose of his own, but believing that it was for the interest of his masters to prevent that omnibus from passing him. [Williams, J. Suppose the driver of an omnibus saw a passenger waiting at a distance and, in order to reach him before another omnibus, drove at full speed and thereby ran over a person, would not the master be liable?] The fair meaning of the direction is that, if the defendants' servant did the wrongful act in order to effect any purpose of his own, they are not liable, but, if the act was done in the course of the employment or for the benefit of the defendants, they are responsible. That is directly within the principle laid down in *Croft v. Alison* (4 B. & Ald. 590) and *Seymour v. Greenwood* (7 H. & N. 355). The argument on the part of the defendants, would limit the responsibility of a master to acts which are strictly within the authority of the servant. But a servant has a discretion entrusted to him by his master, as to the pace and mode of driving. *Lyons v. Martin* (8 A. & E. 512) merely decided that a master is not liable in trespass for a wilfully unlawful act of his servant unauthorized by him. He also referred to *Kyle v. Jeffres* (3 Macq. 611).

Mellish replied.

Cur. adv. vult.

[534] The learned Judges having differed in opinion, the following judgments were now delivered:—

WIGHTMAN, J. It appears by the evidence in this case that the defendants were the proprietors of an omnibus plying between the Bank and Hounslow, which at the time in question was driven by a coachman in their service; that whilst upon the road, in the course of his employment to drive defendants' omnibus from Piccadilly to Kensington, he wilfully and on purpose, and contrary to the express orders of the defendants, wrongfully endeavoured to hinder and obstruct the passage along the road of another omnibus belonging to the plaintiff; and for that purpose, he, who was ahead of the plaintiff's omnibus 80 or 100 yards, slackened his pace, until the plaintiff's omnibus came up to him and was about to pass, and he then purposely pulled across the road in order to prevent and obstruct his progress, and in so doing ran against one of the plaintiff's horses with his (the defendants') omnibus, thereby causing considerable damage. The reason assigned by the defendants' coachman for this wrongful proceeding was that he pulled across the plaintiff's coachman to keep him from passing, in order to serve him (the plaintiff's coachman) as he had served him (the defendants' coachman).

It seems clear upon the evidence that this was wholly a wilful and unjustifiable act on the part of the defendants' coachman, and not in the lawful prosecution of his masters' business.

A master is undoubtedly responsible for any damage occasioned by the negligence

or carelessness of his servant whilst employed upon his master's business. In the present case it was no part of his employment to obstruct or hinder the passing of other omnibuses or carriages,—on the contrary, he was directed not to do so.

The case appears to me to fall within the principle of the [535] decision in the case of *Croft v. Alison* (4 B. & Ald. 590), cited upon the argument. In that case the Court said that the distinction was this: "That if a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horse of another person and thereby produces an accident, the master is not liable. But if, in order to perform his master's orders, he strikes, but injudiciously and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment."

In the case of *Lyons v. Martin* (8 A. & E. 515) Mr. Justice Patteson, in his judgment, says, "*Brucker v. Fromont* (6 T. R. 659) and other cases, where the master has been held liable for the consequences of a lawful act done negligently by his servant, do not apply. Here the act was utterly unlawful. A master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one." There are other cases, some of which were cited upon the argument, to the same effect. In the present case the defendants' coachman wilfully did an illegal act contrary to his masters' orders, and quite beyond the scope of his employment. In this view of the case, it appears to me that, if the evidence of the defendants' coachman was believed, as well as that of the other witnesses in the case, the verdict ought to have been for the defendants. The question however before us is whether the direction of the learned Judge to the jury, as it appears upon the bill of exceptions, was right in point of law upon the case as it appeared in evidence. I entertain the highest and most sincere respect for the opinion of my brother Martin, but it does appear to me that the mode in which the questions were put to the jury was such as might mislead them, and [536] induce them to find a verdict which I cannot but think was wrong.

He appears to have told them "that if the act of the defendants' driver in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interests of his employers and to interfere with the trade and business of the other omnibus, the defendants were responsible; and that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the coachman not to obstruct another omnibus or hinder or annoy the driver in his business were immaterial."

It certainly appears to me that the wilfully or wrongfully attempting to obstruct the progress of another omnibus contrary to the express directions of the defendants, though done by their coachman whilst employed in the service of the defendants, cannot be considered an act done by him in the course of his service. It was quite beside the course of his service and what he was employed to do; and I cannot consider the express prohibition to the coachman to do what he did as immaterial in considering what was the course of his service in that respect. This was not a case of reckless or careless driving, but of wilfully and wrongfully attempting to obstruct the passage of another omnibus, and in so doing running against one of the horses. This cannot, I think, under the circumstances, be considered as an act done in the course of his service, even though the coachman might think that it was for his masters' interest by such wrongful means to obstruct the business of the other omnibus. The defendants' coachman was not employed to [537] obstruct or hinder the plaintiff's omnibus, nor was it in the course of his service, in the proper sense, to do so. Upon the evidence it was entirely his own wrongful and wilful act, for which I think, according to the distinction taken in the cases to which I have referred, the defendants are not responsible. The jury, upon the direction to which I have referred, might well have thought that if the act was done during the time that the defendants' coachman's employment was to drive their omnibus, and that he thought it for their benefit to obstruct the other omnibus, the defendants would be liable. This I think was wrong for the reasons I have given; and I am therefore of opinion that there should be a trial de novo.

WILLIAMS, J., said,—I am of opinion that the judgment ought to be affirmed. If a master employs a servant to drive and manage a carriage, the master is responsible

for any misconduct of the servant in driving and managing it which must be considered as having resulted from the performance of the duty entrusted to him, and especially if he was acting for his masters' benefit and not for any purpose of his own. I think that the summing up of my brother Martin was substantially in accordance with that doctrine, and therefore there is no foundation for the bill of exceptions.

CROMPTON, J., said,—I must confess that my mind has altered in the course of the discussion. At first I was inclined to the opinion which my brother Wightman has expressed, but my present impression is in favour of the view of my brother Williams, that the injury resulted from an act done in the course of the driving and management of the omnibus. I do not follow my brother Wightman in one respect (for which however he has the authority of [538] Patteson, J., in *Lyons v. Martin* (8 A. & E. 515)), as to its being necessary that the act done by the servants should be a lawful act, for later cases shew that the act need not be lawful in order to fix the master with responsibility; but my doubt has been whether this was an act done within the scope of the driver's authority, in other words, whether he was acting in the course of the driving or management of the omnibus. It appears by the evidence of the driver that he was driving the defendants' omnibus in an improper way, for, without intending to touch the horses of the plaintiff's omnibus, he drove so near to it, for the purpose of keeping it from passing him, that he caused the accident. It is not necessary to say what would have been the case if the driver had used the omnibus so as to block up the road; as it is, I cannot see that the direction of my brother Martin was necessarily wrong. If the matter had come before us on a motion for a new trial, it may be that I should have agreed with my brother Wightman, for the question might have been presented in such a way as to bring it more clearly before the jury, and it is possible that some expressions of the learned Judge may have led them to a wrong conclusion. But the question now is, whether any of the exceptions shew that the learned Judge was wrong in point of law. Throughout his summing up he left it to the jury to say whether the injury resulted from an act done by the driver in the course of the service and for his masters' purposes. That is the true criterion; and I cannot see anything necessarily wrong in the ruling of my brother Martin. Therefore, though with considerable doubt, I do not think that we ought to reverse the judgment of the Court below.

WILLES, J., said,—I am of opinion that the judgment of the Court below ought to be affirmed. The direction of [539] my brother Martin was in accordance with principle and sanctioned by authority. It is well known that there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible; for there ought to be a remedy against some person capable of paying damages to those injured by improper driving. This was treated by my brother Martin as a case of improper driving, not a case where the servant did anything inconsistent with the discharge of his duty to his master, and out of the course of his employment. The defendants' omnibus was driven before the omnibus of the plaintiff, in order to obstruct it. It may be said that it was no part of the duty of the defendants' servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever. In my opinion those instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability. Therefore, I consider it immaterial that the defendants directed their servant not to do the act. Suppose a master told his servant not to break the law, would that exempt the master from responsibility for an unlawful act done by his servant in the course of his employment?

But there is another construction to be put upon the act of the servant in driving across the other omnibus; he wanted to get before it. That was an act done in the course of his employment. He was employed not only to drive the omnibus, which alone would not support this summing up, but also to get as much money as he could for his master, and to do it in rivalry with other omnibuses on the road. The act of driving as he did is not inconsistent with [540] his employment, when explained by his desire to get before the other omnibus. I do not speak without authority when I treat that as the proper test. Take the ordinary case of a master of a vessel, who it must be assumed is instructed not to do what is unlawful but what is lawful, if he has

distinct instructions not to sell a cargo under any circumstances, but he does so under circumstances consistent with his duty to his master, the master is liable in damages to the person whose goods are sold.

It appears to me that the summing up is in accordance with the principle that a master is liable for acts done by his servant in the course of his employment. It is also consistent with authority. I need only refer to the authority of Lord Holt in *Tuberville v. Stampe* (1 Ld. Raym. 264), and of Lord Wensleydale in *Huzzey v. Field* (2 C. M. & R. 432). It is part of the history of the law that the judgment in *Huzzey v. Field*, although delivered by Lord Abinger, was prepared by Lord Wensleydale. That learned person there laid down that the proper question is whether the servant was acting at the time in the course of his master's service, and for his master's benefit; if so, his act was that of his master, although no express command or privity of his master was proved. It seems to me that in so laying down the law he was strictly accurate; and I feel bound to say that it is for the interest of every person (for all are liable to be injured by servants), that he should not be without remedy by the law being loosely administered. I entertain no doubt that the direction was correct, and that the judgment ought to be affirmed.

BYLES, J., said,—I am also of opinion that the direction of my brother Martin was correct. He used the words "in the course of his service and employment," which, as my brother Willes has pointed out, are justified by the decisions. [541] The direction amounts to this, that if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may in one sense be wilful on the part of the servant.

It is said that what was done was contrary to the master's instructions; but that might be said in ninety-nine out of a hundred cases in which actions are brought for reckless driving. It is also said that the act was illegal. So, in almost every action for negligent driving, an illegal act is imputed to the servant. If we were to hold this direction wrong, in almost every case a driver would come forward and exaggerate his own misconduct, so that the master would be absolved. Looking at what is a reasonable direction, as well as at what has been already decided, I think this summing up perfectly correct.

BLACKBURN, J., said,—I am also of opinion that the direction of the learned Judge was sufficiently correct to afford the jury a guide in the particular case, which is all that is required. It is admitted that a master is responsible for the illegal act of his servant, even if wilful, provided it was within the scope of the servant's employment, and in the execution of the service for which he was engaged. That the learned Judge told the jury, and perfectly accurately, but that alone would not be enough to guide them in coming to a correct conclusion. It was necessary that the jury should understand the principles which they must apply in order to ascertain whether the act was done in the course of the servant's employment. It is upon that part of the summing up that Mr. Mellish has mainly pointed his argument, saying that it gave the jury a wrong guide.

Now, we must look at what the particular employment [542] was, in order to see what was understood by the jury. The defendants' servant was the driver of an omnibus, and as such it was his duty, not only to conduct it from one terminus to another, but to use it for the purpose of picking up traffic during the course of the journey. He drove across another omnibus, under circumstances from which the jury might have thought that it was done for the purpose of reeking his spite against the driver of that omnibus. The learned Judge, having to tell the jury what was the test by which they were to determine whether the act was done in the course of the service or not, used language in which he tells them, perfectly rightly, that if the act was done in the course of the service the defendants were responsible; and he goes on to say, "that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant." No doubt what Mr. Mellish said is correct: it is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say

that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses. But, in this case, I think the direction given to the jury, was a sufficient guide to enable them to say whether the particular act was done in the course of the employment. The learned Judge goes on to say that [543] the instructions given to the defendants' servant were immaterial if he did not pursue them (upon which all are agreed); and at the end of his direction he points out that, if the jury were of opinion "that the true character of the act of the defendants' servant was that it was an act of his own and in order to effect a purpose of his own, the defendants were not responsible." That meets the case which I have already alluded to. If the jury should come to the conclusion that he did the act, not to further his masters' interest or in the course of his employment, but from private spite, and with the object of injuring his enemy, the defendants were not responsible. That removes all objection, and meets the suggestion that the jury may have been misled by the previous part of the summing up.

Under these circumstances, I think that the direction given by the learned Judge was sufficiently accurate to guide the jury in coming to a right conclusion, and that there ought not to be a trial de novo.

Judgment affirmed.

[544] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

BAGNALL AND ANOTHER v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

June 25, 1862.—The plaintiffs were owners and occupiers of a coal mine which, as well as the surface land, formerly belonged to the same owner. A railway Company to whose rights and obligations the defendants succeeded, purchased, under the powers of their act of parliament, the surface land for the purpose of their railway, and constructed it thereon. The Company cut and removed upwards of twenty feet in thickness of the surface soil over the plaintiffs' mine to get the level at which they laid their rails. This soil was clay impervious to water; by removing it a porous rock was reached. The soil was in like manner cut away by the Company along the length of their line to a lower district of country, through which a brook flowed. The railway was carried over the brook by a flat bridge. The line of railway sloped downwards from the bridge to the part over the plaintiffs' mine. The bridge was sufficient to let the ordinary water of the brook pass, but was an impediment to the passage of water in large floods. The Company were required by their act of parliament to make and maintain sufficient drains. At the time the railway was made the plaintiffs' mine was not worked within forty yards of it; and drains were made at the side of the railway sufficient to carry off the water. Subsequently the plaintiffs gave the defendants notice of their intention to work the mine under the railway. The defendants having declined to purchase the mine the plaintiffs worked under it, when, from no fault or negligence of theirs, but as the natural consequence of fair and lawful working, the railway sank and continued to do so from time to time. The defendants threw materials of a porous character on the sunken parts, but did not repair or puddle the drains. In the year 1860, a flood happened, and the water, part of which would have escaped but for the bridge, flowed down the railway, and in consequence of the high ground between the brook and the surface over the mine being removed it reached that spot, and, together with the water falling there and the springs arising in the cutting, penetrated into the mine for want of efficient drains. Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the defendants were liable in an action for the damage sustained by the plaintiffs, and that the claim was not one which could have been enforced under the compensation clauses of the Railway Clauses Consolidation Act, 1845.

[S. C. 31 L. J. Ex. 480; 9 Jur. (N. S.) 254; 10 W. R. 232, 802; 9 L. T. 419. Applied, *Reg. v. Fisher*, 1862, 3 B. & S. 200; *Midland Railway v. Checkley*, 1867, L. R. 4 Eq. 28. Distinguished, *Cracknell v. Thetford Corporation*, 1869, L. R.

4 C. P. 636. Discussed *Dunn v. Birmingham Canal Company*, 1872, L. R. 7 Q. B. 267; affirmed L. R. 8 Q. B. 42. See also *Gaekwar of Baroda v. Candhi Kachabhai Kasturchand*, 1903, L. R. Ind. App. 60.]

This was a proceeding in error on the judgment of the Court of Exchequer for the plaintiffs, on a special case stated for the opinion of that Court. The pleadings and facts sufficiently appear in the report of the case in the Court below (7 H. & N. 423).

Phipson argued for the plaintiffs in error (*a*) (the defendants below) in last Easter Vacation (May 20), and Gray argued for the defendants in error (the plaintiffs below). The arguments were in substance the same as those in the Court below. The following additional authorities were cited:—*Regina v. The Eastern Counties Railway Company* (10 A. & E. 531); *Glover v. The North Staffordshire Railway Company* (16 Q. B. 912); *Caledonian Railway Company v. Lockhart* (3 Macq. 808); *In re Penny and the South Eastern Railway Company* (7 E. & B. 660); *In re Ware and the Regent's Canal Company* (9 Exch. 395); *Brine v. The Great Western Railway Company* (2 B. & S. 402); *Smith v. Kenrick* (7 C. B. 515); *Rex v. The Commissioners of Sewers for Pagham* (8 B. & C. 355).

Cur. adv. vult.

The judgment of the Court was now delivered by

WILLES, J. In this case the conjoint effect of the making of the defendants' cutting, and of their neglect to keep their drains in proper order has been, that large quantities of water, which, but for the cutting, would not have come near the plaintiffs' mine, and but for the defective state of the drains would have passed away and been carried off without injury to the mine, poured down into and damaged the mine, for which damage the present action is brought.

The Company had, upon receiving the statutory notice, declined to purchase.

The jury found (and upon this finding the question arises) the principal cause of the mischief to be that the drains had not been kept in proper order.

It was hardly denied, and could not successfully have been disputed, that the Company was liable to make compensation, and the main stress of the argument bore upon the question whether such compensation can be recovered as damages in this action, or whether the plaintiff ought to have proceeded under the compensation clauses of the Railway Act.

Now the obvious intention of the Legislature in giving [546] the Company the option of purchasing the mine was that, in case they should decline to buy, the mine-owner should possess his property intact. If it were otherwise, the railway Company would have it in their power to do indirectly what they are not permitted to do directly, namely, to take away the benefit of the mine, either in the whole or in part, without paying for, and after they had elected not to buy, it.

And there are practical obstacles of an insuperable character against saying that there arises upon the making of the railway an immediate right to compensation in respect of possible future injury to unopened mines. At that time it does not appear that the mine will ever be worked, nor that the drains will not always be kept in proper order, so that the Company might contend that peradventure no damage would ever arise, and an assessment of damages in advance would be sheer speculation. This consideration distinguishes the present case from that of *The Caledonian Railway Company v. Lockhart* (3 Macqueen, 808), where the embankment could not have been made without exposing the land to damage by periodical floods, which were certain to occur, and the deterioration in value by disability to work might at once be calculated with reasonable certainty, and brings it within the authority of that class of cases in which it is held that damage caused by a negligent and improper exercise of the powers of the Act forms the proper subject of an action. A fortiori, this is so where the negligence is in the care and management of the line, not in the construction of the works.

That was the course of reasoning by which the Court of Exchequer arrived at the conclusion that the defendants were liable in an action, and upon consideration we are satisfied that their judgment was correct. It must therefore be affirmed.

Judgment affirmed.

(a) Before Erle, C. J., Crompton, J., Willes, J., Keating, J., and Mellor, J.

[547] IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

DARLOW v. EDWARDS, SNOW AND SARAH his Wife. June 24, 1862.—A testator charged his real estate with payment of an annuity to a servant, hired at yearly wages, provided she should be in his service at the time of his decease. Two days before his death the testator wrongfully dismissed her without notice, and she left his house. Held, that she was not entitled to the annuity.

[S. C. 32 L. J. Ex. 51 ; 9 Jur. (N. S.) 336 ; 10 W. R. 700 ; 6 L. T. 905.]

Error on a bill of exceptions. The declaration was in replevin of the plaintiff's goods taken in his dwelling-house.

Cognizance and avowry. The defendant Edwards, as bailiff of Snow and Sarah his wife, well acknowledges, and Snow and Sarah his wife in their own right well avow, the taking of the said goods, because one Thomas Darlow at the time of his death was seized in fee of the said dwelling-house, and by his will "charged and made chargeable the said dwelling-house in which, &c., to and with the payment to the defendant, Sarah (then Sarah Bowring, who was then in the service of the said Thomas Darlow,) of an annuity or clear yearly sum of 12l., provided she should be in the service of the said Thomas Darlow, now deceased, at the time of his decease, for and during the term of her natural life, by equal half-yearly payments, &c., with such and the like remedies, in case of default in payment, by distress and sale, or otherwise, as landlords could or might exercise upon common demises ;" and the said Thomas Darlow by his will gave, devised, and bequeathed the same annuity to the defendant Sarah. Averments: that, on the 25th September, 1856, the testator died so seized of the dwelling-house in which, &c., without having altered or revoked his will: that the defendant continued in the service of the testator until and at the time of his decease, whereupon the defendant [548] Sarah, became and was seized as of freehold of the said annuity during her life: that she afterwards married the defendant Snow ; and because nine of the half-yearly payments were due and in arrear, the defendant Edwards as bailiff acknowledges, and the defendant Snow and Sarah his wife in their own right avow, the taking of the said goods as a distress for the said arrears of the said annuity.

Plea in bar. That the defendant, Sarah, was not in the service of the said Thomas Darlow at the time of his decease. Issue thereon.

The cause was tried before Martin, B., at the Huntingdon Spring Assizes, 1862, and the bill of exceptions stated the following facts:—

1. Thomas Darlow, the father of the plaintiff (hereinafter called the testator), died on the 25th of September, 1856, seized in fee of the said dwelling-house in which, &c. The defendant Sarah for several years before, up to, and on the 22nd of September, 1856, was in the service of the testator as a domestic servant, under a yearly hiring at 10l. 10s. wages, and the current year of which yearly hiring did not expire until the 11th day of October, 1856. The testator by his will, duly made and attested, &c., devised to the plaintiff, his heirs and assigns, the said house in which, &c., along with other property, subject to a charge in favour of the defendant Sarah (by her then name of Sarah Bowring), in the words following:—"Subject nevertheless, and I do hereby charge and make chargeable the said several messuages, lands, tenements and hereditaments hereinbefore devised to my son Thomas Darlow to and with the payment to my faithful servant, Sarah Bowring, of an annuity or clear yearly sum of 12l., provided she shall be in my service at the time of my decease, for and during the term of her natural life, by equal half-yearly payments, the first payment to be made at the expiration of six calendar months [549] next after my decease, with such and the like remedies, in case of default in payment, by distress and sale, or otherwise, as landlords can or may exercise upon common demises. And I bequeath the same annuity to the said Sarah Bowring accordingly."

2. On the said 22nd of September the plaintiff, who resided with his said father, called the said Sarah down stairs from the upper part of the house into a room in the lower part of the same, and told her to take up some money which then was upon a table there. The said Sarah asked what it was for. The plaintiff answered,

it was her wages, and that if she did not take it and go he would make her; that she could not agree with Mrs. Mawdesley, the sister of the plaintiff and daughter of the testator. The said Sarah said the plaintiff was not her master, and she would not go that way; she would see master. The plaintiff said she should not, and became very angry; whereupon she took up the money and went away. The said Sarah went again the next morning and asked the plaintiff to let her see the testator, but the plaintiff refused. The said Sarah, in fact, had said of the said Mrs. Mawdesley and the plaintiff, to a fellow servant, that they were burying the old man before he was dead. For the last two years of the testator's life he had been in failing health and required much care and attention, which she gave him, and for which he expressed himself grateful; and that in her opinion he was seized with mortal illness on the 21st day of September aforesaid. The defendant, Sarah, after the death of the testator, and before the said time when, &c., married the defendant Matthew Snow.

3. The plaintiff gave in evidence that on the 22nd of September the testator was informed by his daughter, the said Mrs. Mawdesley, that the defendant, Sarah, had used disrespectful language to her fellow servant with reference [550] to the said Mrs. Mawdesley, and that thereupon the testator sent a message for the plaintiff to go to him in order that he might direct the plaintiff to dismiss the said Sarah. The plaintiff upon receiving the message went to the testator, and was by him directed to pay the defendant, Sarah, her wages, and send her away, as he, the testator, would not put up with her temper any longer. The plaintiff did thereupon forthwith pay the said Sarah her wages and sent her away. She did then and there go away accordingly. The testator was informed that she had been so sent away and had gone, and expressed his satisfaction thereat. The testator was in full possession of his faculties at the time. The defendant, Sarah, had in fact used disrespectful language to the said fellow servant with reference to the said Mrs. Mawdesley. The said Sarah, after she had in fact left the house of the testator, told a friend that she had left her situation, and, on being asked by the said friend what for, answered, "because of a little unpleasantness between her and Mrs. Mawdesley."

The learned Judge directed the jury that there were three questions for their consideration. First, whether the defendant, Sarah, had voluntarily left the service. Secondly, whether she had consented to rescind the contract of service. Thirdly, whether she had been guilty of misconduct to justify dismissal; and that unless the said Sarah had voluntarily left the service of the testator, or the contract of service had been rescinded by the mutual consent of the testator and the said Sarah, or she had done something to justify her dismissal by the testator, they ought to find a verdict for the defendant.

Whereupon the plaintiff's counsel requested the learned Judge to inform the jury that the question for them was, whether the defendant, Sarah, was in fact dismissed by or by the authority of the testator; and that, if so, she ceased to be in his service within the meaning of the said will and [551] was not entitled to the said annuity. But the learned Judge refused so to inform the jury, and left the aforesaid three questions to them. And thereupon the jury gave a verdict for the defendants.

O'Malley (Keene with him) argued (a) for the plaintiff. The question is whether the defendant, Sarah, was in the service of the testator at the time of his death. It is clear that she was not in fact in his service; but the learned Judge ruled that, unless the contract was determined, she was constructively in his service. But the law of constructive service no longer exists. It was formerly considered that where a servant, hired by the quarter, was discharged by his master without sufficient cause in the middle of a quarter, he might recover the quarter's wages under the indebitatus counts for work and labour: *Gandell v. Pontigny* (4 Camp. 375); but that doctrine is now overruled, and it is established that a servant wrongfully dismissed cannot recover, under the indebitatus counts, as for a constructive service: *Archard v. Hornor* (3 C. & P. 349); *Smith v. Hayward* (7 A. & E. 544); *Fewings v. Tisdal* (1 Exch. 295); *Goodman v. Pocock* (15 Q. B. 576). The servant might have recovered damages under a special count for the wrongful dismissal: *Elderton v. Emmens* (6 C. B. 160). [Crompton, J. It is difficult to see how the service continues when the complaint in such an action is that it was wrongfully put an end to.]

(a) Before Wightman, J., Williams, J., Crompton, J., Byles, J., and Blackburn, J.

The Court then called on

Metcalfe, for the defendants. The defendant, Sarah, was in the service of the testator at the time of his decease, so [552] as to entitle her to the annuity under the proviso in his will. [Crompton, J. It may be conceded that she was wrongfully dismissed by the testator.] The wrongful dismissal did not rescind the contract of service. [Blackburn, J. If a person contracts not to revoke the authority of an arbitrator, though by so doing he commits a breach of contract, the revocation is valid; is it not the same in the case of a wrongful dismissal of a servant?] By the 8 & 9 Wm. 3, c. 30, s. 4, it is declared that no person shall acquire a settlement by hiring, "unless such person shall continue and abide in the same service during the space of one whole year;" and it has been held that a wrongful dismissal does not put an end to the contract, so as to prevent the servant gaining a settlement, but is merely a dispensing with the service for the remainder of the term: *Rex v. St. Phillip's Birmingham* (2 T. R. 624). [Crompton, J. In that case the mistress paid the servant his whole wages, so that there was no wrongful dismissal, but merely a dispensing with the service for the remainder of the term.] *Rex v. Hardhorn with Newton* (12 East, 51) is also an authority that a wrongful dismissal does not put an end to the contract of service. There the Court point out the distinction between that case and *Rex v. Grantham* (3 T. R. 754), where the dissolution of the contract was assented to by both parties. [Blackburn, J. The 4th section of the 8 & 9 Wm. 3, c. 30, comes by way of proviso. There must be a hiring for a year; then, as a condition of acquiring a settlement, the statute says that the person so hired "shall continue and abide in the same service during the space of one whole year." That being a condition imposed by statute, if the servant has done all he possibly can to fulfil it, that is enough: Com. Dig. Condition (D. 1).] The same reasoning would apply to a condition imposed by will. *Goodman* [553] v. *Pocock* (15 Q. B. 576) shews that the contract exists notwithstanding a wrongful dismissal, unless the servant has elected to treat it as rescinded. [Blackburn, J. The contract may continue, so as to enable the servant to bring an action for the breach of it, but the service does not continue. Wightman, J. If the servant brought an action for the wrongful dismissal, the declaration would contain an averment that she was ready and willing to serve but that the master would not let her.] The words "provided she shall be in my service" do not mean "provided she shall actually do the work of a servant," and they are satisfied by a dispensation of service. [Crompton, J. Suppose she had been a servant in husbandry, could she have been punished under the statutes relating to such servants for disobedience of an order of her master given after her dismissal? Or suppose she had come back to the house and stolen something, could she have been indicted for larceny as a servant? Or, in the case of a male servant wrongfully dismissed, would the master afterwards be liable to pay a tax for him? [*Cuckson v. Stones* (1 E. & E. 248) is an authority that the contract may continue, although no service is in fact performed.

D. D. Keane, in reply, referred to *Herbert v. Reid* (16 Ves. 481).

WIGHTMAN, J. The question turns upon the intention of the testator, as shewn by the words used in his will. He devised his real estate to his son in fee, subject to a charge in favour of the defendant in the following terms:—"Subject nevertheless, and I do hereby charge and make chargeable the said several messuages, lands, &c., to and with the payment to my faithful servant, Sarah Bowring, of an annuity or clear yearly sum of 12l., provided she shall be in my service [554] at the time of my decease." Therefore she is clearly not entitled to the legacy unless she was in the testator's service at the time of his decease.

It is said that this is a case of considerable hardship, for the testator, two days before his death, discharged her, as it must now be taken, wrongfully; but at that time her wages, which were yearly wages, were not due, and therefore she was constructively in his service at the time of his death. But it seems to us that the service contemplated by the testator was not a constructive, but an actual service. No doubt the contract for service may remain although it was broken; and the servant might have recovered damages for the breach of it, but she was not in the service of the testator at the time of his death, and, not being so, she was not entitled to this bequest, and there ought to be a trial de novo.

Trial de novo.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

WOOLLEN v. WRIGHT. June 23, 1862.—An execution creditor does not, by becoming a party to an interpleader issue, ratify or adopt the act of the sheriff, so as to render himself liable in trespass for the seizure of the goods, which are the subject of the interpleader issue.

[S. C. 31 L. J. Ex. 513; 10 W. R. 715; 7 L. T. 73. Considered, *Durant v. Roberts*, [1901] 1 Q. B. 629: reversed nomine *Keighley, Marted & Company v. Durant*, [1901] A. C. 240.]

Error on a bill of exceptions. The declaration stated that the defendant broke and entered a dwelling-house of the plaintiff, and seized, took, and carried away his goods.

Pleas (inter alia). First: not guilty. Fourthly, as to breaking and entering the dwelling-house, a justification under a writ of fieri facias issued on a judgment recovered by the defendant against one Inman.

The plaintiff joined issue on the first plea, and took and joined issue on the fourth, except as to the judgment and [555] writ of fieri facias; and he also new assigned, that he sued for trespasses committed by the defendant to a greater extent, and with more violence, and for a longer time than was necessary for the purpose and on the occasion referred to in the fourth plea.

Plea to new assignment: not guilty. Issue thereon.

The cause was tried before Martin, B., at the Yorkshire Summer Assizes, 1861, and the bill of exceptions stated the following facts:—At the time of the seizure hereinafter mentioned the plaintiff was the proprietor and in legal possession of Cooper's Hotel, at Brightside Lane, in Sheffield (being the dwelling-house mentioned in the declaration), and was then carrying on the said Cooper's Hotel as a public house by and under the management of one George Inman and his wife, who were at the time residing therein. There were at the said Cooper's Hotel goods, fixtures, and effects of the plaintiff of large value, and also some goods of the said G. Inman. On the 17th September, 1860, the defendant obtained in the Court of Exchequer final judgment against the said G. Inman for the sum of 165l. 8s. 6d., and the following day, by the direction of the defendant, his attorney sued out a writ of fieri facias, and delivered the same to the sheriff of York to be executed. On the same day a warrant was issued upon the writ by the sheriff directed to one of his officers, and indorsed to levy the amount of the judgment and costs of execution.

On the 19th September, 1860, the officer of the sheriff, with two of his men, entered the said Cooper's Hotel for the purpose of executing the said warrant upon the goods, chattels, and effects of the said G. Inman therein, and left one of his men in possession. There was evidence that the officer and men acting under his authority had misconducted themselves in levying and selling under the writ.

On the 20th September the plaintiff's attorney made a [556] claim to the goods, chattels, and effects so seized, on behalf of the plaintiff, and served a notice of such claim on the officer of the sheriff and the defendant's attorney. The sheriff thereupon took out an interpleader summons.

On the 5th October, the sheriff, the plaintiff, and the defendant, by their respective attorneys, appeared at the hearing of the said summons, when Wilde, B., ordered (inter alia) "that upon payment of 170l. into Court by the claimant within a week, and upon payment to the sheriff of the possession money, the sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of fi. fa.; and that, unless such payment should be made, the sheriff do proceed to sell the said goods and chattels, and pay the proceeds of such sale, after deducting the expenses thereof and the possession money, into Court to abide further order. The sheriff to permit the claimant to inspect the goods and chattels seized, and claimant, within a week, to give notice to the sheriff specifying which of such goods and chattels are not claimed by him. That the parties do proceed to the trial of an issue in which the said claimant shall be plaintiff, and the said execution creditor shall be defendant; and that the question to be tried shall be whether at the time of seizure by the sheriff the goods, &c., were the property of the claimant as against the execution creditor. The issue to be confined to the goods and chattels not specified in such notice as aforesaid."

On the 10th October, 1860, the plaintiff gave notice to the sheriff, specifying therein which of such goods and chattels were not claimed by him.

In pursuance of the interpleader order, the parties did proceed to the trial of an issue as to the title of the plaintiff to the goods and chattels seized exclusive of those specified in the said notice, and such issue was found for the plaintiff.

The plaintiff not having brought into Court the sum [557] mentioned in the interpleader order, the goods were sold and the proceeds paid into Court; and on the determination of the interpleader issue, the said proceeds were paid over to the plaintiff.

The learned Judge told the jury "that there was evidence to go to them against the defendant upon the issues on the plea of not guilty and the new assignment. That the defendant was not responsible for the acts of the sheriff, or his officers, unless something more occurred than putting the writ into the sheriff's hands; but his coming forward in the interpleader proceedings, and accepting and acting upon the interpleader issue, was evidence for the jury that he adopted the seizure by the sheriff of the goods which were the subject-matter of the interpleader issue, and thereby made himself liable in respect of those goods; for that when an execution creditor comes forward and claims the goods in an interpleader proceeding such as that given in evidence he thereby adopts the seizure of the sheriff and becomes a party to that issue, the seizure being for his benefit."

The counsel for the defendant excepted to the said direction, and contended that it was erroneous in point of law; and that there was no evidence to go to the jury as against the defendant in support of the issue on the plea of not guilty, or on the issue on the new assignment. And further, that the defendant making himself and becoming a party to the interpleader proceedings did not make him liable for the act of the sheriff in seizing the goods, nor was it any evidence to go to the jury of his liability in this action. The jury found a verdict for the plaintiff on all the issues except that on the fourth plea, with 200l. damages.

Quain now argued (a) for the plaintiff in error (the de-[558]-fendant below). The direction of the learned Judge was erroneous. *Wilson v. Tumman* (6 M. & G. 236) is an express authority that an execution creditor does not, by a subsequent ratification of the act of the sheriff, render himself liable as a wrongdoer. The sheriff did not act under the direction of the present defendant, but in obedience to the order of the Court.

The Court then called on

Kemplay, for the defendant in error (the plaintiff below). The ruling of the learned Judge was correct. *Wilson v. Tumman* cannot be supported, or at all events is distinguishable. It is conceded that, where a person commits a trespass in his own name and on his own account, another cannot ratify the act so as to render himself liable for it. Thus a person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use: *Wilson v. Barker* (4 B. & Adol. 614). But where a person assumes to act for another, though without any previous authority, if the latter adopt the act, that is equivalent to a prior command, and renders him liable for the consequences. Liability by ratification depends on whether the act was done for the use or benefit of the person who ratifies it: *Eastern Counties Railway Company v. Broom* (6 Exch. 314). [Williams, J. In that case the person who committed the trespass professed to act as the servant of the Company.] In Com. Dig. Trespass (C. 1), it is said that "trespass lies against him who afterwards assents to a trespass done for his use and benefit, though not privy at the time of it: [559] 4 Inst. 317." The law is stated in similar terms in Bac. Abrid. Trespass (G. 1). It is true that the sheriff is not the agent of the execution creditor, but he acts under his direction and for his benefit. If the execution debtor brought an action of trespass against the execution creditor, the latter must justify by pleading that he recovered a judgment and issued thereon a writ by which he directed the sheriff to levy. [Williams, J. If we were to hold that the execution creditor was liable in trespass as agent of the sheriff, he would be liable for the whole amount levied including the sheriff's poundage, which he has

(a) Before Wightman, J., Williams, J., Crompton, J., Willes, J., Byles, J., and Blackburn, J.

never touched.] In *Kelcey v. Minter* (1 Bing. N. C. 721) it was held that an execution creditor was liable for the act of the sheriff in selling the goods of an insolvent after his imprisonment. Tindal, C. J., there said, that "on general principles, where a thing is done through the procurement of another, the procurer is as much liable as the agent. The sheriff and his employer sail in the same boat." A sheriff is bound to obey the directions of the execution creditor, and if he proceeds with an execution after it is countermanded, he is liable in trespass: *Barker v. St. Quintin* (12 M. & W. 441). There Lord Abinger, C. B., said: "It is true that the sheriff is an officer of the Court, but the Court appoints him to do the plaintiff a service, and will not put him in motion unless at the instance of the plaintiff." In *Walker v. Hunter* (2 C. B. 324) the execution creditor, finding a claim made to the goods seized under the writ, directed the sheriff to withdraw, but he nevertheless remained in possession, and it was held that his act was one which the execution creditor might ratify, it having been done for his benefit. Where a writ of execution is set aside as void, both the execution creditor and his attorney are liable in trespass, for whoever [560] procures, commands, aids or assists in a trespass becomes a trespasser: *Parsons v. Loyd* (3 Wils. 341); *Barker v. Braham* (3 Wils. 368). A party who ratifies a wrongful act done in his name and for his benefit becomes as it were a trespasser by estoppel: *Bird v. Brown* (4 Exch. 786); *Buron v. Denman* (2 Exch. 167). There is no doubt that if an execution creditor accompanies the officer in levying the execution, or indemnifies the sheriff, he makes the act of the sheriff his own: *Menham v. Edmonson* (1 Bos. & P. 369); and it seems that the law is the same if the execution creditor receives the money levied: *Rush v. Baker* (2 Stra. 995). [Williams, J., referred to *Whitmore v. Greene* (13 M. & W. 104). Byles, J. According to your argument, in every case of interpleader in which the claimant succeeded, the execution creditor would be liable to an action.] In *Wilson v. Tumman*, the question did not arise under the Interpleader Act; and all that the defendant did was, when served with notice of action, to say that he considered he had a just claim to the goods.

WIGHTMAN, J. The question is whether the defendant is liable, as a wrongdoer, for the act of the sheriff in taking the plaintiff's goods. It appears by the evidence that the defendant, having recovered a judgment against one Inman, issued a writ of fieri facias which was placed in the hands of the sheriff. Under colour of that writ the sheriff seized the goods of the present plaintiff. The defendant did not interfere in any way with the execution, but merely caused the process to issue. The plaintiff claimed the goods, and an interpleader order was the result. Upon the interpleader summons being heard before a Judge, the defendant appeared [561] as execution creditor, and became a party to an issue. It is said that was such a ratification of the act of the sheriff as to make it the act of the defendant and render the sheriff his agent. *Wilson v. Tumman* (6 M. & G. 236) (which has not been disputed until the present case) is an authority that what the defendant did was not a ratification of the act of the sheriff. The Court there said: "If the defendant Tumman had directed the sheriff to take the goods of the present plaintiff, under a valid writ, requiring him to take the goods of another person than the defendant in the original action, such previous direction would undoubtedly have made him a trespasser, on the principle that all who procure a trespass to be done are trespassers themselves, and the sheriff would be supposed not to have taken the goods merely under the authority of the writ, but as the servant of the plaintiff. But where the sheriff acting under a valid writ, by the command of the Court and as the servant of the Court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action, ratifying and approving the taking, cannot, upon the distinction above taken, alter the character of the original taking, and make it a wrongful taking by the plaintiff in the original action." In *Whitmore v. Greene* (13 M. & W. 104) the goods of a debtor were seized by the sheriff under a writ of fi. fa., and sold after the execution creditor had notice of a prior act of bankruptcy, and it was held that he was not liable in trover. The Court there said: "In the cases cited at the bar, of *Menham v. Edmonson* (1 Bos. & P. 369), and *Rush v. Baker* (Buller's N. P. 41) the ground upon which it was held that the assignees could sue the execution creditor was, in the last case, that the defendant had given a bond; and in the former that he was present at the execu[562]-tion. But in the present case there has been no interference of any sort by the execution creditor; and therefore, though he may be liable to refund the money paid to him, we think he cannot be sued in trover as a

wrong doer." In this case, if the sheriff had sold the goods under colour of the writ, not under the interpleader order, and the proceeds had been paid over to the defendant, probably he might have been liable to return the money; but upon the principle laid down in *Wilson v. Tumman*, and not contradicted, but rather supported by *Whitmore v. Greene*, the defendant cannot be sued as a wrongdoer for an act of the sheriff which he never authorized. As the case of *Wilson v. Tumman* is a direct authority that a subsequent ratification cannot render the defendant liable, there must be a trial de novo.

Trial de novo.

MEMORANDUM.

In this vacation, John Robert Kenyon, Esq., of Lincoln's Inn, Thomas Southgate, Esq., of Lincoln's Inn, and Arthur Hobhouse, Esq., of Lincoln's Inn, were appointed Her Majesty's Counsel.

[563] EXCHEQUER REPORTS. MICHAELMAS TERM, 26 VICT.

THE ATTORNEY GENERAL v. WYNDHAM. Nov. 20, 1862.—A testator died in 1811 having devised lands to his nieces as tenants in common in fee, with a proviso, that if his nephew should transfer 10,000l. consols into the names of trustees for the benefit of the nieces the lands should enure to the use of his nephew. The nephew having, in the following year, exercised his option and transferred the consols: Held, that the defendant, the executor of the last surviving trustee, was liable to pay duty on the 10,000l. consols, at the rate of $2\frac{1}{2}$ per cent. as fixed by 48 Geo. 3, c. 149.

[S. C. 32 L. J. Ex. 1; 8 Jur. (N. S.) 1182; 11 W. R. 185; 7 L. T. 386.]

Information in equity by the Attorney General as follows:—

1. The object of this information is to obtain from the defendant, who is the legal personal representative of his late father, the Reverend John Heathcote Wyndham, deceased, payment of the duty owing to Her Majesty in respect of the legacy of 10,000l. Consolidated Bank Annuities, hereinafter mentioned.

2. Under the Act of Parliament, 45 Geo. 3, c. 28, a duty is payable to the use of Her Majesty upon all legacies, specific or pecuniary, or of any other description, above the amount or value of 20l., whether the same be charged upon or payable out of real or personal estate.

3. By section 4 of the same Act, a legacy is defined to be a "gift by any will or testamentary instrument of any person dying after the passing of this Act, which by virtue of any such will or testamentary instrument shall have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the [564] power to dispose of, whether the same shall be given by way of annuity or in any other form."

4. By section 5 of the same Act it is provided, in effect, that the duties on legacies charged upon or payable out of real estate, or out of monies to arise by the sale of real estate, shall be accounted for, answered, and paid by the trustee to whom the real estate shall be devised, or if there shall be no trustee, then by the person entitled to such real estate, subject to such legacy, or by the person or persons empowered or required to pay or satisfy any such legacy.

5. By the Act of Parliament, 48 Geo. 3, c. 149 (which, although the duties granted by it were repealed in 1815 by 55 Geo. 3, c. 184, is still in force with regard to arrears of duty which became payable between 10th October, 1808, and 31st August 1815), the rate of duty payable upon any legacy of the amount or value of 20l. or upwards, given by the will of any person dying after the 5th April, 1805, either out of his personal estate, or out of or charged upon his real estate, or out of any monies to arise from the sale, mortgage, or other disposition of his real estate, and which should be satisfied or discharged after the 10th October, 1808, to or for the benefit of a brother or sister, or any descendant of a brother or sister of the deceased, was fixed at 2l. 10s. per cent.

6. Under the provisions of certain statutes in that behalf, the collection and the management of the duty on legacies has become and is now vested in the Commissioners of Inland Revenue.

7. The Rev. Thomas Heathcote, formerly rector of Stone, in the county of Kent (hereinafter referred to as the testator), died in the year 1811, having made a will, dated the 22nd of July, 1809, which was duly executed and attested as was then by law required for the devise of real estate, and thereby, after giving various pecuniary legacies, in-[565]cluding one to his nephew, the said John Heathcote Wyndham, the testator gave all his freehold and copyhold lands, tenements, and hereditaments unto his three nieces, Henrietta, Charlotte, and Sophia Frances Wyndham, to hold the same (subject as to parts thereof to the life estate of the Countess of St. Vincent therein) unto his said nieces as tenants in common, and their respective heirs and assigns for ever, subject to a proviso that if any of them should marry, her interest should, from the day next before the day of her marriage, be suspended, and the rents of the said estates should thenceforth be enjoyed by such of them only as should not have been married until their respective marriage or death, to the intent that the whole rents should be enjoyed by such of them as should not marry until marriage or death, which should first happen; and that after all of them should be married, or the death of the survivor of them, which should first happen, the said freehold and copyhold estates should be held by his said three nieces, and their respective heirs and assigns, under the devise to them as tenants in common in fee simple, before contained: and the said will then contains a proviso in the following terms:—"Provided nevertheless, and I do hereby further declare and direct, that my said nephew, John Heathcote Wyndham, shall have the option of becoming the purchaser or beneficial proprietor or owner of the whole of my said freehold and copyhold estates, and the inheritance in fee simple thereof respectively, at the rate or price of 10,000l. 3l. per cent. Consolidated Annuities, transferable at the Bank of England; and therefore that upon my said nephew, John Heathcote Wyndham, investing the sum of 10,000l. of those annuities in the names of himself and of any other person or persons to be appointed in that behalf by my said nieces, or any two of them, or by the survivor of them, or in default of appointment by them or her, in [566] the names of himself and of any one or two other person or persons of his own appointment, then and from thenceforth the use hereinbefore limited to my said nieces, their heirs and assigns, in the said freehold manors, lands, hereditaments, and premises, and also in the said copyhold messuages, lands, hereditaments, and premises, shall absolutely cease and determine; and the same freehold manors, lands, hereditaments, and premises, and also the said copyhold messuages, lands, hereditaments, and premises, shall forthwith be and enure to the only absolute use of my said nephew, the said John Heathcote Wyndham, his heirs and assigns for ever, freed and discharged of and from all charges and incumbrances to be made or created by my said nieces, any or either of them, or any or either of their heirs and assigns; and also then and from thenceforth they, my said nieces, their heirs and assigns, shall on request, and at the costs and charges of my said nephew, John Heathcote Wyndham, his heirs and assigns, well and effectually convey all and singular my said freehold manors, lands, hereditaments, and premises, and surrender all and singular my said copyhold hereditaments and premises to the use of my said nephew, his heirs and assigns, or to the use of such person or persons, or for such estate or estates, as my said nephew, his heirs and assigns, shall direct, and the tenure of the said copyhold premises, and the rules of law and equity, will admit, freed and discharged from all charges and incumbrances to be done and committed by my said nieces, any or either of them, their heirs and assigns, in the meantime. And I declare that my said nephew, John Heathcote Wyndham, and such other person or persons, and their executors and administrators, shall thenceforth stand possessed of the said 10,000l. 3l. per cent. Consolidated Annuities, in trust for my said three nieces, in equal shares, and for their respective executors, administrators, and [567] assigns, but that during their lives, and the life of the survivor of them, the said trustees shall pay the whole of the annual dividends and proceeds thereof to such of my said nieces only as shall have remained and be unmarried, in the same manner as is hereinbefore directed with regard to the rents and annual profits of my said freehold and copyhold estates; and after the marriage of all of them, or the death of the survivor of them, which shall first happen, that the said trustees shall transfer the principal of the said 10,000l. 3l. per cent. Consolidated

Annuities to my said nieces and their respective executors, administrators, and assigns, in three equal shares." And the testator directed that in case he died before Lady St. Vincent, and his said nephew, John Heathcote Wyndham, chose to invest the 10,000*l.* consols before the death of Lady St. Vincent, then the said John Heathcote Wyndham was to retain the annual dividends of the said 10,000*l.* consols during Lady St. Vincent's life for his own use.

8. The testator left his said nephew, John Heathcote Wyndham, and his said three nieces in his will named respectively surviving him, and some time in the year 1812 his said nephew exercised the option given to him by the testator's will of purchasing his freehold and copyhold estates, and entered into the possession thereof accordingly, and he forthwith thereupon transferred the sum of 10,000*l.* consols into the names of himself and William Wyndham and George Wyndham, both now deceased, in trust for the testator's nieces, as directed by his will, and in satisfaction and discharge of the legacy of that amount thereby bequeathed to them, or for their benefit, as hereinbefore mentioned.

9. Under the circumstances hereinbefore stated, a duty, at the rate of 2*l.* 10*s.* per cent., upon the value of the said legacy or sum of 10,000*l.* consols, became, forthwith upon [568] the transfer thereof into the names of the said trustees hereinbefore mentioned, payable to the use of her Majesty, but no part of such duty has hitherto been paid.

10. The said John Heathcote Wyndham survived both of his co-trustees, and died some time since, leaving the above named defendant, his eldest son and heir at law, and also the executor appointed by his will, him surviving. The defendant, as such executor, has proved his said father's will in her Majesty's Court of Probate, and has thereby become and now is sole trustee of the said legacy, which is at present held by him upon the trusts declared thereof by the testator's will, as hereinbefore stated, or such of them as are still subsisting.

11. As soon as the Commissioners of Inland Revenue discovered (which they did not till very recently) the gift of the said legacy, they caused application to be made to the defendant for payment of the duty owing in respect thereof; but the defendant refuses to comply with such application, alleging that no such duty is payable.

The information prayed (*inter alia*) a declaration that duty at the rate of 2*l.* 10*s.* was payable on the said sum of 10,000*l.* consols.

The defendant's answer was, so far as is material, an admission of the facts stated in the information.

The Attorney General (with him the Solicitor General, Locke and Hanson), for the Crown. The question is, whether the sum of 10,000*l.* consols invested by the nephew of the testator, for the benefit of his nieces, in pursuance of the option of purchase contained in his will, is liable to legacy duty. The last surviving niece died recently, and the Commissioners of Inland Revenue then discovered the gift of this legacy. As to the rate of duty, no question arises. By the 48 Geo. 3, c. 149, *sch.* [569] *d.* *part* 3, title "Legacies and Successions" (which is still in force with regard to arrears of duty which became payable between the 10th of October, 1808, and the 31st August, 1815), the rate of duty payable upon "every legacy, specific, or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th of April, 1805" (as this testator did), "either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 10th of October, 1808," to or for the benefit of a brother or sister of the deceased or any of their descendants, is fixed at 2*l.* 10*s.* per cent. This 10,000*l.* consols, it is submitted, is clearly such a legacy. Either it is charged on the testator's real estate, or it is given out of monies to arise by the sale or other disposition of his real estate. There is a sale here, with only this peculiarity, that it is to a designated individual, and at a fixed price. A conveyance is unnecessary, since, upon the consols being invested, the will directs that the land shall enure to the use of the nephew. At any rate, the words "other disposition" are sufficiently comprehensive. Further, the Court will, even in the construction of a Revenue Act, give effect to the real substance of the transaction, and if it can thus be brought within the enactment, will not adhere strictly to a mere literal interpreta-

tion. Several authorities, decided upon a similar clause of another Revenue Act, support this proposition. The question there turned upon the words in the 55 Geo. 3, c. 184, sched., part 3, tit. "Legacies," by which legacy duty is made payable upon "monies to arise from the sale, mortgage, or other [570] disposition of any real or heritable estate directed to be sold, &c." Upon the construction of that enactment it was held, in *The Attorney General v. Simcox* (1 Exch. 749) and *The Attorney General v. Mangles* (5 M. & W. 120), overruling *In re Evans* (2 C. M. & R. 206), that where the will gave to trustees a discretion as to selling, and they sold in exercise of that discretion, legacy duty attached. In *Williamson v. The Advocate General* (10 Cl. & F. 1) it was held that the duty attached, where a direction to sell could be gathered from the whole language of the will though there was in terms no such direction, and although the direction was never acted upon. These authorities shew that the Court, in construing Revenue Acts, will adopt a reasonable construction, and not be bound by the bare letter. But, independently of this line of argument, the actual words used by the Legislature are amply sufficient to include this case.

The Court then called upon

Bovill and Wickens, for the defendant. The authorities which have been cited fail to support the proposition contended for, namely, that a tax can be imposed on the subject if the case be brought within the spirit though not within the letter of the enactment. Those were not decisions enlarging the language of statutes, but upon the construction of wills, and the construction of this will is not in dispute. *The Advocate General v. Smith* (1 Macq. H. L. Cas. 760) is, however, an express authority, that under the statute which has been referred to (55 Geo. 3, c. 184), legacy duty is not chargeable upon real estate, except where its conversion into personalty takes place under some imperative trust or direction to that [571] effect; and Lord St. Leonards there said that *In re Evans* (2 C. M. & R. 206) is not overruled by *The Attorney General v. Mangles* (5 M. & W. 120). The case for the defendant is a negative one; it is, that the Crown has failed to find words in either the 45 Geo. 3, c. 28, or the 48 Geo. 3, c. 149, which include the present case. This is not a legacy out of the testator's real or personal estate, neither is it charged on his real estate, nor is it out of monies to arise from the sale, mortgage, or other disposition of his real estate. First, it is not a legacy out of the testator's real or personal estate. [Bramwell, B. If it is given by the will and not out of the testator's personal estate; then does it not follow that it must be given out of his real estate?] No; for example, where property is given up under the doctrine of election, it would not be so. In *Laurie v. Clutton* (15 Beav. 131) it was decided, and indeed admitted upon the part of the Crown, that legacy duty is not payable on the value of personal estate given up by one legatee to another under that doctrine. Secondly, this is not a charge upon the testator's real estate. All charges have this common feature, that there is a right to have the money raised out of the estate, vested in some person not the owner of the estate, and which that person may enforce against the estate, in whosoever's hands it may be. The question is clearly dealt with by the Master of the Rolls in *Laurie v. Clutton* (15 Beav. 131), with the view of ascertaining whether the circumstances of that case created a charge. Here the estate was not charged either in the hands of the nieces or of the nephew. There never was a moment when any person, not the owner of the estate, had the right to have the 10,000l. consols raised out of the estate by a sale. Thirdly, there is here neither a sale nor a mortgage, nor other disposition of the real estate. [572] A sale requires a vendor and a conveyance. Here there is neither, nor is it necessary that there should be. There is simply an executory devise to the nephew, to take effect upon his investing the consols for the benefit of the nieces. The words of the will, "that my nephew shall have the option of becoming the purchaser, or beneficial proprietor, or owner, &c.," cannot make that which was no sale, a "sale" within the meaning of the Act. The object of directing the nieces to convey, is to render it unnecessary to prove the transaction. When the obligation arises, there is, in fact, nothing for them to convey. It is not suggested that there is any mortgage. Lastly, as the words "sale" and "mortgage" point to a dealing with the estate after the testator's death, the words "other disposition" must be similarly construed. The cutting and selling timber would be an instance of such disposition. It must be a disposition ejusdem generis with the sale or mortgage. The present case was not contemplated by the legislature, and the Crown has failed to find language sufficiently comprehensive to include it.

The Attorney General was not called upon to reply.

POLLOCK, C. B. I am of opinion that the Crown is entitled to the payment of the duty sought by this information. The testator was possessed of freehold and copyhold estates, which he devised to his nieces, subject to a provision, that his nephew should have the option of becoming "the purchaser, or beneficial proprietor or owner of them at the rate or price of 10,000*l.* 3*l.* per cent. Consolidated Annuities; and, therefore, that, upon his investing the sum of 10,000*l.* of those annuities in the names of himself and other trustees, then and from thenceforth the use thereinbefore limited to the testator's said nieces should absolutely [573] cease and determine, and the same lands should be and enure to the only absolute use of his said nephew." The nephew transferred 10,000*l.* consols into the names of himself and certain other trustees, and entered into possession of the estate. The nieces received the dividends, and died one after another, the last surviving niece having died very lately. The Crown now claims legacy duty upon this gift of 10,000*l.* consols, and I am of opinion that the duty is payable.

I quite assent to the proposition that no person is liable equitably to the payment of a duty. The claim of the Crown cannot be sustained, unless it is made out with clearness, and so as to admit of no reasonable doubt. But we ought not to look at mere words, but at what is the substance; and the effect of this clause in the will is either to sell the estate to the nephew for 10,000*l.* consols, with a stipulation that the money shall first be paid, by being invested in the names of trustees, or else, it is such a "disposition" as produced 10,000*l.* consols, which the testator was desirous of bequeathing to his nieces. The expression "other disposition of his real estate" cannot, in my judgment, be read in the narrow way which the defendant's counsel have suggested, viz., that because a "sale" or "mortgage" must be made by some person after the death of the testator, the words "other disposition" cannot mean a disposition made by the will itself. I cannot see any ground for such a construction, especially when in this case the testator did dispose of his real estate so as to produce 10,000*l.* consols to be divided among his nieces. If the construction contended for be adopted, any amount of personal property might be left by will without being subject to legacy duty. No one, who looks at what is expressed in the will itself, and bears in mind this possible mischief, [574] can deny that this was a "disposition" by the testator, which was calculated to raise the money. It is true there is no charge upon the estate, because the consols are to be actually invested before the estate vests in the nephew. It is said that it is an executory devise; but that does not alter the substance of the transaction. It is a "disposition" within the express words of the section, which are, "either out of his personal estate, or out of, or charged upon his real estate, or out of any monies to arise from the sale, mortgage, or other disposition of his real estate." The monies arise from a "disposition" by the testator's will, which gives the real estate to his nephew, upon the condition of his making this payment.

On these grounds, I think there can be no doubt as to the construction of the statute, and that the case falls both within its meaning and its language. I am therefore of opinion that the Crown is entitled to our judgment.

BRAMWELL, B. I am of the same opinion. Upon the spirit of the Act, the Crown ought clearly to succeed. The intention of the legislature appears to have been, to impose a duty on legacies of personalty—to except real estate bequeathed to a legatee, but that, whenever the legatee got money, he was to pay the duty. We cannot however construe acts of parliament of this description, by the mere spirit or intention of the legislature, unless we can find words sufficiently comprehensive to carry it into effect. I incline to the opinion that there is here no "sale" of property. A sale supposes a seller, and also, I think, a conveyance; here there is neither; nor is it necessary there should be. I also incline to think that this money is not "charged" upon the estate, because there never was a time when the estate was to be subject to any charge. The consideration for its acqui-[575]-tion by the testator's nephew was to be paid by him before he got the estate. But the framers of the Act have, as if advisedly, made use of the most comprehensive language. The words of the Act are, a legacy given by a will "either out of personal estate, or out of or charged upon real estate, or out of any monies to arise from the sale, mortgage, or other disposition of real estate." This language supposes that there may be some disposition of an estate, out of which monies may arise, which is neither a sale nor a mortgage; and even that

money may arise out of an estate where there has been no "disposition," for the first words are, "out of the personal estate, or out of, or charged upon the real estate." I think, therefore, that the words are sufficiently comprehensive and general to include this case. In a popular sense, the words are equally plain; for no one, although not conversant with the law, could entertain a doubt, that the testator's nieces got their money out of a disposition of his real estate. I forbear from discussing the authorities which have been cited, as they have no bearing on the point which we are deciding. The legislature has made use of language which is large enough to include this case, and I therefore think the Crown is entitled to our judgment.

CHANNELL, B. I am of the same opinion, and upon the same grounds.

Judgment for the Crown.

[576] *KELCEY v. STUPPLES*. Nov. 25, 1862.—Upon the reference, by Judge's order, of an action for several breaches of a farming agreement, after plea, and before issue joined, it was ordered that the costs of the reference should abide the event. The arbitrators found, as to one breach, that the plaintiff had sustained damages to the extent of 16s., and on all other points substantially in the defendant's favour. Held, that the plaintiff was not entitled to any costs of the reference: as the event was not in his favour, and, there being no issues, the costs were not apportionable.

[S. C. 32 L. J. Ex. 6; 9 Jur. (N. S.) 256; 11 W. R. 121; 7 L. T. 389; 1 N. R. 104, Distinguished, *Parsons v. Tinling*, 1877, 2 C. P. D. 122.]

This was an action by a landlord against his tenant, alleging various breaches of the terms upon which he held his farm.

The declaration stated that the defendant became and was tenant to the plaintiff of a farm, messuage, buildings, and land, upon the terms that the defendant should pay for the labour required for thatching, and for the carriage of all building materials required for the said premises, and for the labour expended upon all repairs required to be done to the said premises; that the defendant should farm the said land during the said tenancy in a husbandlike manner according to the custom of the country where the same was situate; that the defendant should leave at the end of his said tenancy seven acres of good clean summer fallow, or make a proper allowance for the same; that no fodder, hay, or straw should be carried off the said farm, but should be fed out upon the said farm: that in case the defendant should sell off the said farm any hay or straw, clover, sanfoin, or any other green crop, without the consent in writing of the plaintiff, the defendant should pay to the plaintiff the sum of 5l. for every ton so sold; and that the defendant at the time of his leaving the said farm, should leave all the manure on the said farm, either in the yard of the said farm or in mixens, on being paid for the cartage of the same, according to custom. Averment: that all conditions precedent had been performed by the plaintiff. Breaches: that the defendant had not paid for the labour required for thatching, nor for the carriage of all building materials required for the said premises, nor for the labour expended upon all [577] repairs required to be done to the said premises; and that the defendant did not farm the said land during the said tenancy in a husbandlike manner according to the said custom; and that the defendant did not leave at the end of the said tenancy seven acres of good clean summer fallow, nor make a proper or any allowance for the same; and that fodder, hay and straw were carried off the said farm by the defendant, and were not fed out on the said farm; and that the defendant did sell off the said farm hay, straw, clover, sanfoin, and other green crops, without the consent in writing of the plaintiff, and had not paid to the plaintiff the sum of 5l. for every ton so sold, or any sum of money whatsoever; and that the defendant, at the time of his leaving the said farm, did not leave all the manure on the said farm, either in the yard of the said farm or in mixens, on being paid for the cartage of the same according to custom; and the plaintiff claimed 100l.

Pleas. First, to so much of the declaration as charged that fodder, hay and straw were carried off the said farm by the defendant, and were not fed out on the said farm: A traverse.

Second, to so much of the declaration as alleged that the defendant sold off the said farm hay, straw, clover, sanfoin, and other green crops: A traverse.

Third, to the residue of the declaration: Payment of 10l. into Court.

The cause was by Judge's order and consent referred, without issue being joined, to two lay arbitrators. The order of reference contained no direction as to the costs of the cause, but directed that the costs of the reference should abide the event.

The arbitrators' award (so far as material) was as follows:—"We award and find that the defendant has paid into Court the sum of 10l., and that the plaintiff has accepted [578] the same in full satisfaction and discharge of all causes and rights of action in the declaration mentioned, not hereinafter specified. And we further award and adjudge that the land in the said declaration mentioned has been farmed by the defendant during his tenancy fairly, and in a husbandlike manner, according to the custom of the country, and for the benefit and advantage of the estate of the plaintiff. And we further award and adjudge that the plaintiff has sustained damages by reason of the alleged breach of covenant on the part of the defendant in removing straw from the said farm, in the said declaration mentioned, and in not feeding the same upon the said farm, in the sum of 16s., which sum we award and direct the defendant to pay to the plaintiff. And we further award and adjudge that the plaintiff has sustained no damages by reason of the breach of covenant on the part of the defendant, in the said declaration alleged, in removing fodder or hay from the said farm, and in not feeding the same upon the said farm. And we further award and adjudge that the plaintiff has sustained no damages by reason of the breach of covenant on the part of the defendant, in the said declaration alleged, in selling off the said farm hay, straw, clover, sanfoin, and other green crops, without the consent and payment therein mentioned. And we further award and adjudge that the plaintiff has sustained no damages by reason of the breach of covenant on the part of the defendant, in the said declaration alleged, at the time of his leaving the said farm, in not leaving all the manure on the said farm, either in the yard of the said farm or in mixens, on being paid for the cartage of the same according to custom."

The plaintiff took up the award, and paid the arbitrators' fees. He then made out his bill of costs, and gave the defendant notice of taxation, and both parties attended [579] before the Master; but the Master declined to tax the bill. The order of reference had been made a rule of Court.

Francis had obtained a rule to shew cause why the Master should not tax the plaintiff his costs of the reference, upon the ground that the event was in the plaintiff's favour, citing *Jones v. Jones* (7 C. B. N. S. 832) and *Wigens v. Cook* (6 C. B. N. S. 784).

Hayes, Serjt., shewed cause. The event of the reference is not in the plaintiff's favour: the substantial finding is for the defendant. The declaration contains numerous breaches, and several distinct questions were in difference in the action; except on one minor point, on which 16s. was awarded to the plaintiff, the finding was in favour of the defendant. There can be no costs of particular issues, for issue was not joined, nor are any issues found by the arbitrators. The question is, therefore, divested of the technicalities of issues, and is simply in whose favour is the event of the reference. In *Russell on Awards*, p. 380, 2nd ed., the general rule is thus stated: "When, on a reference of a cause and all matters in difference, the submission provides that the costs of the cause and of the reference are to abide the event of the award, that, as a general rule, it is said (though some cases hold differently), will be construed to mean the general event of the award, and that each party will have to pay his own costs, unless everything be decided in favour of one party." Thus, in *Boodle v. Davies* (3 A. & E. 200), on a reference of a cause and all matters in difference, the costs of the action, reference and award were to abide the event of the award, and though the action was trespass, and the arbitrator found that the trespasses had been committed, as the award adjudged some matters in favour of each party the [580] Court held that the plaintiff was not entitled to the costs. Lord Denman, C. J., there said: "As far as regards costs we think the defendant is right. As the award is drawn, he may have gained much more by it than the plaintiff; and the agreement of reference makes no provision for costs in the event of an award like the present." So, in *Yates v. Knight* (2 Bing. N. C. 277), the costs of the suit, reference and award were to abide the event of the award, and the arbitrator directed that the defendant should deliver certain goods to the plaintiff, and the plaintiff pay a sum of money to the defendant, upon which payment proceedings in the suit should cease, and each give the other a general release, and it was held that the event was that each party should pay his own costs. In the cases relied on by the other side, the direction was, that the costs of the cause should abide the event. The question, therefore, was as

to, the event of the cause and not of the reference. Independently of that distinction, *Jones v. Jones* (7 C. B. N. S. 832) does not apply. There, on a reference of a cause before trial, the arbitrator found for the plaintiff on the issue of never indebted, and for the defendant on a set-off, and awarded the balance of 3l. to the plaintiff. The only question raised was whether the 3l. could be considered as recovered in the action within the meaning of the County Court Act, 13 & 14 Vict. c. 61. Here, if due weight be given to the fact that the cause is referred in such a way as to be dis-embarrassed from all technicalities of issues, the rule must prevail, that neither party is entitled to costs unless he be substantially successful.

Francis, in support of the rule. Where the plaintiff in an action recovers any sum however small, and however much of his case has been successfully answered, he is entitled to the general costs of the cause; and those general costs include costs arising from the investigation of the [581] defendant's case. The authorities establish that the same rule applies where the action is referred, and the distinction taken on the other side between costs of the cause and costs of the reference is not well founded. The cases of *Boodle v. Davies* (3 A. & E. 200), and *Yates v. Knight* (2 Bing. N. C. 277) are inapplicable to the present case. In neither of those cases was it possible for the Court to determine in whose favour the event was, for there was a direction by the arbitrator that something should be done by each of the litigant parties. In *Griffiths v. Thomas* (4 D. & L. 109), where all matters in difference in a cause were referred by Judge's order, the costs of the suit to abide the event of the award, and the arbitrator assessed the plaintiff's damages at sixpence, it was held that the plaintiff was entitled to costs. Coleridge, J., in delivering judgment, there said: "It seems to me that the true meaning of the submission is what its words import, that costs, i.e. the payment of costs, should follow the event—i.e. the legal event of the award—that he in whose favour the decision was should be paid by the other party the costs of the suit." [Bramwell, B. In that case all the issues were found for the plaintiff.] In *Jones v. Jones* (7 C. B. N. S. 832) no such distinction was made as is here attempted between costs of the cause and costs of the reference. In that case Byles, J., was of opinion that the plaintiff was entitled to the costs of the reference and award, though not to the costs of the cause. [Channell, B. There the event was clearly in the plaintiff's favour. The only question raised was whether the amount awarded entitled the plaintiff to costs. Pollock, C. B. The set-off merely entitled the defendant to deduct what he proved under it.] In *Wigens v. Cook* (6 C. B. N. S. 784) the costs of the cause were to abide the event, and the costs of the [582] reference to be in the discretion of the arbitrator. All the issues but one were found for the defendant, and on that a farthing for the plaintiff, on a count in trover. The arbitrator gave the defendant the costs of the reference and did not certify; but the Court held that the plaintiff was entitled to the costs of the cause. Cockburn, C. J., in giving judgment, said: "The agreement of the parties is that the costs of the cause shall abide the event of the award, and the event is in favour of the plaintiff. The consequence must necessarily follow." [Bramwell, B. The finding here is not capable of being divided into issues.] It is a finding in the plaintiff's favour. The defendant only traversed two breaches, and paid money into Court to the residue of the declaration. As to one breach, the finding is for the plaintiff, as to the other, that the plaintiff has sustained no damage by the alleged breach. The event of the award is, that the defendant is to pay and the plaintiff to receive.

POLLOCK, C. B. I am of opinion that the Master acted correctly in refusing to tax the plaintiff's costs, and that this rule should be discharged. The error in the argument of the plaintiff's counsel consists in his applying, to a reference of an action before issue is joined, the same doctrines which are applicable where a cause has gone down to trial and there has been a verdict upon the issues joined on the pleadings. In such a case, the plaintiff and defendant are each entitled to the costs of all the issues on which they respectively succeed. If, on the whole result, the plaintiff has so far succeeded upon a single issue, that a complete answer is not established to all the causes of action in the declaration, the plaintiff is entitled to the general costs of the cause. Upon taxation before the Master, the circumstances of the case are gone into, and complete justice can be done. But where a cause is referred, as here, before [583] issue has been joined, and it is agreed between the parties that the costs of the reference shall abide the event, no such rule can be applied. The party who succeeds is entitled to the costs. Here, if it were necessary for us to decide whether the

plaintiff or the defendant has succeeded, I should say the defendant has substantially succeeded much more than the plaintiff. It would, I think, be neither in accordance with good sense nor with justice, to hold, that where, out of a number of questions in difference, one unimportant point is found in favour of the plaintiff, and every other matter in favour of the defendant, that the event of the reference is in the plaintiff's favour. For these reasons I am of opinion that this rule should be discharged.

BRAMWELL, B. I also think the Master was right, and I base my opinion upon the grounds which have been stated by the Lord Chief Baron. I was at first struck by the argument, that the arbitrator has found something in favour of the plaintiff and nothing against him; but the answer is, that, if the one question which was found in the plaintiff's favour had not been so found, the finding would on every point be for the defendant. It cannot be said that this is a finding more in favour of the plaintiff, than of the defendant. Where, indeed, an action is pending, in which issue has been joined, and judgment can be signed, so that particular costs can be ascribed to particular issues, if the costs are to abide the event, the plaintiff obtains the costs of the issues on which he succeeds, and so does the defendant. Thus it is correctly stated in Gray on Costs, p. 416, that "where the costs abide the event, each party is in general entitled to the costs of issues found for him." But, in the present case, neither can judgment be signed, nor are any issues found; and if the arbitrators were requested to find the issues, they would not be bound to do so. We must look then at the substantial event, and in [584] my judgment there is no such event, as will entitle the plaintiff to the costs of the reference; and there can be no taxation of particular issues, because the costs are not apportionable. I think, therefore, that this rule should be discharged.

CHANNELL, B., concurred.

Rule discharged.

FREDERICKS, *Appellant*; PAYNE, *Respondent*. Nov. 12, 1862.—A booth theatre, which is taken to pieces, and carried from place to place for theatrical representations, is a "place" within the meaning of the 11th section of the 6 & 7 Vict. c. 68, and a person causing a stage play to be acted therein for hire, is liable to the penalty imposed by that section, if it be not licensed, and not a patent theatre.

[S. C. 32 L. J. M. C. 14; 8 Jur. (N. S.) 1109; 11 W. R. 36; 7 L. T. 329.]

Case stated by a Lambeth Police Magistrate under the 20 & 21 Vict. c. 43:—

This was a proceeding under the Act for regulating theatres, 6 & 7 Vict. c. 68. The appellant was summoned at the instance of the Commissioners of Police, under the 11th section of that Act, "for that he did, on the 27th day of May, 1862, at Camberwell, in the county of Surrey, unlawfully, for hire, cause, permit and suffer to be acted and presented a certain stage play, in a place there situate, not being a patent theatre, or duly licensed as a theatre."

On the hearing it was proved that the appellant was the manager of a booth or temporary or portable theatre, hereafter described, and the manager of a company of strolling players, and that, on the day mentioned in the information, he did, for hire, cause, permit and suffer to be acted and presented a stage play in the said booth, and that the said booth was not a patent theatre, or licensed as a theatre. At the time of the alleged offence the said booth was on a piece of private ground, which had been rented by one Abraham Fox, for the purpose of holding thereon a pleasure fair, not legal or licensed in any way.

The booth had painted on it these words, "Olympic Theatre," and consisted of two caravans or waggons, which [585] were drawn from place to place by horses, and when the said two caravans or waggons were joined together, and covered with canvass supported by poles resting on the ground, they formed a temporary booth with a stage therein, and capable of holding about 800 persons. The said caravans or waggons rested on wheels, and could be moved away with the poles, canvass, &c., in an hour or two, without any difficulty, and it was the custom of the proprietor of the said caravans or waggons to move them about frequently from place to place, for the purpose of converting them into a booth.

It was contended, on behalf of the appellant, that he had committed no offence, because the said booth was not a "place" within the meaning of the 6 & 7 Vict.

c. 68, s. 11; that the 11th section must be read in conjunction with the 2nd section of the Act; and that, as it was not an offence under section 2 to keep such booth for the public performance of stage plays without a license (*Darys v. Douglas* (4 H. & N. 180)), it was not an offence to permit a stage play to be acted therein, and that "place" in section 11 means such a "house or place of public resort" as requires a license under section 2.

I was of opinion that the said booth was a "place" within the meaning of section 11, and therefore convicted the appellant of the offence charged in the information, and adjudged him to forfeit and pay the sum of 3l., with 2s. costs. The ground of my decision was that the word "place" in section 11 is used generally, without any such restriction as was contended for on the part of the appellant. That the only exception was that contained in section 23 of the Act, namely, that of "a theatrical representation in any booth or show which, by the justices of the peace, or other persons having authority in that behalf, shall be allowed in any lawful fair," which this was not.

[586] The question of law submitted is, whether or not the said booth before described is a "place" within the meaning of the 6 & 7 Vict. c. 68, s. 11. If the Court shall answer this question in the affirmative, the said conviction to be affirmed; if in the negative, the conviction to be quashed.

Field, for the respondent. The question turns on the construction of the Act for regulating theatres, 6 & 7 Vict. c. 58.(a) By section 2 a penalty is imposed on every person who shall, without license, have or keep any house or other place of public resort, for the public performance of stage plays. By section 11 a penalty is imposed on [587] every person who for hire shall act or cause, permit, or suffer to be acted, any part in any stage play, in any place not being a patent theatre, or duly licensed as a theatre. By section 16, whenever money is taken for the admission of any person to see any stage play, "every actor therein shall be deemed to be acting for hire." The 23rd section defines the meaning of the word "stage play," and provides that the Act shall not apply to any theatrical representation in any booth or show which shall be allowed by justices in any lawful fair. The defendant, by acting in

(a) The following were the sections to which reference was principally made in the arguments and judgment:—

Section 2. "That, except as aforesaid, it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain, for the public performance of stage plays, without authority by virtue of letters patent from her Majesty, her heirs and successors, or predecessors, or without licence from the Lord Chamberlain of her Majesty's Household for the time being, or from the justices of the peace, as hereinafter provided; and every person who shall offend against this enactment shall be liable to forfeit such sum as shall be awarded by the Court in which, or the justices by whom he shall be convicted, not exceeding 20l. for every day on which such house or place shall have been so kept open by him for the purpose aforesaid, without legal authority."

Section 11. "That every person who, for hire, shall act, or present, or cause, permit, or suffer to be acted or presented, any part in any stage play, in any place, not being a patent theatre or duly licensed as a theatre, shall forfeit such sum as shall be awarded by the Court in which, or the justices by whom he shall be convicted, not exceeding 10l. for every day on which he shall so offend."

Section 16. "That in every case in which any money or other reward shall be taken or charged directly or indirectly, or in which the purchase of any article is made a condition for the admission of any person into any theatre to see any stage play, and also in every case in which any stage play shall be acted or presented in any house, room, or place in which distilled or fermented exciseable liquor shall be sold, every actor therein shall be deemed to be acting for hire."

Section 23. "That in this Act the word 'stage play' shall be taken to include every tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof: provided always, that nothing herein contained shall be construed to apply to any theatrical representation in any booth or show which by the justices of the peace, or other persons having authority in that behalf, shall be allowed in any lawful fair, feast, or customary meeting of the like kind."

this booth, acted in a "place not being a patent theatre, or duly licensed as a theatre," and therefore incurred a penalty under the 11th section. *Davys v. Douglas* (4 H. & N. 180) only decided that a booth theatre, which is taken to pieces and carried from place to place for theatrical performances, is not "a house or other place of public resort for the public performance of stage plays," within the meaning of the 2nd section. In *Fredericks, Appt., Howie, Resp.* (ante, p. 381), the question arose upon the Metropolitan Police Act, 2 & 3 Vict. c. 47, and it was held that a booth theatre was not a "tenement," within the meaning of the 46th section of that Act.

Poland, for the appellant. This booth is not a "place" within the meaning of the 6 & 7 Vict. c. 68, s. 11. If the word be read without any limitation, an actor engaged at a private house, or even amateur performers for a charity, if money were taken for admittance, would be liable to the penalty imposed by this section. The word "place" must necessarily be read with some addition: thus it may either [588] be read as "place requiring a license," or "such place," having reference to the same word in the 2nd section. It is argued that, by the 16th section, "acting for hire" means acting a stage play in any place where money is taken for admission to see it. But that is not so. To prevent an evasion of the Act that section facilitates the proof of "acting for hire." "Hire," as defined by Johnson, is "wages paid for service." The paid actor at a private house would be an "actor for hire" within that definition. The Act seems not to have contemplated a license being granted to a booth of this description. It is very doubtful whether the magistrates have power to grant it. The 2nd section prohibits, under a penalty, the "having or keeping any house or other place of public resort" for the performance of stage plays without letters patent or a license; and in *Davys v. Douglas* (4 H. & N. 180) it was expressly decided that a person who keeps a booth-theatre such as this is not liable to a penalty under that section. The language of the 5th section clearly contemplates the granting of licenses only to places that are fixed and permanent, and not to a mere temporary erection. If, in such a case, there be any power to grant a license, by that section, it must be taken out in every jurisdiction into which the booth is carried. In sects. 6, 7, 9 and 17, the subject for a license is styled a "theatre." The proviso in the 23rd section, from which, at first sight, an inference might be drawn unfavourable to the appellant, only applies to those descriptions of booths or shows which would be "places of public resort," within sect. 2, and, when not within the proviso, require a license. An enactment, by which it is no offence to keep a booth-theatre, can hardly be construed to impose a penalty on anyone who acts in it for hire.

Field, in reply. *Davys v. Douglas* was not a decision on [589] the language of the 11th section, but of the 2nd, and therefore no authority in favour of the appellant. He was then stopped by the Court.

POLLOCK, C. B. We are all of opinion that the decision of the magistrate may be supported. The case is brought within the express words of the 11th section of the Act. [His lordship read the section.] This is neither a patent theatre, nor duly licensed as a theatre. A minute examination of the other sections is unnecessary, since the words of this section are plain and free from doubt.

BRAMWELL, B. I am of the same opinion. The words of the 11th section, if they are to be read in their literal sense, certainly include this case. The appellant has acted for hire a part in a stage play in a "place" which is not a patent theatre, nor duly licensed as a theatre. It is contended, however, that the word "place" means a "place which requires a license." The introduction of words into an act of parliament is open to serious objections, and should only be resorted to for the most cogent reasons, so as to avoid a repugnancy of construction, or something which is opposed to good sense. But here it would be opposed to good sense to introduce any words, since it would interfere with the very object which the legislature had in view, viz. to prohibit unlicensed play acting. By the 2nd section it is provided, that no person "shall have or keep any house or other place of public resort, for the public performance of stage plays," without letters patent or a license; and a penalty is imposed upon any one who shall keep open any such house or place for that purpose. That is an express prohibition against keeping such a place, and, in addition, a penalty is imposed on the person who keeps it. But that alone would not be sufficient. If the [590] statute had stopped there, any person might act at a place not so kept, without becoming liable to any penalty. Thus, a band of strolling players, acting in barns, and similar places not kept for the purpose, might cause the mischief which it

was the object of the legislature to provide against. But the 11th section prohibits the acting for hire in all places, except those that are licensed, whether they be kept for the public performance of stage plays or not, and so forms a necessary complement to the 2nd section. This view is also confirmed by the proviso in the 23rd section. [His lordship read the proviso.] It seems a legitimate inference that booths and shows in a fair, if not excepted by the terms of that proviso, are within the scope of the 11th section. Now, the only reason which is urged for introducing any words is, that if the 11th section applies to all persons who act for hire in any place that is not licensed, then, if a private gentleman were to engage an actor to take part in a play at his own house, that actor would be liable. That result is, I think, attended with less inconvenience than would arise, as I have pointed out, from the proposed construction. But it is by no means certain that it would be so. The 16th section points out in what cases an actor shall be deemed to be acting for hire, and would seem to shew that the hire, which the Act contemplates as a necessary constituent of the offence, must be a hire received from the spectators. On that point, however, it is unnecessary to express any opinion, since, for the reasons I have given, it seems to me that this conviction should be affirmed.

CHANNELL, B. I also think that this conviction ought to be affirmed. The case expressly finds that the appellant caused a stage play to be acted for hire. On that point, therefore, no question arises. The 23rd section has been referred to; but as the facts of this case do not bring it [591] within the proviso contained in that section, it can only be of use in assisting us to ascertain the true meaning of the 11th section. Unless, therefore, the word "place" in the 11th section must, by reference to the 2nd and 23rd sections, of necessity be read with some addition, the appellant was rightly convicted. I am of opinion that there is no such necessity. There is nothing in either of these sections to require it; nor is the 2nd section, when rightly interpreted, in any way inconsistent with the 11th section. I therefore agree with the other members of the Court that our judgment should be for the respondent.

Conviction affirmed.

BRAITHWAITE v. MARRIOTT. Nov. 25, 1862.—A sheriff is not entitled to deduct the expenses of advertising a sale by public auction of the execution debtor's effects, seized under a writ of *fi. fa.*, although the debt or damages exceed 50*l.*, and the 24 & 25 Vict. c. 154, s. 74, renders it imperative on the sheriff in such case to advertise and sell by auction.

[S. C. 32 L. J. Ex. 24; 9 Jur. (N. S.) 26; 11 W. R. 93; 7 L. T. 363.]

Gates had obtained a rule calling on the sheriff of Surrey to shew cause why he should not refund to the plaintiff the sum of 15*s.*, the excess overcharged by him upon the levy under a writ of *fi. fa.*, and on the sheriff's officer to shew cause why a writ of attachment should not issue against him for his contempt in demanding and taking from the plaintiff such excess contrary to the 1 Vict. c. 55.

It appeared from the plaintiff's affidavits that the writ was indorsed to levy 185*l.*; that the sheriff sold by public auction, and the proceeds of the sale amounted only to 68*l.*, from which the sheriff claimed to deduct, among other items, 15*s.* which had been paid for three advertisements of the sale. Notice had been given to the sheriff that the legality of this deduction would be contested.

Abbott now shewed cause. The 24 & 25 Vict. c. 134, s. 74, enacts, "that wherever the goods and chattels of a debtor are sold under an execution upon any judgment [592] recovered in any action or suit brought for the recovery of a debt, money demand, or damages, against any debtor, exceeding 50*l.*, such goods and chattels shall in all cases, unless the Court shall otherwise direct, be sold by the sheriff by public auction, and not by bill of sale or private contract, and such sale shall be publicly advertised by the sheriff on and during three days next preceding the day of sale." The 73rd section contains a proviso that in case of bankruptcy the costs and expenses of the action and execution shall be retained and paid out of the proceeds of the sale, and the balance only be paid to the assignees. The legislature could never have intended that the sheriff should deduct the expenses, which the Act enjoins, only in the event of a bankruptcy. The duty of advertising is imposed on the sheriff by the express words of the enactment; the expenditure is therefore compulsory. There

is no provision in the 28 Eliz. c. 4, or 1 Vict. c. 55 (by which statutes the sheriff's poundage and fees are regulated), to reimburse him for this outlay. [Pollock, C. B. The sheriff was at common law bound to perform all his duties without remuneration; the right to it, therefore, depends on the statutes which create it.] The claim is not for work done, but to be recouped for a compulsory disbursement. [Bramwell, B. The sheriff's poundage and auction fees vary in proportion with the success of the sale.]

Gates, in support of the rule. The sheriff, in addition to his poundage fees, is entitled by the table of fees, allowed in accordance with the provisions of the 1 Vict. c. 55, s. 2, to take 5l. per cent. on every sale by auction which does not produce more than 300l. The 24 & 25 Vict. c. 134, s. 74, makes it imperative on the sheriff to do that which it was previously his duty to do whenever there was a sale by auction, viz., to take proper steps to make the sale public. [593] If it was not the practice to advertise, that only shews that the sheriffs neglected that duty.

Per Curiam.(a) The rule must be absolute, but the attachment will lie in the office for a fortnight.

Rule accordingly.

HYDE v. GRAHAM. Nov. 19, 1862.—To trespass for entering the plaintiff's close and breaking open a gate and lock with which it was fastened, the defendant pleaded (as a defence on equitable grounds), that a dispute had arisen between the plaintiff and defendant and certain other persons as to whether there was a public highway over the plaintiff's land; and thereupon, in order that the defendant and the plaintiff's solicitor might arrange to come to a definite understanding as to the course to be pursued in deciding or trying the question, and in consideration that the defendant and the other persons, at the request of the plaintiff, then signed the same, it was, by a memorandum in writing, then signed by the plaintiff, his solicitor, the defendant, and the said other persons, agreed that, without prejudice on either side to the question of right to the said way, it should remain open and unobstructed, for the passage of the defendant and the said other persons, until the plaintiff's solicitor and the defendant should come to a definite understanding as to the course to be pursued in deciding or trying the question then in dispute. The plea then stated that the alleged trespasses were committed before any understanding had been come to, and were the use of the way by the defendant; and, because the gate was wrongfully and contrary to the agreement placed across the way and locked, the defendant broke it open. Held, that the plea was bad both as an equitable and legal defence.—A plea pleaded as an equitable defence may be sustained as a plea at law if it discloses a good legal defence.

[S. C. 32 L. J. Ex. 27; 8 Jur. (N. S.) 1229; 11 W. R. 119; 7 L. T. 563.]

Declaration. For that heretofore, to wit, on, &c., the defendant broke and entered certain land of the plaintiff, called "The Hyde End Estate," situate, &c., and then broke open a certain gate of the plaintiff then standing and being in and upon his said land; and then broke open, damaged and spoilt a certain lock of the plaintiff wherewith the said gate was then locked and fastened, and then on divers times on the same day, with a certain carriage and horses, drove over and across the said land of the plaintiff.

Plea, for defence on equitable grounds. That, before the alleged trespasses in the declaration mentioned, or any [594] of them, a question and dispute had arisen between the plaintiff and the defendant and certain other persons as to whether there was a public highway by and near to a certain house of the plaintiff, or a public highway over the said land of the plaintiff; and thereupon, in order that the defendant and T. Rooke, the solicitor of the plaintiff, might arrange to come to a definite understanding as to the course to be pursued in deciding or trying the said question, and in consideration that the defendant and the said other persons, at the request of the plaintiff, then signed the same, it was, by a memorandum in writing, then signed by the plaintiff, the said T. Rooke, and the defendant, and the said other persons, agreed between the plaintiff and the defendant, and the said other persons, that, without prejudice on either side to the question of right to the said way by the said house or the said way over the said land of the plaintiff in the declaration mentioned, the said

(a) Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.

last mentioned way should remain open and unobstructed for the passage of the defendant and the said other persons until the said T. Rooke and the defendant should come to a definite understanding as to the course to be pursued in deciding or trying the question then in dispute; and that the defendant and the said other persons thereby pledged themselves to evidence that the said agreement was without prejudice to the plaintiff's claim. And the defendant says that all things happened necessary to entitle the defendant to have the said agreement observed and kept by the plaintiff, and that the alleged trespasses were committed by the defendant after the said agreement was so made and signed, and before any understanding had been come to between the said T. Rooke and the defendant, and were the use by the defendant of the said last mentioned way; and the defendant, at the time of the said alleged [595] trespasses, having occasion to use, and using the said way, with a carriage and horses as in the declaration mentioned, because the said gate had been and was wrongfully and contrary to the said agreement placed and kept, and was then standing in and across the said way, locked and fastened and obstructing the same, so that, without breaking open the said gate and lock and a little damaging and spoiling the same, the defendant could not then pass along the said way, the defendant then, in order to remove the said obstruction, broke open the said gate and lock and a little damaged and spoilt the same, doing no unnecessary damage, and passed along the said way with the said carriage and horses, which are the supposed trespasses above complained of by the plaintiff; and that the defendant has a right, under the said agreement and circumstances aforesaid, by an injunction from a Court of equity, to have the plaintiff restrained from maintaining or prosecuting the said action against the defendant in respect of the matters in the declaration mentioned.

Demurrer and joinder therein.

Gray, in support of the demurrer. The plea discloses no defence either at law or in equity. The agreement is without consideration, and, not being under seal, it cannot confer any interest in the land. The alleged consideration is the signing the agreement, but it is not sufficient to support it.

The Court then called on

Dowdeswell (Secker with him), for the defendant. The plea affords a good answer both at law and in equity. Though pleaded by way of equitable defence, if it discloses an answer on legal grounds, the defendant will be entitled [596] to judgment. First, the plea is good at law, for the facts stated in it would be evidence in support of a plea of leave and licence. The agreement amounts to a contract on the part of the plaintiff that, during a certain interval, the way shall remain open and unobstructed for the passage of the defendant. Therefore he was justified in breaking open the gate in order to use the way. [Pollock, C. B. Not until after he had demanded the key. But if the licence has been revoked, what right is left?] The plaintiff cannot avail himself of his breach of contract to sue the defendant as a trespasser. In *Burridge v. Nicholetts* (6 H. & N. 383) it was held that a person might break open a lock in order to get possession of his own book. [Channell, B. There the question arose under the County Court Act, 9 & 10 Vict. c. 95.] This is, in effect, an agreement that, if the plaintiff obstructs the way with a locked gate, the defendant may open it. Secondly, the plea affords a good defence on equitable grounds. The fact that the agreement is indefinite in point of time does not invalidate it. It is a sufficient consideration in equity that third persons are parties to it, and it may be supported on the same principle as an agreement of reference. If it had been under seal it would have been irrevocable; and in equity there is no distinction between instruments under seal and by parol. The plaintiff has acted contrary to conscience and good faith, and on that ground a Court of equity would restrain this action by a perpetual injunction. A Court of equity would also restrain the action on the ground that it is unjustifiable and vexatious. In *Story on Equity Jurisprudence*, § 904, it is said: "Cases often arise in which a party may be entitled to proceed in a suit at law for damages, when a complete equitable defence exists, which is yet incapable of being asserted at law. In such cases the suit at law is treated as vexatious, [597] and will be stayed by injunction." After giving several instances, the author proceeds to say: "Indeed, there can scarcely be found an end to the enumeration of cases in which vexatious suits of this sort have been suppressed by injunctions when there was no redress at law, and yet when, upon the principles of justice, the party was entitled to complete protection against such litigation." The jurisdiction of a Court of equity to

restrain by injunction an act which a party is by contract bound to abstain from is not confined to cases in which there are either no other executory terms in the contract, or none which a Court of equity has not the means of enforcing: *Dietrichsen v. Cabburn* (2 Phil. 52). Wherever a person has entered into an agreement either to do or abstain from a particular act, a Court of equity will interfere to prevent a violation of that agreement. In *Phillips v. Treeby* (8 Jur. N. S. 711) the Court granted an injunction to restrain the defendant from obstructing a way which he had agreed that the plaintiff should use.

POLLOCK, C. B. I am of opinion that the plea affords no defence to the action, either on legal or equitable grounds. If the plaintiff has broken his agreement by placing a gate across the way, the defendant should have brought a cross action; he has no right, so to speak, to help himself to the performance of the contract. That might be productive of great mischief to the plaintiff. It seems to me that the placing a gate across the way was a practical statement to the defendant and the other parties that the plaintiff did not mean to perform the agreement, and that he would in future treat the defendant as a trespasser if he used the way. The defendant had no right to turn a mere licence into a right to open the gate, even with a key. Therefore, in my opinion, this is not a good legal plea.

[598] I also think that it is not a good equitable plea. Courts of law have laid down certain rules for their guidance in the case of pleas on equitable grounds; and it is now established that, unless the right is such that a Court of equity would grant a perpetual injunction, it cannot be made the subject of an equitable plea. I am not aware, however, of any decision applicable to the present case. In order that some arrangement might be made as to the best course to be pursued in deciding a disputed right of way, the plaintiff, by way of concession, says to the defendant: "The way shall remain open and unobstructed for your passage until that is settled." Nothing can be more indefinite; and the defendant has no right to treat it as a definitive arrangement and break open the gate which the plaintiff has placed across the way. It would be contrary to all principle to hold this a good equitable plea. No doubt, in Blackstone's Commentaries (vol. 3, p. 4), some instances are given where a person is allowed to obtain redress by his own act as well as by operation of law, but the occasions are very few; and they might constantly lead to breaches of the peace, for if a man has a right to remove a gate placed across the land of another, he would have a right to do it even though the owner was there and forbade him. The law of England appears to me, both in spirit and on principle, to prevent persons from redressing their grievances by their own act. The argument for the defendant comes to this: "You agreed that for some indefinite period I should be at liberty to use the way, therefore I have a right to the performance of that agreement notwithstanding you would rather pay damages than abide by it; and as I am entitled to apply to a Court of equity to restrain this action, I can plead the facts by way of equitable defence." But I think a Court of equity would not restrain the action. It may be, that after a person [599] has made an agreement of this kind, he finds out that by performing it he may do himself or some other person irreparable mischief; and, rather than perform it, he is content to pay damages for breaking it. For these reasons it appears to me that the plea is bad, and that there ought to be judgment for the plaintiff.

BRAMWELL, B. I am also of opinion that the plea is bad both as a legal and an equitable defence. Mr. Dowdeswell says that it is good as a plea of leave and licence, but it is not in terms so pleaded. Neither does it contain any allegation of leave and licence, for it states that because the gate was wrongfully and contrary to the agreement placed across the way, locked and fastened, the defendant broke it open. When the defendant found the gate locked, that was a tolerably clear intimation to him that the licence was revoked, and the plaintiff did not intend to perform the agreement. It seems to me that the defendant had no right to break open the gate, and the plea, which professes to justify all the trespasses, being bad in part is bad altogether.

Then, as to its being a good equitable plea, the answer has been already given by my Lord. There would be difficulty in a Court of equity saying, "We will restrain you from revoking your license, absolutely and without any qualification of any kind." If the defendant applied for a specific performance of the agreement, surely a Court of equity would say: "You were to come to some arrangement as to the course to be pursued in deciding the disputed right of way, we will only restrain the plaintiff from revoking the licence upon the terms that you forthwith come to that arrangement."

I therefore think that a Court of equity would not, by injunction, restrain the plaintiff from proceeding with this action. Another difficulty is this—the way is to remain open without prejudice on either side to the ques[tion] of right to it. Now, suppose that, in using the way, some damage is done to the soil, and it is afterwards decided in the mode arranged between the parties that there is no way over the plaintiff's land, would he not be entitled to claim compensation for the damage? But if the defendant succeeded on this plea, the plaintiff never could recover damages for what would be an unjustifiable trespass, because he would be barred by this action in respect of it. It seems to me, not only on the grounds stated, but taking a common sense view of the matter, that the plea is bad.

CHANNELL, B. I agree that our judgment ought to be for the plaintiff. I do not dispute the proposition, that a plea pleaded by way of equitable defence may be sustained as a plea at law provided it discloses a good legal defence. But it cannot be good at law unless it answers what it professes to answer. This plea professes to justify all the trespasses alleged in the declaration, and ought therefore to answer the whole,—apart from what is mere matter of aggravation. The breaking open the gate is a substantive ground of complaint, and that is not answered by the plea. I do not deny what has been urged at the bar, that an agreement which, not being under seal, cannot be enforced at law, may, in some cases, be pleaded as a licence, so as to excuse a trespass. But here, as my brother Bramwell observed, the plea is not in form a plea of leave and licence; and we must look at the whole matter alleged, and ascertain, not only whether a licence has been granted, but whether it continued unrevoked at the time the trespasses were committed, so as to excuse them. I am clearly of opinion that, though this agreement may amount to a licence, it was not a licence which was irrevocable, and that the plaintiff must be considered as having revoked it to this extent; that, though the defendant might have a right to use the [601] way up to the gate, he was not justified in breaking it open. I therefore think that the plea is bad in law.

I also think that it cannot be sustained as a defence in equity. On this point I entertain the same opinion as the Lord Chief Baron and my brother Bramwell, and I think it unnecessary to repeat the reasons which they have already given.

Judgment for the plaintiff.

BROWN AND OTHERS v. THE LOCAL BOARD OF HEALTH OF HOLYHEAD. Nov. 14, 1862.—The 34th section of the Local Government Act, 1858 (21 & 22 Vict. c. 98), empowers every local Board to make bye-laws “with respect to the level, width, and construction of new streets; and to provide for the observance of the same by enacting therein such provisions as they think necessary as to the power of the local Board to remove, alter, or pull down any work begun or done in contravention of such bye-laws.” By section 35, “when any house or building has been taken down in order to be rebuilt or altered, the local Board may prescribe the line in which any house or building to be thereafter built shall be erected, and the same shall be erected in accordance therewith; and the local Board shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back.”—A local Board made a bye-law which provided that “if any owner or person should construct or cause to be constructed any works, or do any act, or omit to do any act, or comply with any requirements of the local Board, or should make any alterations in any works after they have been completed, whether in new or existing buildings, contrary to the provisions therein contained, the local Board might cause such works to be removed, altered, or pulled down.” Held, that the bye-law was invalid as exceeding the powers conferred by the Act.

[S. C. 32 L. J. Ex. 25; 11 W. R. 71; 7 L. T. 332. Considered, *Reay v. Gateshead Corporation*, 1886, 55 L. T. 101; 34 W. R. 682; 50 J. P. 805.]

This was an action in trespass by the plaintiffs to recover damages by reason of the defendants having broken and entered a close of land of the plaintiffs, and broken down and destroyed the wall or boundary fence thereof, and pulled down and damaged the railings and gates thereon, and damaged and destroyed the steps and

coping and wall thereof. By consent and order of a Judge a case was stated for the opinion of this Court, without pleadings (so far as material), as follows :—

In 1859 the plaintiffs became the lessees of a piece of land [602] in the town of Holyhead, adjoining Market Street. The lease was for ninety-nine years, and contained covenants by the plaintiffs to erect a dwelling-house and other buildings thereon.

The land was four or five feet higher than the street, and was at the time of the lease bounded by a retaining wall, which belonged to the lessors and was included in the lease. In consequence of the different levels of the street and land, the plaintiffs, who had obtained the lease for the purpose of erecting a chapel, school and house upon it, had to set their buildings back from the street in order to leave room for placing steps on their own land to form an approach from the street; and for the purpose of building the chapel and house it was necessary to pull down the old wall and clear away the soil so as to make a part of it level with the street.

The chapel and house were erected in 1859 and the beginning of 1860, and before the town of Holyhead was placed under the Local Government Act, 21 & 22 Vict. c. 98. Subsequently to the town being placed under the Local Government Act, the plaintiffs, who had pulled down the old wall, were about to rebuild it further back from the street and place railings thereto, and also to place steps for approaches to the doors which were four feet above the level of the street. The boundary wall, railings, and steps were part of one and the same plan and design under which the chapel and house had been built.

On the 14th June, 1860, the plaintiffs were served with the following notice, under the hands and seal of the members of the Board :—“ We, the members of the Local Board of Holyhead, hereby give you notice that the contemplated steps from the entrance of the chapel to the street do not meet with the approbation of this Board; and we require such alterations to be made as shall not bring the lowest [603] step so near the centre of the street as the present contemplated arrangements would bring it.”

After some correspondence and negotiations between the parties, which failed, and after a resolution by the defendants that they would not consent to the proposed steps in front of the chapel, on the ground that they did not leave sufficient space for the highway, the plaintiffs, in July, 1861, erected their boundary wall and fence in a line with the railing in front of the adjoining property, and built two flights of steps to the doors of the building (within the boundary wall), all of them being built and put upon their own land, and leaving between two and three feet of their own land open for the widening of the street at one end; but the road was still only twenty-two feet wide by measuring from the plaintiffs' wall to the houses on the opposite side.

The defendants, on the 7th of September, 1861, after serving formal notice to the plaintiffs to remove them in fourteen days, caused the walls and fence to be thrown down, pursuant to a resolution of the Board. The defendants refused to compensate the plaintiffs for the land they required them to give up to the street. They also refused to point out any act of parliament or other authority under which they acted; and they asserted their absolute right to acquire the strip of land in front of the plaintiffs' buildings for the use of the street without compensation.

The defendants drew up a set of bye-laws, which were duly sanctioned and approved by the Secretary of State, before the steps were built by the plaintiffs.

The 33rd bye-law, “ As to local width, &c., of new streets,” was as follows :—

“ XXXIII. The local Board shall by their order approve or disapprove of proposed new works or buildings within the times severally specified herein for the deposit of notices [604] thereof; but if the owner or other person intending to construct any new street or erect any new building, fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices, without the approval of the local Board, or if any owner or person shall construct or cause to be constructed any works, or do any act, or omit to do any act, or comply with any requirements of the local Board, or shall make any alteration in any works after they have been completed, whether in new or existing buildings, contrary to the provisions herein contained, he shall be liable for each offence to a penalty not exceeding 5l.; and he shall pay a further sum, not exceeding 40s., for each and every day which such works shall continue or remain contrary to the said provisions; and

the local Board may, if they shall think fit, cause such works to be removed, altered, pulled down, or otherwise dealt with as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner, as provided by the Public Health Act, 1848."

The Court is to be at liberty to draw inferences of fact as a jury.

The question for the opinion of the Court is, whether the defendants, under the circumstances, were justified in removing and throwing down the wall and fence of the plaintiffs. If the Court shall be of opinion in the negative, judgment is to be for the plaintiffs, with 20l. damages, and costs; if in the affirmative, judgment of non pros is to be entered.

Mellish (Crompton Hutton with him), for the plaintiffs. The defendants had no right to destroy the plaintiffs' wall and fence. They were not justified by the 33rd bye-law, for if it applies to this case it is void, for the local Board [605] had no power to make it. The 34th section (a)¹ of the Local Government Act, 21 & 22 Vict. c. 98, enables the local Board to make bye-laws "with respect to the level, width, and construction of new streets." That cannot authorize a bye-law empowering them to pull down any new works of which they may disapprove. [Bramwell, B. The 34th section authorizes bye-laws "as to the power of the local Board to remove, alter, or pull down any work begun or done in contravention of such bye-laws."] That must mean bye-laws which the Board had power to make. [606] The 35th section (a)² of the Act only applies to cases "where any house or building has been taken down in order to be rebuilt or altered," and in that case the local Board may prescribe the line in which it is to be thereafter built; and they are bound to pay compensation to the owner

(a)¹ Sect. 34. "The fifty-third and seventy-second sections of the Public Health Act, 1848, shall be repealed; and in lieu thereof be it enacted as follows:—

"Every Local Board may make bye-laws with respect to the following matters (that is to say):—

"(1). With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof;

"(2). With respect to the structure of walls of new buildings for securing stability and the prevention of fires;

"(3). With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings;

"(4). With respect to the drainage of buildings, to waterclosets, privies, ash-pits, and cesspools in connexion with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation.

"And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the Local Board, and as to the power of the Local Board to remove, alter, or pull down any work begun or done in contravention of such bye-laws: Provided always, that no such bye-law shall affect any building erected before the date of the constitution of the district:

"But for the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the frame work shall be left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."

(a)² Sect. 35. "When any house or building has been taken down in order to be rebuilt or altered, the Local Board may prescribe the line in which any house or building to be hereafter built shall be erected, and the same shall be erected in accordance therewith; and the local Board shall pay or tender compensation to the owner or other person immediately interested in such house or building, for any loss or damage he may sustain in consequence of his house or building being set back; the amount of such compensation, in case of dispute, to be settled in the same manner as compensation for land, to be taken under the provisions of 'The Lands Clauses Consolidation Act, 1845,' is directed to be settled; and all provisions of the said last mentioned Act relating to the purchase of lands shall apply to the payment made for such loss or damage as if it were a purchase under such Act."

for any damage he may sustain in consequence of his house or building being set back. Here the local Board have not prescribed any line, and they have refused to make any compensation to the plaintiff.

The Court then called on

Manisty, for the defendants, who admitted that their acts were unjustifiable unless the 33rd bye-law was authorized by the 34th section of the Local Government Act, 1858.

POLLOCK, C. B. We are all of opinion that this bye-law is invalid. The local Board had no right to make a bye-law investing themselves with power beyond that conferred on them by the Act. Our judgment will therefore be for the plaintiffs.

BRAMWELL, B., and CHANNELL, B., concurred.

Judgment for the plaintiffs.

[607] MAITLAND AND OTHERS *v.* MACKINNON. Nov. 23, 1862.—In 1766, P., the owner in fee, demised to B. a plot of ground for ninety-seven years and a quarter from the 25th of December, 1765. The trustees of B. demised to S. for ninety-six years, from Lady Day 1765, a part of the ground upon which a house, called No. 7 Cumberland Street, and a stable, were built; and they also demised to E. for eighty-nine years, from Lady Day 1771, another part of the ground upon which a house, called No. 4 Hyde Park Place, was built. In 1795 R., being the owner of the leases of both houses, assigned the lease of No. 7 Great Cumberland Street to G., reserving the stable, and from that period it was always occupied with No. 4 Hyde Park Place. In 1823 the defendant, who had acquired the interest of R. in the lease of No. 4 Hyde Park Place, and who was in actual occupation of it together with the stable, (to which he had made a direct communication by a door from the house), obtained from the owner of the reversion of the plot of ground, demised in 1766, a reversionary lease of No. 4 Hyde Park Place, for ninety-nine years from the 25th of March, 1822. The house was described in this lease by metes and bounds and by reference to a plan in the margin, neither of which included the stable, but the lease contained the following words which were not contained in the lease of the 23rd of December, 1774:—“Together with all out-houses, edifices, buildings, stables, yards, gardens, ways, water-courses, lights, areas, vaults, cellars, easements, profits and commodities whatsoever to the said premises hereby demised belonging or appertaining.” There was also a covenant to deliver up at the end of the term “racks, mangers, stalls,” &c. In 1840, the owner of the reversion of the plot of ground demised in 1766 granted to D. a reversionary lease of No. 7 Great Cumberland Street, for fifty years by the following description:—“Together with the capital messuage or tenement, coach-house and stable, erected and built thereon, &c., and which said messuage (but not the stable) is now in the possession of D.,” and which said stable is now in the possession of M. (the defendant). On the expiration of the lease of the 23rd of December, 1774, the plaintiff, to whom the reversionary lease of No. 7 Great Cumberland Street had been assigned, brought ejectment to recover possession of the stable. Held, that the stable did not pass to the defendant under the general words in the reversionary lease of 1823, as “belonging or appertaining” to the demised premises.

[S. C. 32 L. J. Ex. 49; 9 Jur. (N. S.) 255; 11 W. R. 237; 7 L. T. 427.]

Ejectment to recover possession of stables, situate at the back of a house, No. 7 Great Cumberland Street, Marylebone, in the county of Middlesex.

At the trial, before Martin, B., at the Middlesex Sittings after last Trinity Term, the following facts appeared:—By indenture of lease, dated the 15th April, 1766, H. Portman demised to W. Baker for a term of ninety-seven years and one quarter from the 25th of December, 1765, a plot of ground delineated on a plan in that lease, and upon which No. 7 Great Cumberland Street, with the stable in question, and No. 4 Hyde Park Place, were subsequently built. By indenture of underlease, dated the 25th August, 1774, the trustees of W. Baker, after his death, under the powers of a private act of parliament, demised the ground on which No. 7 Great Cumberland Street and the stable now stand to R. Sturt for ninety-six years from Lady Day, 1765. By [608] indenture of underlease, dated the 23rd December, 1774, the trustees of

UPPER BRYANSTONE STREET

*The part coloured blue shows
N^o 7 Great Cumberland street
The part coloured pink shows
N^o 4 Hyde Park Place*

CUMBERLAND MEWS

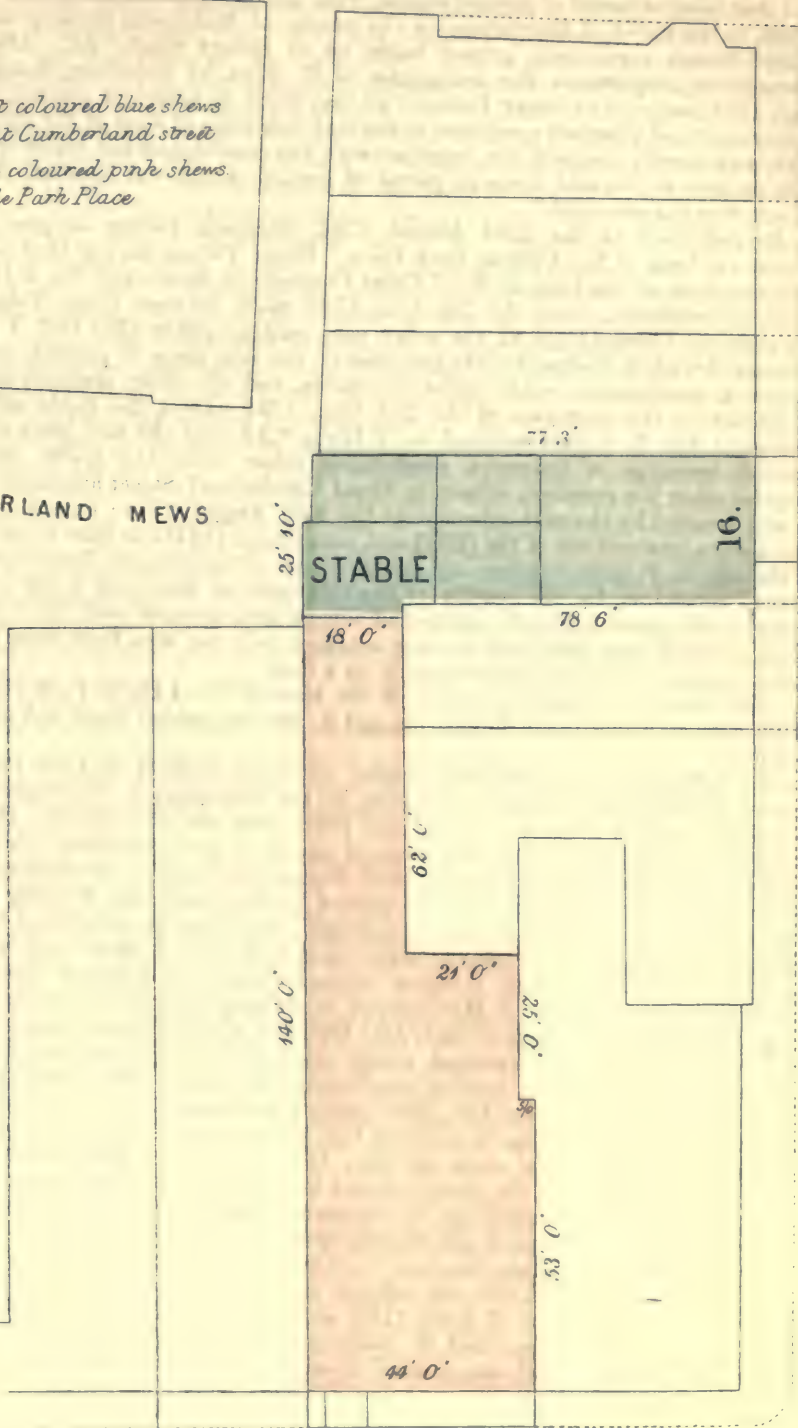
STABLE

16.

GREAT CUMBERLAND STREET.

OXFORD STREET

10 5 0 30 100 Feet



W. Baker demised the ground on which No. 4 Hyde Park Place now stands to Elizabeth Palmer for eighty-nine years from Lady Day, 1771, by the description of "all that piece or parcel of ground situate, lying and being on the north side of Oxford Street, in the parish of Marylebone in the county of Middlesex, fronting south upon Oxford Street, north upon ground lately let to Robert Sturt," &c. After several intermediate assignments, the mortgagees of R. Sturt, by indenture, dated the 2nd May, 1794, assigned to Roger Palmer "all that piece or parcel of ground, messuage, or tenement and premises comprised in the said indenture of lease of the 25th August, 1774, and thereby demised, &c., together with the coach-house and stable erected and built on part of the said piece or parcel of ground, which was demised to the said Robert Sturt as aforesaid."

By indenture of the 22nd August, 1786, Elizabeth Palmer assigned to Roger Palmer the lease of No. 4 Hyde Park Place. Roger Palmer having thus become the possessor both of the lease of No. 7 Great Cumberland Street and No. 4 Hyde Park Place, by indenture, dated the 5th June, 1795, made between Roger Palmer of the one part and Thomas Glyn of the other part, reciting (inter alia) that T. Glyn had contracted with R. Palmer for the purchase of the said piece of ground, messuage or tenement, coach-house, cellar under the stable, and all other premises assigned to R. Palmer by the indenture of the 2nd May, 1794, except the stable only: it was witnessed that R. Palmer assigned to T. Glyn, "All that the said piece or parcel of ground, messuage or tenement, coach-house, cellar under the stable, and all and singular other the premises, situate in Great Cumberland Street aforesaid, comprised in and demised by the said indenture of the 25th August, 1774: except nevertheless, and always reserved out of the [609] said assignment, the stable then in the possession of the said R. Palmer, standing and being on part of the premises demised by the said lease," habendum, for the residue of the said term of ninety-six years. From that period to the present time the stable had always been occupied with No. 4 Hyde Park Place; and for some time past the only entrance to it has been from these premises, a direct communication having been made by a door.

The defendant became possessed of the lease of No. 4 Hyde Park Place in right of his wife, to whom Roger Palmer devised it, and he resided there and occupied the stable.

By indenture, dated the 18th August, 1823, the trustees of Lord Portman (the owner in fee of the reversion) granted to the defendant a reversionary lease of No. 4 Hyde Park Place for ninety-nine years from the 25th March, 1822, by the following description:—"All that piece or parcel of ground situate, lying and being in Hyde Park Place, lately called Oxford Street, and being at the western extremity of Oxford Street on the north side thereof, in the parish, &c., fronting south upon Oxford Street aforesaid, and abutting east upon the corner house in Great Cumberland Street, belonging to Lord Bagot, north upon Cumberland Mews, and west upon a messuage or tenement and premises formerly leased to Edmund Rush, but now occupied by the Duchess of Marlborough, containing in width from east to west on the south end or front thereof forty-four feet, and in depth on the west side 140 feet, and running from the south-east corner northwards fifty-three feet, then running westwards five feet, then running northwards again twenty-five feet, then running westwards again twenty-one feet, then running northwards again sixty-two feet, and then running westwards again eighteen feet, be the same several dimensions, or any of them, of assize little more or less; the ground plot [610] whereof is more particularly described in the plan (a) drawn in the margin of these presents: together with the double brick messuage or tenement erected and built thereon, being the first house westwards from Great Cumberland Street and next the corner house, and No. 4 in Hyde Park Place, but lately called 246 in Oxford Street; all which said premises hereby demised are now subject to a lease which, by a certain indenture bearing date the 15th day of April, 1766, and made or expressed to be made between H. Portman of the one part and W. Baker of the other part, was granted for a term of ninety-seven years and one quarter of another year, commencing from Christmas day, 1765: together with all out-houses, edifices, buildings, stables, yards, gardens, ways, water-courses, lights, areas, vaults, cellars, easements, profits, and commodities whatsoever to the said premises hereby demised belonging or appertaining." The

(a) The plan did not include the stable in question.

lease contained a covenant by the defendant, at the expiration of the term, to yield up the premises, together with (inter alia) "racks and mangers."

After several mesne assignments, by indenture dated the 15th May, 1830, the lease of No. 7 Great Cumberland Street was assigned to Bonamy Dobree, excepting the stable. By indenture of the 16th May, 1840, a reversionary lease of No. 7 Great Cumberland Street was granted to Bonamy Dobree for fifty years from the 25th March, 1839, by the following description:—"All that piece or parcel of ground situate, lying and being on the west side of Great Cumberland Street, in the parish, &c.; fronting east on Great Cumberland Street aforesaid, and abutting north on a message or tenement formerly leased to Mr. Langley, but now in the occupation of

Palmer, south upon another message or tenement formerly leased to J. Chessman and now in the occupation of Scott, and west on premises in [611] Cumberland Mews, formerly let to E. Rush: Together with the capital message or tenement, coach-house and stables erected and built thereon, &c., and which said message (but not the stables) is now in the possession of the said Bonamy Dobree; and which stables are now in the possession or occupation of W. Mackinnon or his under-tenants; the dimensions of which said piece or parcel of ground and premises are more fully set forth and described in the plan (a) or ground plot thereof drawn in the margin of these presents: all which said premises hereinbefore demised, or intended so to be, are subject to an indenture of lease bearing date the 15th day of April, 1766, and made or expressed to be made between H. Portman of the one part and W. Baker of the other part, whereby the said premises were demised for a term of ninety-seven years and one quarter of another year commencing from Christmas 1765." After several mesne assignments the reversionary lease of the 16th May, 1840, was assigned to the plaintiff. Under the stable there was a cellar which belonged to No. 7 Great Cumberland Street.

On the expiration of the underlease of the 25th August, 1774, the plaintiff required the defendant to give up possession of the stable, which he refused to do, on the ground that it passed to him under the general words in the reversionary lease of the 18th August, 1823.

Upon these facts the learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

Montague Smith, in the present term, obtained a rule nisi accordingly, on the ground that the stable passed to the defendant under the lease of the 18th August, 1823; against which

Mellish (Garth with him) shewed cause (Nov. 21). [612] The stable did not pass to the defendant under the lease of the 18th August, 1823. The demised premises are described by metes and bounds, and by reference to a plan in the margin of the lease which excludes the stable. Then follow the words "together with all out-houses, edifices, buildings, stables, yards, &c. to the said premises hereby demised belonging or appertaining." But where the demised premises are described by metes and bounds, no more will pass under any general words than is contained in the particular description: *Doe d. Meyrick v. Meyrick* (2 C. & J. 223). Moreover, the stable cannot be said to belong or appertain to the demised premises, for one piece of land cannot properly appertain to another. He also argued that the stable would not pass because it was not mentioned in the memorial registered under the 7 Anne, c. 20, s. 5.

Montague Smith and Maude, in support of the rule. The stable passed under the lease of the 18th August, 1823. In the year 1795, the owner of the leases of both houses assigned that of No. 7 Great Cumberland Street, reserving to himself the stable; and thenceforth, up to the time when the lease of the 18th August, 1823, was granted, the stable had been occupied with No. 4 Hyde Park Place. The general words in that lease are therefore apt words to pass the stable. The words "belonging or appertaining" are equivalent to "occupied with or enjoyed." No doubt, land cannot be "appurtenant" to a message in the strict sense of the term, but, in order to give effect to the intention of the parties, the word "appurtenant" may be read in the sense of "usually held, used, occupied, or enjoyed therewith:" *Hill v. Grange* (Plow. 170); *Morris v. Edgington* (3 Taunt. 24); *James v. Plant* (4 A. & E. 749); 1 Shep. Touch. [613] 94. In *Ongley v. Chambers* (1 Bing. 483) Lord Gifford, in delivering the judgment of the Court, said: "In Cro. Eliz. 16, Anderson, J., says,

(a) The stable was shewn in this plan.

'That land shall pass as pertaining to a house which has been occupied with it by the space of ten or twelve years, for by that time it hath gained the name of parcel or belonging, and shall pass with the house by that name in a will or leases.'" *Doe d. Norton v. Webster* (12 A. & E. 442) is also an authority that land occupied with a messuage may pass under a grant of the messuage "with the appurtenances." Again, in *Doe d. Gore v. Langton* (2 B. & Adol. 680), the words "thereunto belonging" were construed in their popular sense. In *Doe d. Meyrick v. Meyrick* (2 C. & J. 223) there was a particular enumeration of the closes intended to be passed, which confined the operation of the general words. Here the covenant to surrender, at the end of the term, the "racks and mangers," shews that the stable was intended to pass. Assuming that the language of the lease is ambiguous, the continuous user of the stable with No. 4 Hyde Park Place, raises the presumption that it was intended to pass, notwithstanding the plan in the margin of the lease excludes it: *Simpson v. Dendy* (8 C. B. N. S. 433); *Berridge v. Ward* (10 C. B. N. S. 400).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. In this case the plaintiff is entitled to our judgment unless the stable passed under the reversionary lease of August, 1823. We are of opinion that it does not. There is in it a precise and most particular description by metes and bounds of certain premises to be demised, which do not include the stable in question. It [614] may be that something would pass, though not within the boundary set out, if necessarily a part of the premises, as for instance a front area might so pass. But the stable in question would not pass on that principle, because undoubtedly it is not necessarily a part of the dwelling-house and land described. Accordingly the counsel for the defendant did not contend for this, but urged that the stable passed under the subsequent words describing all "outhouses," &c., "stables," &c., "belonging to the premises." Now everyone knows that these and similar words are inserted in leases without reference to any particular subjects to which they may be applicable, as indeed appears in this case, for, among other things, "water-courses" are mentioned, there being no water-course connected with the premises. Still there may be cases in which something would pass by these words, and therefore it is necessary to see whether in this case the stable does pass. The words relied on are "stables belonging." But if the premises themselves are examined, it is difficult to say the stable "belongs" to the house in Hyde Park Place. Adding it to that house makes the outline of both premises irregular, obviously cuts a piece from the Cumberland Place plot, and adds it to the plot in Hyde Park Place. Then the cellars under the stable belong to No. 7 Great Cumberland Street, and there was a door from thence to the stable. If the history of the premises is examined, it is certain that originally the ground on which the stable stands "belonged" to No. 7 Great Cumberland Street, and that if the lease of that house were forfeited, with it would be forfeited the stable. It comes to this, that, notwithstanding these considerations, the stable must be said to "belong" to the house No. 4 Hyde Park Place, because it has been used with it for (no doubt) a vast number of years, with no open communication with any other premises. It seems to us that these words, which are not words of art, do not include these stables, [615]—that any person knowing the facts would say, "the stable belongs to No. 7 Great Cumberland Street though it has been used with No. 4 Hyde Park Place."

In the argument it was much relied upon by defendant's counsel that there is a covenant to give up "racks" and "mangers," but the mention of stables in the lease would of course lead to a covenant to give up racks and mangers; and if the one did not cause the stable to pass, so neither in our judgment would the other. The case may appear to be hard upon the defendant, who no doubt intended to renew his lease of all that he actually occupied; but it seems to have escaped the attention of those who prepared the lease that the defendant held his house and premises, No. 4 Hyde Park Place, under one title, and the stable in question under another; and the lease in its present form does not operate on both.

Judgment for the plaintiffs.

PARR AND ANOTHER v. LILLICRAP. Nov. 24, 1862.—Where a defendant pays money into Court, which the plaintiff accepts in satisfaction of his claim, he “recovers” the amount within the meaning of the 13 & 14 Vict. c. 61, s. 11, which, in certain cases, deprives a plaintiff of costs if he “shall recover a sum not exceeding 20l.”

[S. C. 32 L. J. Ex. 150; 9 Jur. (N. S.) 80; 11 W. R. 94; 7 L. T. 425. Approved, *Boulding v. Tyler*, 1863, 3 B. & S. 473. Referred to, *Pearce v. Bolton*, [1902] 2 K. B. 116.]

This was an action to recover 12l. 5s. 6d. for goods sold and delivered. The defendant pleaded to the whole declaration payment into Court of 12l. 5s. 6d. The plaintiffs replied by accepting the sum paid into Court in full satisfaction and discharge of the causes of action in the declaration mentioned. The Master taxed the plaintiffs’ costs at 4l. 7s., whereupon the defendant obtained a summons at Chambers to review the taxation by disallowing the whole of the items comprised in the plaintiffs’ bill of costs. The summons was heard before Martin, B., who made an order accordingly.

Gadsden now moved to rescind the order. The 13 & 14 Vict. c. 61, s. 11, deprives a plaintiff of costs in actions of [616] covenant, debt, detainee or assumpsit, if he “shall recover a sum not exceeding 20l.” Here the amount paid into Court was not “recovered” within the meaning of that enactment. The word “recover” has been judicially interpreted to mean a recovery by judgment of the Court: *Brooks v. Rigby* (2 A. & E. 21). In 15 Jurist, part 2, p. 242, it is stated that, in a case of *Power v. Jones*, Platt, B., decided at Chambers that a plaintiff is not deprived of his costs where money is paid into Court. In *Chambers v. Wiles* (24 L. J. Q. B. 267) Coleridge, J., decided, in accordance with the opinion of four of the Judges who had considered the point, that the taking money out of Court was not a “recovery,” within the meaning of the 13 & 14 Vict. c. 61, s. 11. [Martin, B. If the plaintiff does not recover the money, how does he get it?] The 11th section of the 13 & 14 Vict. c. 61, contemplates a recovery by judgment, for it goes on to say, “the plaintiff shall have judgment to recover such sum only, and no costs.” This is a voluntary payment on the part of the defendant. [Martin, B., referred to *Dunston v. Paterson* (5 C. B. N. S. 279).] Formerly a plaintiff was not deprived of his costs in the case of a judgment by default, but that is altered by the 19 & 20 Vict. c. 108, s. 30; and if the legislature had intended that a plaintiff should have no costs where money is paid into Court, there would have been a similar enactment. [Pollock, C. B., referred to the 73rd section of the Common Law Procedure Act, 1852.] That section enables the plaintiff to sign judgment for his costs; but there is no judgment in respect of the debt. [Bramwell, B. If the language of the statute had been that a plaintiff shall have no costs when he “shall not recover a sum exceeding 20l.,” there could have been no doubt. You draw a distinction between that and “shall recover a sum not exceeding 20l.”] The latter part of the 11th section shews that the word [617] “recover” has reference to a recovery by judgment. [Martin, B., referred to *Robertson v. Sterne* (13 C. B. N. S. 248).] That was the case of a compulsory reference under the Common Law Procedure Act, 1854, which gives to the award the effect of a judgment. [Bramwell, B. Suppose an action is brought for 25l., and the defendant pays into Court 15l., and the plaintiff goes to trial and recovers 10l. more, according to your argument he would not have “recovered” 25l., but 10l. only, and therefore would not be entitled to any costs.] In that case there would be a judgment for 25l.

Rochfort Clarke appeared to shew cause in the first instance, but was not called upon to argue.

POLLOCK, C. B. The case put by my brother Bramwell shews what is the meaning of the word “recover,” in the 13 & 14 Vict. c. 61, s. 11. It does not mean “recover” by verdict or judgment, but “obtain” by means of the suit. There ought to be no distinction between the case where a defendant pays money into Court, which is accepted by the plaintiff in satisfaction of his claim, and where the plaintiff goes on to trial and still recovers less than 20l. If a defendant paid 10l. into Court and the plaintiff recovered by verdict only 5l. more, it is admitted that he would not be entitled to costs; whereas it is said that if a defendant paid 15l. into Court and the plaintiff accepted it in satisfaction of his claim, he would get his costs. What reason can there be for such a distinction? In each case it would appear by the record that the sum which the plaintiff obtained by the suit was less than 20l. It seems to me,

therefore, that if a sum not exceeding 20l. is paid into Court, and the plaintiff accepts it in satisfaction of his claim, as that is what he was suing for he ought not to have any costs.

[618] I should add, that we are deciding in accordance with the opinion of the Court of Common Pleas in *Robertson v. Sterne* (13 C. B. N. S. 248), which is at variance with that of Coleridge, J., in *Chambers v. Wiles* (24 L. J. Q. B. 267); but the former case was decided after full argument and upon consideration, while the latter was the decision of a single Judge in refusing a rule nisi. Therefore, upon authority as well as upon the construction of the Act, this rule must be refused.

MARTIN, B. I am of the same opinion. The question turns upon the meaning of the words "shall recover in any action," in the 11th section of the 13 & 14 Vict. c. 61. It seems to me, that if a man brings an action and declares, and the defendant pleads payment of money into Court, and the plaintiff takes it out of Court, he "recovers" it in that action; for he obtains by means of that action money which he could not obtain without it. That seems to me the good sense and reason of the matter. The only objection arises from the words "the plaintiff shall have judgment to recover such sum only," and if that meant a judgment in the strict sense of the term there might be a difficulty; but in my opinion that is not the true meaning. It seems to me that the meaning is this: If in consequence of an action a plaintiff shall recover a sum not exceeding 20l., he shall have no costs. Where the money is obtained by means of an action, the legislature has thought fit to deprive a plaintiff of costs if the cause is within the jurisdiction of a County Court and he might have sued in that tribunal. Originally there was an exception with respect to judgments by default, but a subsequent Act, 19 & 20 Vict. c. 108, s. 30, has abolished that distinction. Again, it was supposed that a plaintiff who recovered by the award of an arbitrator upon a compulsory reference under the Common [619] Law Procedure Act, 1854, a sum not exceeding 20l., was entitled to his costs; but the case of *Robertson v. Sterne* (13 C. B. N. S. 248) decided that a plaintiff succeeding upon such a reference equally recovers the amount awarded as if he had obtained it by the verdict of a jury. That case is an authority that, where a person brings an action in a superior Court under circumstances which disentitle him to costs, the enactment which deprives him of them extends to every mode by which he obtains the money sought to be recovered by that action.

BRAMWELL, B. I am also of opinion that a rule ought not to be granted. Independently of authority, I see no reason for any difference between the case where money is paid into Court and where the plaintiff goes to trial and recovers it. In each case he obtains the money by means of the action. A plaintiff loses his costs where he recovers by verdict, or obtains judgment on demurrer, or where there is a judgment by default, and why should he be entitled to costs when money is paid into Court? In *Chambers v. Wiles* (24 L. J. Q. B. 267) Coleridge, J., said: "The law which has extended the jurisdiction of the County Court left it open to a party, if the sum was above 20l., to sue in the superior Court. That right ought not to be construed invidiously. If a party, taking advantage of the law as it stands, sues for a sum just over 20l., and the defendant pays into Court 19l. 19s., it would be a wrong thing for the plaintiff to go on and put himself and the other party to the expense of a trial; and yet he would be compelled to do it, in order to get his costs, if the objection on the part of the present defendant was held to be well founded." Precisely the same argument might be used with respect to a judgment by default. It is said that the statute does not apply, because the plaintiff has not "recovered" a sum not ex-[620]-ceeding 20l., but that is not so. Formerly there could be no "recovery" without a judgment, for at common law every case was determined by a judgment of some kind. But now a new method has been introduced, by which a plaintiff may obtain the money which he sues for without a judgment, and I cannot see why the money so obtained is not "recovered" by the action. It is said that this is a voluntary payment, but it is only voluntary in the sense that the money is paid to avoid the expense of further proceedings to compel payment. It might as well be said that a payment after judgment is voluntary, because a defendant pays the money to avoid an execution. The payment is enforced by means of the action, and therefore there is a "recovery" of the amount in the action.

CHANNELL, B. I am also of opinion that there ought to be no rule. I have come to that conclusion upon the words of the Act, independently of authority. Though

our decision is opposed to that of Coleridge, J., in *Chambers v. Wiles*, it is in accordance with that of the Court of Common Pleas in *Robertson v. Sterne*.

Rule refused.(a)

[621] WALKER v. OLDING AND OTHERS. Nov. 25, 1862.—An execution creditor is not liable to the person whose goods have been wrongfully taken in execution for any damage sustained by him in consequence of their sale under an interpleader order.

[S. C. 32 L. J. Ex. 142; 9 Jur. (N. S.) 53; 11 W. R. 186; 7 L. T. 633.]

Case stated by an arbitrator for the opinion of this Court, as follows:—

1. The plaintiff, in the first count of the declaration, complained of a trespass by the defendants in breaking and entering a dwelling-house, wharf, &c., and premises of the plaintiff at Millwall, in the parish of Poplar and county of Middlesex, and seizing, taking and carrying away certain timber, wood, &c., household furniture, fixtures, goods and effects of the plaintiff, with an allegation that the plaintiff was thereby prevented from carrying on his trade and business of a timber merchant, and lost all the profits he would have made by the sale of the said timber, wood, &c., and was injured in his said business, and was put to expense in endeavouring to obtain possession of the said goods and premises and to establish his right thereto.

The declaration contained a second count in trover, for the conversion by the defendants to their own use of goods of the same description and quality as those mentioned in the first count, alleging that the plaintiff sustained thereby similar damages to those in the first count mentioned.

2. To this declaration the defendants pleaded:—First, not guilty. Secondly, to so much of the first count as alleged trespasses to the realty: A denial that the said premises were the plaintiff's property. Thirdly, to so much of the first count as alleged trespasses to the said goods and effects: A denial that the said goods and effects were the plaintiff's. Fourthly, to the second count: A denial that the goods therein mentioned were the goods of the plaintiff.

3. The plaintiff is a timber merchant.

[622] 4. The defendants carry on business in partnership as bankers in Clement's Lane in the city of London.

5. The trespasses and conversion for which the action is brought, and in respect of which the said verdict was entered, are the entry by the sheriff of Middlesex upon the premises of the plaintiff for the purpose of executing the writ of fieri facias hereinafter mentioned; and the seizure and sale of the furniture, stock in trade, plant and effects of the plaintiff as hereinafter described.

6. At the time of the issuing of the said writ of fieri facias and of the delivery thereof to the sheriff as hereinafter mentioned, the plaintiff was tenant and occupier of a dwelling-house and of a timber yard, wharf and premises at Millwall, Poplar, in the county of Middlesex, known as the Regent's Wharf, where he was then carrying on his said business of a timber merchant.

7. The plaintiff was also at the time of the said seizure the owner of the household furniture (then constituting the furniture of the said dwelling-house) and of the stock in trade, plant, fixtures and effects seized and taken as hereinafter mentioned under the said execution.

8. The plaintiff had become the owner of the said furniture, stock in trade, plant, fixtures and effects on the 1st June, 1861, by the purchase thereof from one John Eades to whom the same then belonged, and who had previously occupied the said dwelling house, yard, wharf and premises, and had carried on there the business of a timber merchant.

9. The plaintiff bought the said furniture for the sum of 305l., and the said stock in trade, plant and other effects for the sum of 466l. 6s., and gave bills of exchange for the said several sums, which were afterwards duly paid by him.

(a) This decision was adopted by the Court of Queen's Bench in *Boulding v. Tyler* (1863, 3 B. & S. 473).

10. The plaintiff also on the said 1st June, 1861, became tenant of the said dwelling-house, yard, wharf and premises to the said John Eades at the monthly rent of 20l., and thereupon, on or about the 8th June, 1861, took possession [623] of the said wharf and premises, and entered upon his said business there, and removed with his family into and took possession of the said dwelling-house and furniture.

11. The said John Eades, whilst the said wharf and premises were occupied by him, before the said sale to the plaintiff, had, on the 2nd January, 1861, been compelled to stop payment, being then indebted, among others, to the defendants, in the sum of 308l. 16s. 8d. on a dishonoured bill of exchange of which the said John Eades was the drawer, and which had been discounted by the defendants.

12. After his said stoppage a meeting of his creditors was called by the said John Eades, and a composition of 6s. 8d. in the pound, payable by bills of exchange at two, four and six months, upon his said debt, was offered by him to his creditors, the majority of whom agreed to receive the same in satisfaction of their several claims.

13. The defendants declined to accept the said composition, and on the 29th May, 1861, commenced an action against the said John Eades, in the Court of Common Pleas, under the Bills of Exchange Act, for the recovery of their said debt, and on the 14th June, 1861, obtained a judgment in the said action for the sum of 313l. 8s. 3d.

14. After the commencement of the said action the following notice, on behalf of the plaintiff in this action, was, on the 8th June, 1861, served on the sheriff of Middlesex, and on the defendants and their attorney:—

“To the Sheriff of Middlesex.

“Messrs. Olding, Sharpe and Company, and Mr. Algernon Wells,
their Attorney.

“We hereby give you notice, that the premises known as Regent’s Wharf, Millwall, Poplar, in the county of Middlesex, and all the stock in trade, furniture and other effects there, belong to Mr. William Walker.

[624] “If, after this notice, you enter upon the said premises you will be treated as trespassers and proceeded against accordingly.

“Dated this 8th June, 1861.

“TAYLOR AND JAQUET,
“15 South Street, Finsbury Square, Attornies for
the said William Walker.”

15. On the 14th June, 1861, a writ of fieri facias was sued out by the present defendants upon the said judgment against the said John Eades, and the said writ was on the same day delivered to the sheriff of Middlesex, indorsed with a direction as follows:—“Levy 313l. 8s. 3d. and 1l. 10s. for costs of execution, &c., and also interest on 313l. 8s. 3d. at 4l. per cent. per annum from the 14th day of June, 1861, until payment, besides sheriff’s poundage, officers’ fees, costs of levying and all other legal incidental expenses. The defendant is a timber merchant, and resides at Regent’s Wharf, Millwall, in your bailiwick.”

16. Under the said writ of fieri facias, the sheriff of Middlesex, on the 15th June, 1861, entered upon the said dwelling-house, wharf and premises of the plaintiff, and levied upon the whole of the said furniture, stock in trade, plant and effects then being thereon, and which had been purchased by the plaintiff as aforesaid from the said John Eades.

17. On the 17th June, 1861, the following notice, on behalf of the plaintiff in this action, was served on the said sheriff, and on the defendants and their attorney, by Messrs. Taylor and Jaquet, as attornies for the plaintiff:—

“To the Sheriff of Middlesex and his Officers.

“Messrs. Olding, Sharpe and Company, and Mr. Algernon Wells,
their Attorney.

“Notwithstanding our notice to you of the 8th of June [625] instant, we find that you have caused a levy to be made upon the premises known as Regent’s Wharf, Millwall, Poplar, under and by virtue of a writ of fieri facias in a cause of *Olding and Others against Eades* :

“The premises and property are claimed by and belong to our client Mr. William

Walker, and we shall forthwith commence an action of trespass against you to recover damages for your illegal entry upon our client's premises.

"Dated this 17th day of June, 1861.—Yours, &c.

"TAYLOR AND JAQUET,
"15 South Street, Finsbury Square."

18. An interpleader summons was thereupon taken out by the said sheriff, upon which, on the 21st June, 1861, the following order was made by Mr. Justice Williams:—

"Olding and Others v. Eades.

"Upon hearing the attornies or agents for the sheriff of Middlesex and for the plaintiff and for William Walker the claimant, and upon reading the affidavit of William Walker, I do order, that upon payment of the sum of 350l. into Court by the said claimant within a week from this date, or upon his giving within the same time security to the satisfaction of one of the Masters for the payment of the same amount by the said claimant, according to the directions of any rule of Court or Judge's order to be made herein, and upon payment to the said sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of fieri facias issued herein.

"And I do further order, that unless such payment shall be made or such security be given within the time aforesaid, the said sheriff do proceed to sell the said goods and chattels and pay the proceeds of the sale, after deducting the [626] expenses thereof and the possession money from this date, into Court in the cause to abide further order herein.

"And I do further order, that the parties do proceed to the trial of an issue in the Court of Common Pleas, in which the said claimant shall be the plaintiff and the said execution creditor shall be defendant; and that the question to be tried shall be whether, at the time of seizure by the sheriff, the goods, &c., were the property of the claimant as against the execution creditor.

"And I do further order, that such issue shall be prepared and delivered by the plaintiff therein within five days from this date and be returned by the defendant therein within three days, and shall be tried at the next assizes for the county of Surrey.

"And I reserve the question of costs and all further questions until after the trial of the said issue; and I further order, that no action shall be brought against the said sheriff for the seizure of the said goods."

19. The plaintiff (the claimant mentioned in the said order) did not, within the time in the said order mentioned, either pay the said sum of 350l. into Court or give security for the same, and the sheriff of Middlesex thereupon, on the 3rd and 9th days of July, 1861, proceeded under the said order to sell the said furniture, stock in trade, plant and effects, which realized, after deducting expenses and possession money, the sum of 325l. 15s. 3d.

20. The sheriff withdrew from the said premises on the 13th July, 1861.

21. On the 15th August, 1861, the sheriff paid into Court the said sum of 325l. 15s. 3d.

22. An issue was prepared in the form directed by the said interpleader order between the plaintiff (the claimant in the said order mentioned) and the present defendants, [627] which was tried at the assizes held in and for the county of Surrey on the August, 1861, when a verdict was found for the claimant, the plaintiff in this action.

23. After the trial of the said issue the following order was, on the 7th November, 1861, made by Mr. Justice Williams:—

"Olding and Others v. Eades.

"Upon hearing the attornies or agents, I do order that the sum of 325l. 15s. 3d. paid into Court in this cause by the sheriff of Middlesex, on 16th August, 1861, be paid out of Court to Mr. J. H. Taylor, the attorney for William Walker, the claimant; and that the defendants do pay to the said Mr. J. H. Taylor the costs of and occasioned to the claimant by the claim and of the sale and possession money under the interpleader order, and of the issue thereby directed to be tried, and of this application, to be respectively taxed.

"E. V. WILLIAMS."

24. In pursuance of the last mentioned order the said sum of 325l. was afterwards paid out of Court to the plaintiff, and the costs mentioned in the said order were also taxed and paid by the defendants to the plaintiff.

25. I find and assess the damages actually sustained by the plaintiff by reason of the execution in manner aforesaid of the said writ of fieri facias, and of the said entry, seizure, possession and sale thereunder by the said sheriff, at the sum of 411l., of which amount I find and award that the damages sustained by the plaintiff up to and at the date of the said interpleader order were the sum of 50l.

26. The defendants contend that the plaintiff is not legally entitled to recover any portion of the said damages which accrued subsequent to the date of the said interpleader order.

27. The plaintiff, on the other hand, contends that he is legally entitled to the entire amount of the said damages.

[628] 28. The pleadings in this action are to form part of this case.

29. The question for the opinion of the Court is, whether the plaintiff is entitled to the whole of the said damages found by me to have been actually sustained by the plaintiff, or only to the damages sustained by him up to the date of the said interpleader order.

30. I award and direct that the verdict shall be amended and entered in accordance with the judgment of the Court upon the said question.

J. Brown (Hawkins with him) argued for the plaintiff (Nov. 17 and 19). The plaintiff is entitled to the whole of the damages claimed. If there had been no interpleader, it is clear that the plaintiff would have been entitled to recover whatever damage he sustained by the wrongful seizure and sale of his goods. The defendants contend that the effect of the interpleader order is to deprive the plaintiff of all damages which accrued subsequently to the date of the order; but, if that were so, an interpleader order by which goods wrongfully seized were directed to be sold, would operate as an absolute protection against any liability for damage occasioned by their sale. An interpleader order has no such effect. At the time it is made the rights of the claimant and execution creditor are in dubio, and the order merely directs what is to be done with the goods until those rights are ascertained. The order is made for the protection of the sheriff, not to exempt the execution creditor from liability if it shall turn out that he has wrongfully seized the claimant's goods. [Bramwell, B. Suppose the action had been brought against the sheriff, to what damages would he have been liable?] It is clear that he would not be liable to any damage subsequent to the interpleader order, for the express object of the 1 & 2 Wm. 4, c. 58, s. 6, [629] is to afford relief and protection to sheriffs and their officers. But if the effect of an interpleader order is to deprive the claimant of a portion of his damages, great injustice would be done, for the bulk of the damage may arise from a forced sale of the goods in pursuance of the order. Even if the Judge had power to controul the rights of the parties against each other, he has not by this order exercised it: *Mercer v. Stanbury* (2 H. & N. 155, note), *Beswick v. Boffey* (9 Exch. 315).

Lush (Dixon with him), for the defendants. No person is responsible in damages for what is done in obedience to the order of a Court of competent jurisdiction. [Pollock, C. B. That is not universally true. Persons are liable for maliciously putting the law in motion. No doubt, in criminal cases, if they act *bonâ fide*, they are excused, though mistaken; but that is on public grounds, and can scarcely apply to a case like this where the parties act for their own advantage. Channell, B. No action will lie to recover damages which have been caused by the delay of a Court; but it is too broad a proposition to say that no one is responsible for anything done in obedience to the order of a Court.] If a person causes another to be brought before a magistrate on an unfounded criminal charge, and the magistrate remands him, he can recover no damages for his imprisonment subsequent to the remand, because that was the judicial act of the magistrate: *Brown v. Chapman* (6 C. B. 365). Suppose the execution creditor had established his right to the goods, could he have recovered damages against the claimant for the delay of his execution by the interpleader order? An interpleader order is for the protection of the execution creditor as well as the sheriff. In *Carpenter v. Pearce* (27 L. J. Exch. 143) this Court held that a Judge at [630] Chambers had authority to restrain an action against the execution creditor as well as against the sheriff. It is clear that the sheriff is not responsible for selling the goods under an interpleader order: *Abbott v. Richards* (15 M. & W. 194). So, here,

the defendants have no answer to the action, but the plaintiff cannot recover any damage subsequent to the interpleader order. The plaintiff has in fact brought the damage upon himself, for he might either have consented to the sheriff remaining in possession, or he might have paid the amount levied into Court, or have given security for its payment.

J. Brown, in reply. The Interpleader Act recognises a distinction between the execution creditor and the sheriff. An execution creditor is not responsible for the act of the sheriff in seizing and selling the wrong person's goods unless he directed it: *Wilson v. Tummon* (6 Scott, N. R. 894). But a sheriff may maintain an action against an execution creditor for directing him to make such a seizure and sale: *Humphrys v. Pratt* (5 Bligh, N. S. 154). If the effect of an interpleader order is to deprive the claimant of the damages which he would be entitled to recover had there been no interpleader, the practice should be altered and the rights of the claimant reserved by the order. As a general rule, a person who puts the law in motion is responsible for the damage thereby caused to another. *Lock v. Ashton* (12 Q. B. 871) merely decided that the defendant was not liable in trespass for a remand, which was the judicial act of the magistrate. An interpleader order is not a judicial act, but a mere direction to the sheriff in what manner he is to dispose of the goods until the disputed claim is determined. A sale under the order is a continuation of the original trespass: 1 Chit. Plead. 207, [631] 7th ed., *Loweth v. Smith* (12 M. & W. 582), 1 Wms. Saund. 24, n. (1). He also referred to Daniel's Chancery Practice, pp. 1611, 1043, 2nd ed.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. We think the plaintiff is entitled to damages only up to the time of the interpleader order. The verdict establishes that the defendants are trespassers and wrong-doers as stated in the declaration, and the only question is, what is the damage caused to the plaintiff by the trespasses and wrongful acts so established?

Now, up to the time of the interpleader order, all the damage sustained by the plaintiff is caused by the defendants, for they certainly are caused by the acts of the sheriff, viz., in taking and detaining, and those acts are the acts of the defendants, who, up to that time, are, with the sheriff, joint trespassers and wrong-doers. But, on the making of the interpleader order, the case is different. That order, and what is done under it, are the consequence of the claim of the plaintiff, the interpleader summons of the sheriff, and the decision of the Judge thereon. In this case the common order was made, and very often it is made with the consent or at the solicitation of the execution creditor. But it may be otherwise. The execution creditor may join the claimant in praying that the goods may not be sold, but that the sheriff may retain possession, and yet the Judge, at the sheriff's instance, may order a sale. So the claimant may prefer a sale, though the sheriff is willing to keep possession. How, then, can the Judge's order, and what is done under it, be said to be the act of the execution creditor, or so direct a consequence of any [632] act that he is liable for it. No doubt that order would not have been made but for the seizure of the goods by the defendants, but still it is a remote and not a proximate consequence of it, and therefore the defendants are not liable for it. No doubt this is hard on the plaintiff, but as between him and the execution creditor the same hardship would exist if the latter had not directed the seizure of the goods, but merely contested the plaintiff's claim on the hearing of the interpleader summons. For there would then be no way of making him liable to these damages, nor indeed ought he to be. He would not in that case have ordered the seizure of the goods; he would have been brought before the Judge, not by his own act, but by that of the sheriff; he would have affirmed nothing, done nothing, but merely have refused to admit the plaintiff's claim, and then would have been subject to the order to interplead. And an execution creditor in such case might fairly object to be made liable for such damages as are claimed; because he might say that but for the Interpleader Act, he would not be; that the risk would have been with the sheriff, whose duty it was to determine whether or no he would seize and sell; that he was quite content with the sheriff's responsibility, and that the Interpleader Act was never intended to augment his responsibility. This does not shew that the case is not hard on the plaintiff; but it goes to shew that a decision in his favour would be hard on the defendant, and that, if the loss is to be borne at all, it should be by the sheriff, for whose protection that is ordered which results in the loss to the plaintiff of which he

complains. But, however this may be, our judgment is that the plaintiff cannot recover more than the 50l. found by the arbitrator.

[633] *WILKINSON v. FAIRRIE AND ANOTHER.* Nov. 25, 1862.—The plaintiff, a carman, was sent by his employer to the defendants' premises to fetch some goods. After waiting some time, he was directed by a servant of the defendants to go along a passage to a counting-house where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase and was seriously injured. Held, that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase.

[S. C. 32 L. J. Ex. 73; 9 Jur. (N. S.) 280; 7 L. T. 599. Commented on, *Indermaur v. Dames*, 1867, L. R. 1 C. P. 288: affirmed L. R. 2 C. P. 311. Overruled, *Paddock v. North Eastern Railway*, 1868, 18 L. T. 60. Referred to, *Latham v. Johnson*, [1913] 1 K. B. 411.]

The declaration stated that the defendants, before and at the time of the committing of the grievance, and of the occurring of the injury and damage hereinafter mentioned, were lawfully possessed of and in the occupation of a certain messuage, warehouse and premises, wherein they carried on their business as sugar bakers, and in which said warehouse there was a certain hole or aperture: yet the defendants, well knowing the premises, whilst they were so possessed and in the occupation of the said messuage, warehouse and premises, and so carried on their business therein as aforesaid, and whilst there was such hole or aperture as aforesaid, wrongfully, and contrary to their duty in that behalf, permitted the said hole or aperture to be and continue, and the same was then so badly, insufficiently and defectively covered and protected, and the part of the warehouse in which the said hole or aperture was situated was then so insufficiently and ineffectually lighted, that, by means of the premises, and for want of a proper and sufficient covering and protection to and a sufficient and effectual light near or about the said hole or aperture, the plaintiff, who was then lawfully passing in and about the said warehouse for the purpose of transacting certain lawful business with the defendants in the way of their said trade, fell into the said hole or aperture, and thereby the plaintiff was greatly injured and damaged.

Pleas (inter alia). First: Not guilty. Thirdly, that it was not the duty of the defendants to cover and protect the said hole or aperture, or to light that part of the said warehouse near or about the said hole or aperture, as alleged. Issues thereon.

[634] At the trial, before Bramwell, B., at the London Sittings after last Trinity Term, the following facts appeared:—The plaintiff, who was a carman in the employment of one Dale, was sent by his master to the warehouse of the defendants, who were sugar refiners in Church Lane, Whitechapel, for a tierce of sugar. The plaintiff delivered his order to the defendants' gatekeeper, as he had done on former occasions. The gatekeeper directed him to wait in the road opposite the "shoot" with the cart until the sugar was delivered to him. After waiting some time, the sugar not being brought to him, and not being able to make anyone hear, the plaintiff left his horse and cart at the "shoot" and again applied to the gatekeeper, who told him to go into the yard and through a door on the left hand side, and then up stairs, where he would find the delivery foreman or warehouseman in the counting-house. The plaintiff went into the yard and through the door, but, it being late in the evening and the place very dark, he could not see his way, and after proceeding a few steps fell down a staircase and was severely injured. There was no danger in going there when it was light.

Upon these facts, the learned Judge nonsuited the plaintiff, being of opinion that, if he could see his way, the accident was the result of his own negligence; if he could not see his way, he ought not to have proceeded without a light.

B. C. Robinson moved to set aside the nonsuit on the ground of misdirection (Nov. 7). There was evidence of negligence on the part of the defendants. It was the duty of the plaintiff to get the sugar for his employer, and, after waiting some time for it, he was told by the defendants' gatekeeper to go to a place which was dangerous. Even a trespasser may maintain an action for injury caused by the wrongful act of the person on whose land he trespasses: [635] *Bird v. Holbrook* (4 Bing. 628), *Lynch v. Nurdin* (1 Q. B. 29), *Jordin v. Crump* (8 M. & W. 782). But

here the plaintiff was acting in the discharge of his duty ; and he pursued the direction given to him by the defendants' servant. The defendants ought either to have lighted the place, or fenced the staircase: *Barnes v. Ward* (9 C. B. 392). [Bramwell, B. The plaintiff walked in the dark, and thereby met with the accident.] In pursuing the directions of the defendants' servant, the plaintiff would naturally expect that he might walk in safety.

Cur. adv. vult.

POLLOCK, C. B., now said,—This was an application to set aside a nonsuit directed by my brother Bramwell ; and we are all of opinion that there ought to be no rule.

The action was brought against the owners of certain premises on which the plaintiff had sustained serious personal injury. The plaintiff, who was a carman, was sent by his master to the defendants' premises to fetch some goods. He went there late in the evening ; and, after waiting some time, he was directed by a servant of the defendants to go to a place where he would find their warehouseman. He accordingly proceeded there, and, in going along a dark passage, fell down a staircase. My brother Bramwell directed a nonsuit upon this alternative—if it was so dark that the plaintiff could not see, he ought not to have proceeded without a light ; if it was sufficiently light for him to see, he might have avoided the staircase, which is a very different thing from a hole or trap door, through which a person may fall. We think the nonsuit was perfectly right. I am not aware of any question which could have been left to the jury. It certainly was not the duty of the defendants to light the passage. In general it is the duty of every person to take care of his own safety, [636] and not to walk along a dark passage without a light to disclose to him any danger. As there was no contract, or any public or private duty on the part of the defendants that their premises should be in a different condition from that in which they were, it seems to us that the nonsuit was perfectly right.

Rule refused.

IN RE WORMAN. Nov. 3, 1862.—When an attorney does not appear to shew cause against a rule calling on him to answer the matters of an affidavit, the Court will make the rule absolute to answer within a certain time, and in default that an attachment issue against him, and also that he be struck off the roll.

[S. C. 32 L. J. Ex. 83 ; 11 W. R. 26 ; 7 L. T. 249.]

Dowdeswell, in last Trinity Term (June 7), had obtained a rule calling on Robert Worman, an attorney of this Court, to answer the matters of certain affidavits. The rule was returnable on the 13th of June, but on the application of Worman was enlarged until the first day of the present term.

Dowdeswell now moved to make the rule absolute, no cause being shewn, and also to strike Worman off the roll, or to issue an attachment against him. *In re Crossley* (6 T. R. 701) is an authority that an attachment may issue where an attorney has not answered the matters of an affidavit. [Bramwell, B. There is this difficulty : the rule calls on the attorney to shew cause why he should not answer the matters of the affidavit, and, as he shews no cause, the rule would be absolute that he answer them.] The Court have refused to grant a rule in the alternative, calling on the attorney to shew cause why he should not answer the matters of an affidavit, or why he should not be struck off the roll: Arch. Prac., p. 149, 11th ed. [Bramwell, B. Although the rule in form calls upon the attorney to shew cause why he should not answer the matters of the affidavits, [637] it is in substance an order upon him to do so. He admits that the rule ought to be absolute, and he ought to be called upon to shew cause why an attachment should not issue against him, or why he should not be struck off the roll.]

Per Curiam.(a) The rule must be absolute to answer the matters in the affidavit within ten days, and in default of his so doing that an attachment do issue against him, and also that he be struck off the roll.

Rule absolute accordingly.

(a) Pollock, C. B., Bramwell, B., and Channell, B.

EX PARTE BUTLER. IN RE JAY v. MARY AMPHLETT. Nov. 21, 1862.—The Court will not discharge a married woman in custody under a ca. sa. issued on a judgment obtained against her whilst sole, if it appear that she has properly settled to her separate use.—Where, in such a case, the husband has obtained an order in bankruptcy for his discharge, the Court will not interfere on motion, but will allow a writ of auditâ querelâ to issue.

[S. C. 32 L. J. Ex. 176.]

This was an application to discharge a married woman out of custody under a writ of ca. sa. issued on a judgment for 60l., obtained against her whilst sole. The affidavit in support of the application, sworn on the 13th November, 1862, stated that, on the 1st day of February, 1862, she was married to George Butler, who is now living: that she was entitled, under the will of her late mother, Eliza Amphlett, deceased, and an order of the Court of Chancery, dated the 22nd day of March last, made in a cause of *Benyon v. Amphlett*, to the interest of 4806l. 13s. 1d. Bank 3l. per cent. annuities and 840l. 12s. 7d., New 3l. per cent. annuities (subject to reduction by payment of the costs by the said order directed to be paid) for her separate and inalienable use: that she was not entitled to any other separate property, nor to any property whatever out of which she can discharge the debt in this action: that, on the 29th day of October last she was arrested by and is now in the custody of the sheriff of Essex under a writ of *capias ad satisfaciendum* under the judgment in this action. [638] A similar application had been made to Martin, B., at Chambers, and refused.

C. Pollock, in support of the application. No doubt there are authorities that the mere fact of a married woman having no separate property is not sufficient to entitle her to her discharge out of custody under a writ of ca. sa.: *Beynon v. Jones* (15 M. & W. 566), *Larkin v. Marshall* (4 Exch. 804). But that rule has been considered too strict, and the Court will in its discretion discharge a married woman out of custody unless it is shewn that she has separate property which may be applied in satisfaction of the debt: *Ivens v. Butler* (7 E. & B. 159). Another ground on which the defendant is entitled to her discharge is that she cannot obtain her release by means of the bankrupt law. A married woman could not petition under the Insolvent Act, 1 Geo. 4, c. 119, s. 25, because she was not capable of executing a warrant of attorney: *Ex parte Deacon* (5 B. & Ald. 759). By the 1 & 2 Vict. c. 110, s. 101, express power was given to a married woman to petition the Insolvent Court, but there is no such provision in the Bankruptcy Act, 1861. [Bramwell, B. The reason probably is that formerly a married woman was not subject to the bankrupt law, as she could not be a trader, but now trading is not necessary in order to petition in bankruptcy.]

POLLOCK, C. B. It is sufficient to say that this is not a case in which we ought to interfere.

BRAMWELL, B., and CHANNELL, B., concurred.

Rule refused.(e)

[639] EXCHEQUER REPORTS. HILARY TERM, 26 VICT.

THE ATTORNEY GENERAL v. GARDNER. Jan. 12, 1863.—A testator who died before the 19th May, 1853 (the day on which the Succession Duty Act came into operation), devised a reversion, in respect of which he would not have been liable to succession duty, if it had vested in possession in his lifetime after that date. Held, that he thereby created a new succession which was not exempt from duty under the 15th section of the Act.—Therefore where A. (who died before the 19th of May, 1853), devised to C., a stranger in blood, a reversionary property to which he had become entitled by the exercise of a power of appointment contained in a settlement made by himself: Held, that when, on the death of the tenant for life (which happened after the 19th of May, 1853) the property

(e) In the following Easter Term J. Brown renewed the application on the ground that, on the 26th February, 1863, the husband had become bankrupt and obtained his order of discharge. Holl shewed cause (May 8), when the Court refused to interfere on motion, but allowed the defendant to issue a writ of auditâ querelâ.

vested in possession, C. took a succession under the devise upon which duty was payable at the rate of 10l. per cent.

[S. C. 32 L. J. Ex. 84 ; 9 Jur. (N. S.) 281 ; 11 W. R. 378 ; 7 L. T. 682. Distinguished, *Attorney-General v. Rushton*, 1864, 2 H. & C. 812. Referred to, *Attorney-General v. Gell*, 1865, 3 H. & C. 615.]

Information in equity by the Attorney General, as follows :—

1. The object of this information is to obtain from the defendant payment of the duty owing to her Majesty in respect of his succession in certain real property, called Soham Mere, to which he became beneficially entitled in possession upon the death of the Marchioness Townshend as hereinafter stated. The question for the decision of the Court is as to the rate of duty payable in respect of such succession.

2. By an indenture of settlement, made on the 11th May, 1807, previously to the marriage which was shortly afterwards solemnized between the late Marquis Townshend and the late Marchioness Townshend (then Sarah Gardner Dunn Gardner), it was declared that the trustees therein named should stand possessed of a sum of 25,000l. Navy 5l. per cent. Bank Annuities, then lately transferred into their names by William Dunn Gardner (the lady's father), upon certain trusts, which were in effect for the benefit of the [640] husband and wife successively for life, and after the death of the survivor for the benefit of the issue of the marriage as therein mentioned ; and in case (which happened) there should be no child of the said marriage, then in trust for such persons as the wife should by deed or will appoint, and in default of appointment for herself absolutely.

3. The said Bank Annuities were afterwards sold, and the produce was, pursuant to a power for that purpose contained in the said indenture of settlement, invested in the purchase of certain real property called Soham Mere, which was thereupon conveyed so as to become subject to the trusts of the before stated indenture of settlement.

4. After the said marriage had been solemnized, that is to say, on the 26th December, 1808, the said Marchioness Townshend, by an indenture or deed of that date, pursuant to the power given or reserved to her by the said indenture of settlement, duly appointed the said property called Soham Mere, from and after the death of the survivor of her husband and herself without issue as aforesaid, to such uses as her father, the said William Dunn Gardner, should by deed or will appoint, and in default of appointment to the use of the said William Dunn Gardner, his heirs and assigns, for ever.

5. Under the circumstances hereinbefore stated, the said William Dunn Gardner had become and was, at the time of making the will as hereinafter stated, the absolute owner of the said real property called Soham Mere, in reversion expectant on the death of the survivor of the said Marquis and Marchioness Townshend without issue of their marriage.

6. The said William Dunn Gardner died on the 10th November, 1831, having by his will, dated the 16th August, 1831, given and devised all his estate and interest in the said real property called Soham Mere to the above named defendant John Dunn Gardner during his life, with remainder to his first and other sons in tail male.

[641] 7. The said Marchioness Townshend survived her husband, who died on the 31st December, 1855, and she herself died on the 11th September, 1858, after the time appointed for the commencement of the Succession Duty Act, 1853, without having ever had any child by her said husband ; and the Attorney General submits and insists that upon her death the defendant became entitled in possession to the real property called Soham Mere, as a succession derived by him from the said testator William Dunn Gardner, by reason of the disposition thereof made by his will, as hereinbefore stated.

8. The defendant is a stranger in blood to the said testator, and application has been made to him for payment of duty at the rate of 10l. per cent. in respect of the aforesaid succession, which is, as the Attorney General submits and insists, the proper rate of duty. But the defendant declines to pay the same.

The bill prayed (inter alia) a declaration that duty at the rate of 10l. per cent. was payable by the defendant, in respect of his succession in the Soham Mere estate.

The defendant, by his answer, admitted the material statements in the bill; but he also stated the additional fact, that the 25,000l. Bank Annuities were, prior to the execution of the settlement, the property of William Dunn Gardner, and that he was, in fact, the settlor thereof, and settled the same by the settlement. Under these circumstances, he submitted that he was not chargeable with any succession duty at all; but that if the Court should be of opinion that he was chargeable with some succession duty, then that the proper rate was 1l. per cent.

The Attorney General, the Solicitor General, Locke and Hanson argued for the Crown in last Michaelmas Term (November 20th). The Crown is entitled to duty at the [642] rate of 10l. per cent., as upon a succession derived by the defendant under the will of William Dunn Gardner, who is the predecessor. The case falls within the express words of the 2nd section of the Act regulating succession duty, 16 & 17 Vict. c. 51. There is a "past disposition of property by reason whereof some person," viz. the defendant, "has become beneficially entitled to property upon the death of some person," viz. the Marchioness Townshend, "dying after the time appointed for the commencement of this Act." Unless, therefore, the effect of that section is modified by some of the succeeding sections, the claim of the Crown is established. It is concluded by authority, and will hardly now be contested by the defendant, that the Succession Duty Act, 1853, operates on estates which were created and vested in interest before that Act came into operation, but which did not vest in possession until after that date: *The Attorney General v. Middleton* (3 H. & N. 125), *Wilcox v. Smith* (4 Drewry, 40). But the point upon which reliance will probably be placed is, that William Dunn Gardner, being the donor of, and appointee under a power of which his daughter was the donee, took under a disposition made by himself; and since, but for that disposition, he would not, if he had survived the passing of the Succession Duty Act, have been liable to duty, so, by the operation of the 12th section, he would still be exempt; and that, then, by the effect of the 15th section, the defendant would stand in the same position, and be also exempt. Now the duty is imposed by the conjoint operation of the 2nd and 10th sections, and the five sections following the 10th modify the rate of duty in particular cases. The first branch of the 15th section is as follows:—"Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation [643] or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the 2nd section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession, at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created." From the language there used it is apparent that the clause is dealing, not with a case in which the alienor is, as in the present case, wholly exonerated from duty, but with one in which he would himself have paid duty if he had not aliened. The point, however, has already been twice decided in favour of the Crown. In the case of *Re Jenkinson* (24 Beav. 64), by the effect of certain instruments executed in 1852, between Sir Charles and Sir George Jenkinson, a sum of 25,000l., of which Sir Charles was regarded as the purchaser from Sir George, was to be paid after the death of Sir Charles without issue male, out of the estates which would then devolve upon Sir George. Of this 25,000l., 20,000l. was contemporaneously settled upon the daughters of Sir Charles, and the other 5000l. was left as part of Sir Charles's personal estate. It was held, under the 17th section, that upon the 5000l. no duty was payable, as being purchased by Sir Charles for his own benefit, and, in substance, derived from himself, but that upon the 20,000l. the daughters were chargeable with duty, as upon a succession derived from their father, and that the 15th section did not apply. In the case of *The Attorney General v. Yelverton* (7 H. & N. 306), by deeds executed in 1850, a tenant in tail in remainder of certain settled estates, for valuable consideration, charged them with 20,000l., for the use of the tenant for life, payable twelve months after the determina-[644]-tion or failure of the limitations to two persons, of whom the tenant for life was one, for their lives, and to their sons in tail male; and the tenant for life forthwith assigned the 20,000l. to trustees in trust for his adopted children. It was held that succession duty was payable thereon. Martin, B., in delivering the judgment of the majority of the Court, said: "The 15th section has been referred to: we cannot appreciate its application. It seems to us to refer to a

species of property different from that on which the duty is claimed in the present case, that is to say, a reversionary property in respect of which the assignor would have been liable to duty, but which he has assigned." The judgment of Bramwell, B., who, in that case, differed from the rest of the Court, proceeds on the ground that there the alienee would not be liable to succession duty, as between himself and the alienor; but here it is submitted that, under the 2nd section, he would be so liable. The case therefore falls within the express words of the 2nd and 10th sections, and is not taken out of them by the 12th or 15th sections.

Lush and J. Chitty, for the defendants. The Crown is not entitled to the payment of any duty. It is not, however, disputed on the part of the defendant, that he is a successor within the meaning of the 2nd section of the Act. But that section does not impose duties. It simply defines the terms "successor" and "predecessor," with a view to the construction of the subsequent sections. It is admitted that the defendant would be liable to duty if he were not exempt by the operation of the 12th and 15th sections. William Dunn Gardner, in settling this property upon his daughter's marriage, gave to her a power of appointing the ultimate remainder, which she afterwards exercised in her father's favour. Now, applying the general [645] rule of law, that limitations created by the execution of a power must be read as if they were introduced into the instrument creating them, the limitations to William Dunn Gardner, under the execution of the power, must be read into the original settlement. Thus, William Dunn Gardner takes a succession under a disposition made by himself, and, if he had survived his daughter, he would, under the 12th section, have been exempt from duty; and then the defendant, as alienee or derivative owner of William Dunn Gardner's reversionary interest, would have stood in the same position under the first branch of the 15th section. That branch of the section had for its object the exemption of all persons who had obtained reversions by means of alienations before the passing of the Act, by putting them in the position of their alienors; since it would have been a manifest hardship to subject to a 10 per cent. tax, as strangers in blood, those who had purchased reversions before the Act was passed. The argument of the Crown, that the 15th section applies only to cases where some duty is payable, involves this anomaly, that, if William Dunn Gardner had taken a succession from his daughter, the defendant would stand in his place as alienee and pay only 1l. per cent. duty; but where, as in the present case, he takes under his own disposition, and would therefore, if he had survived his daughter, have paid nothing, the defendant, or even a purchaser for value from William Dunn Gardner, would be chargeable with a 10l. per cent. duty. The cases of *Re Jenkinson* (24 Beav. 64) and *The Attorney General v. Yelverton* (7 H. & N. 306) are not authorities in favour of the Crown. In the former case the Master of the Rolls decided that the 15th section was not applicable, on the ground that the 25,000l. was not reversionary property. It was money charged upon the estate, and not part of the estate; and though money might [646] be so settled as to constitute reversionary property, it was not so settled, when, as there, it was only to come into existence on a future and contingent event. It is a fair inference from the judgment of the Master of the Rolls that, if the 25,000l. had been an existing sum of money at the time of the settlement, the 15th section would, in his judgment, have been applicable. So, in *The Attorney General v. Yelverton* (7 H. & N. 306), it appears from the judgment of the majority of the Court that they considered the 20,000l., which was to become payable on a contingent event, was not reversionary property within the 15th section. [Martin, B. Was not William Dunn Gardner the alienor of his daughter's reversion?] No: he took under the settlement which created the power: *In re Barker* (7 H. & N. 109), *Lord Braybrooke's case* (9 H. L. Cas. 150), *Sir Edward Clere's case* (6 Rep. 17 b.), *Sudgen on Powers*, p. 93, 8th ed. The uses could not be served out of the daughter's remainder, as the power was executed during coverture, and a fine would have been requisite to pass her estate. As this power was exercised before the Act came into operation, the 4th section does not apply. In the first branch of the 15th section, the word "alienation" is a term of the largest import, and must, it is submitted, include a devise by a testator who died prior to 1853; in the second branch of the section, which relates to alienations subsequent to the Act, the language is studiously different, the words "or any title not conferring a new succession" being expressly introduced. [Bramwell, B. Are not those words to be implied in the first branch of the section? Is not the statement of them in the second branch unnecessary?] To imply the words

would, it is submitted, be to tax by implication. [Martin, B. Would William Dunn Gardner have [647] become entitled by reason of a disposition within the 2nd section? Would he not come in upon his old estate?] He would undoubtedly come in under his own settlement, but nevertheless a reversionary interest was thereby created. That interest has now become vested by alienation in the defendant, within the meaning of the 15th section, and, if so, he is not liable to any duty. They also referred to *Lovelace's case* (4 De Gex & J. 340).

The Attorney General, in reply. There is no section in the Act, by which any duty could have been imposed on William Dunn Gardner if he had survived the Marchioness. The 12th section, upon which reliance has been placed, merely states affirmatively what might have been deduced negatively from the 10th section, which does not impose any duty where a person takes under his own disposition. It has been put as a hardship that, if the Crown be correct, those who purchased reversions before the Act was passed might be liable to a 10l. per cent. duty, while their alienors would have been altogether exempt. In such a case, the purchaser might be regarded as the disponent, since the property, having been attained by his money, might be said to come from him. *The Attorney General v. Baker* (4 H. & N. 19) and *The Attorney General v. Yelverton* (7 H. & N. 306) are authorities which support this view. At all events, no sufficient argument has been advanced to induce the Court to discard the plain language of the 15th section, which applies only to those cases where the alienor is himself chargeable with some duty. Again, even if a devisee of the entire fee can be regarded as an alienee within that section, can it be contended that, where there are a series of limitations, each of the persons upon whom in succession the estate would [648] devolve is also such an alienee? If so, the revenue might be deprived of duty until there was a failure of heirs in tail. But, if not, why should the devisee of a life estate be an alienee within that section. Upon these grounds, it is submitted that the Crown is clearly entitled to duty at 10l. per cent.

The judgment of the Court was now delivered by

MARTIN, B. This is an information for succession duty. By a marriage settlement, on the marriage of the Marquis and Marchioness of Townshend, made in the year 1807, a sum of 25,000l. Navy 5l. per cent. Bank Annuities was settled by William Dunn Gardner, the lady's father, upon certain trusts. These annuities were afterwards sold, and, in pursuance of a power contained in the settlement, an estate called Soham Mere was purchased and conveyed, subject to the same trust as in the settlement. These were for the husband and wife successively for life, and after the death of the survivor for the benefit of the issue of the marriage, and should there be no child (which was the case), then in trust for such persons as the Marchioness should by deed or will appoint, and in default of appointment for herself absolutely. After the marriage the Marchioness, by deed of the 26th of December, 1808, executed the power vested in her, and appointed the Soham Mere estate, after the death of her husband and herself without issue, to such uses as her father should appoint, and in default of appointment to the use of her father, his heirs and assigns, for ever. On the 10th of November, 1831, William Dunn Gardner, by will, devised the estate to the defendant (a stranger in blood) for life, with remainder to his first and other sons in tail, and soon afterwards died. The Marchioness survived her husband, and died in 1858, [649] without ever having had a child. The Succession Duty Act came into operation in May 1853, and the Attorney General claimed duty at the rate of 10l. per cent. The defendant contended that he was not chargeable with duty at all, or, if to any, at the rate of 1l. per cent. only.

It was admitted by Mr. Lush and Mr. J. Chitty, who argued the case for the defendant, that the will of William Dunn Gardner was a past disposition of property, by reason whereof the defendant became beneficially entitled, within the 2nd section, to property upon the death of the Marchioness, who had died after the time appointed for the commencement of the Act. William Dunn Gardner, at the time of making his will, was absolute owner in fee simple of an estate, which, for the purpose of the succession duty, must be deemed a reversion, expectant upon the estates for life of the Marquis and Marchioness and the contingent estates to the unborn children. This estate is as well known and recognised in law as an estate in fee simple in possession. It might have been sold, or mortgaged, or leased, or dealt with, in like manner as any other fee simple estate, and, in fact, was devised to the defendant by will; and it is difficult to see why succession duty should not be payable upon a dis-

position of it. The simple and proximate state of facts was, that a testator, owner in fee simple of a reversion expectant upon life and contingent estates, made a will, and devised an estate for life to the defendant, who therefore took by devise an estate from an owner in fee simple, and it would seem to be immaterial what was the nature of the testator's title, or how he became possessed of the property. In truth, he, by his will, created a new succession, the defendant taking a beneficial interest by devise carved by him out of his estate in fee simple in the reversion. It is according to the ordinary rule of law that the proximate state of things, and not the remote, is to be regarded.

[650] But it was contended, on behalf of the defendant, that he is not chargeable with duty by virtue of the 12th and 15th sections. The argument was, that William Dunn Gardner having taken the reversion in fee under the power of appointment conferred upon the Marchioness by the marriage settlement, the case was the same as if his name had been originally inserted in the settlement with the same limitation. For this position a passage in the judgment of Lord Kingsdown in the *Braybrooke case* (9 H. L. Cas. 150), in the House of Lords, was cited. The defendant therefore, it was said, took a succession under a disposition made by himself within the meaning of the 12th section, and under the circumstances of this case would not himself have been chargeable with duty; that the property was reversionary property expectant upon the deaths of the Marquis and Marchioness, and that, by the 15th section, this reversionary property being vested in the defendant by alienation, viz., by will, he was only chargeable with duty at the same time and at the same rate as the testator (the person originally entitled) would have been, and as he would not have been chargeable with duty, neither was the defendant. This argument is founded upon the position that the estate of William Dunn Gardner must be deemed to be as one inserted in the marriage settlement, and, assuming this to be so, nevertheless the argument on behalf of the defendant seems to us to be fallacious. Assuming the estate to William Dunn Gardner to have been inserted in the settlement, the limitation would have been to the Marquis for life, remainder to the Marchioness for life, contingent remainders (which never vested) to their children, remainder to William Dunn Gardner in fee. This would be improperly called a remainder. It really would have been a reversion and part of the old fee simple of William Dunn Gardner,—it would [651] never have passed out of him; and when the Marquis and Marchioness died without children, and the particular estates thereby determined, he or his heirs or devisees would become entitled to the possession, not of a new estate, but by reason of the old ownership. Under such circumstances it is quite clear that William Dunn Gardner would not have been chargeable to succession duty. First, the title to the possession being by reason of the old reversion, our impression is that it was not a succession at all,—it was a mere repossession of the old estate after the particular estates created by him had become extinct. But, secondly, it is expressly declared not to be chargeable by the latter part of the 12th section, which enacts, that no person shall be chargeable with duty upon the extinction or determination of any estates created by himself, unless at the date of its creation he was entitled to the property expectant upon the death of some person dying after the time appointed for the commencement of this Act. This was not the position of William Dunn Gardner when the estates of the Marquis and Marchioness were created. And, thirdly, in order to the chargeability to duty there must be a predecessor and a successor who are different persons. Upon the assumption of the defendant, William Dunn Gardner filled both characters. In fact he would have been successor to himself. But we think the first part of the 12th section does not apply to such a case as the present at all. When the owner of a reversion in fee not chargeable to succession duty makes a will and devises the reversion, it seems to us that he creates or confers a new succession, and that the Act is to be applied to it in its simple and direct application in like manner as if he had been owner of the fee simple in possession. And what this part of the 12th section seems to us to refer to is such a case as Lord Braybrooke's, and several others which have come before the Courts, where a [652] man chargeable to succession duty makes a disposition of property, in which case he is to be chargeable as if no such disposition had been made. And the first part of the 15th section seems to us to refer to the case of an alienation of reversionary property by an alienor chargeable himself to duty, in which case the alienee is subjected to the same duty. In the infinite variety of cases and circumstances to which the Succession Duty Act may be

sought to be applied, it may be that it will turn out to be otherwise; but our impression strongly is, that the first parts of the 12th and 15th sections apply only to cases where the disponent or alienor would himself be chargeable to duty, and do not apply to a case like the present where he would not.

Several cases were cited by the learned counsel on both sides. *The Attorney General v. Yelverton* (7 H. & N. 306) was alleged to be a direct authority in favour of the Attorney General, and it seems to us to be so. In substance, the settlement of the money in that case constituted a new succession. The expression of Lord Kingsdown in *Lord Braybrooke's case* (9 H. L. Cas. 150) and the case *In re Barker* (7 H. & N. 109) were relied upon on behalf of the defendant. We do not dissent from either, but they seem to have no application to this case. We would merely observe that when it is said that a limitation created under a power must be read as if it was introduced into the deed creating the power, it seems to be rather a similitude than a rule—that generally it is as if the limitation had been contained in the original deed, and not that under all circumstances it is absolutely to be so read. If it is to be deemed and considered as an abstract, positive, absolute rule of law, it would be difficult to understand how the grant of a lease or rent charge by the tenant for life having a power of [653] appointment would not be defeated by the exercise of the power: 1 Sugden on Powers, p. 81.

As to the duty at the rate of 1l. per cent., we are not aware that any argument was used to shew that such was the proper rate. The lawful rate, in our opinion, is 10l. per cent., as claimed by the Attorney General.

BRAMWELL, B. (a) I concur in the judgment pronounced, but I wish to say a few words in addition. William Dunn Gardner is entitled to an estate in reversion or remainder, it seems to me immaterial which, as also how he got it. This estate he devised to the defendant. If *The Attorney General v. Yelverton* was well decided the case is concluded; but though I defer to the authority of that case, I confess I am not convinced by it. Still, independently of that authority, I think the Crown is entitled to judgment. To my mind the property is not “vested by alienation or other derivative title” in the defendant within section 15. I think a title by will is not within those words, but it is such a disposition as would be, if of money, “a disposition or devolution such as in itself to create a succession within the provisions of the Act” within section 17; and is within section 2, and creates a succession between the defendant and William Dunn Gardner. It is clear that had William Dunn Gardner died intestate his heir would have taken a succession. Why not his devisee? This opinion is in conformity with what I suggested in *The Attorney General v. Yelverton*.

Judgment for the Crown.

[654] IN RE A PLAINT IN THE COUNTY COURT OF YORKSHIRE, BETWEEN CHARLES DENTON, *Plaintiff*, AND JAMES MARSHALL AND OTHERS, *Defendants*. Jan. 14, 1863.—Upon the hearing of a plaint in a County Court on the 11th of September, an objection to the jurisdiction was overruled and judgment given for the plaintiff. On the 20th of September notice was given of the defendants' intention to apply for a writ of prohibition. On the 10th of October the debt and costs were paid to the Registrar to prevent an execution, and on the same day a summons was taken out at Chambers, returnable on the 14th, calling on the County Court judge and the plaintiff to shew cause why a writ of prohibition should not issue. On the 13th it was served. On the 16th the Registrar paid over the debt and costs to the plaintiff's attorney. Held, that the defendants' delay had disentitled them to a writ of prohibition.—Quære, whether in prohibition the Court will award restitution? Semble, per Martin, B., not, when the subject-matter of the suit is no longer within the control of the inferior Court.—Semble, that where a dispute has arisen between a member and the trustees of a Friendly Society, for the decision of which a specific tribunal is provided by the rules of the Society, the jurisdiction of the County Court is ousted.

[S. C. 32 L. J. Ex. 89; 9 Jur. (N. S.) 337; 11 W. R. 268; 7 L. T. 689.]

(a) His lordship made these remarks on the 15th of January, and stated he had intended to make them when the judgment of the Court was delivered.

This was an application for a writ of prohibition to the County Court of Yorkshire, holden at Kingston-upon-Hull.

The defendants were members and trustees of the Hull District of "The Independent Order of Odd Fellows Manchester Unity Friendly Society," and the plaintiff was a member of the Loyal Victory Lodge, which is an auxiliary branch of the Hull District. The rules or laws of the said Order, District and Lodge had respectively been certified by the Registrar of Friendly Societies as being in conformity with the 13 & 14 Vict. c. 115, the statute then in force relating to Friendly Societies. The 18 & 19 Vict. c. 63, s. 40 (by which statute the 13 & 14 Vict. c. 115, is repealed), enacts "that every dispute between any member or members of any Society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such Society, and the trustee, treasurer or other officer, or the committee thereof, shall be decided in manner directed by the rules of such Society, and the decision so made shall be binding and conclusive on all parties without appeal." By the 32nd rule of the said Lodge: "If any dispute arise between a member or any person claiming under or on account of a member of this Lodge, if the amount in dispute exceed the sum of 21s., then such dispute shall be [655] heard by a committee chosen under the 191st general law of the said Order, and the decision made by such committee shall be binding and conclusive, unless appealed against by a committee of the district within six months of the decision. The decision of the district committee may within six months of its being passed be appealed against to the directors of the said Order by either of the disputing parties, and the decision of the directors shall be final and conclusive." The 191st general law of the said Order points out how the committee, to whose arbitration the dispute is to be referred, is to be constituted.

The plaintiff, upon his wife's death, made a claim upon his Lodge for the sum of 10l., under the 33rd district law, but the claim was disputed upon the ground that he was not good upon the books of the Lodge within the meaning of that law, and that he was disentitled to it by the operation of the 35th district law, in consequence of his subscriptions having, as the defendants alleged, been in arrear within fourteen weeks of his wife's death. The plaintiff, instead of adopting the course pointed out by the rules, thereupon entered a plaint in the County Court, holden at Kingston-upon-Hull, against the defendants, as trustees of the Hull District, to recover the above amount. At the hearing, on the 11th of September, 1862, the defendants, who appeared in person, objected to the jurisdiction of the County Court judge on the ground that by the 18 & 19 Vict. c. 63, s. 40, and by the rules of the Society, his jurisdiction was taken away; but the judge overruled the objection and proceeded to try the question in dispute, and ultimately gave judgment for the plaintiff for the amount claimed with costs.

On the 20th of September, 1862, notice of the defendants' intention to apply for a writ of prohibition was served on the Registrar of the County Court and on the plaintiff, and on the 23rd and 24th of September similar [656] notices were served on the County Court judge and the plaintiff's attorney respectively. On the 8th of October an order of the County Court for the payment of the sum of 10l. for debt, and 2l. 10s. for costs was served on the defendants. The defendant Marshall, on the 10th of October, paid the amount to the Registrar of the County Court, to prevent a seizure under an execution. On the same day a summons, returnable on the 14th of October, was obtained, on behalf of the defendants, at Chambers, calling on the judge of the County Court and the plaintiff to shew cause why a writ of prohibition should not issue. This summons was served on the 13th of October. On the 16th of October the debt and costs were paid over to the plaintiff's attorney by the Registrar, who did not appear to have had any notice of this summons having been obtained.

Upon the return of the summons it was adjourned till the 24th, and it was then arranged that the question should be referred to the Court, and subsequently it was ordered to stand over by consent to the present term.

Davison, in support of the motion. First, the jurisdiction of the County Court was ousted when a dispute was shewn to exist for the settlement of which the rules of the Society provided. By the 18 & 19 Vict. c. 63, s. 40, such disputes are to be decided in the manner directed by the rules of the Society, and that decision is to be final. By the 41st section, where the rules of the Society do not prescribe any

other mode of settling such disputes, the County Court shall have jurisdiction. Thus, the 40th section takes away its jurisdiction in disputes to which the Society's rules apply; the 41st section gives it jurisdiction where they do not. Here the 32nd Lodge rule and the 191st general law provide a tribunal for the regulation of disputes above 21s. [Martin, B. Where a specific tribunal is appointed by the rules of a Friendly Society, that tribunal has by the statute exclusive [657] jurisdiction, and the jurisdiction of the County Court is ousted.] In *Turner v. Scott*, (a) Coleridge, J., at Chambers, granted a prohibition to the County Court, on the ground that it had no jurisdiction where the certified rules of a Friendly Society provided for the reference of disputes contemplated by the 40th section to a committee of the Society. In *Sinden v. Bankes* (3 El. & El. 623) Crompton, J., states the result of the authorities thus: "It must be taken to be established by the cases which have been decided upon the subject, that if disputes between these societies and their members are ordered by the rules to be referred, and if the statute provides that the rules shall so order, then that any such dispute must be referred, and the remedy by action is taken away." Hill, J., in the same case, says, that "the desire of the legislature was to protect the property of these societies by preventing the expenditure of their funds in useless and expensive litigation, and to provide a cheap and speedy remedy."

Secondly, the application is not too late. The delay was not, under the circumstances, unreasonable. [Martin, B. What is there to prohibit when the debt and costs have been paid?] *Jones v. Owen* (5 D. & L. 669), which in its facts closely resembles the present case, shews that the rule may be drawn up with a clause commanding restitution. In that case the execution of the warrant of possession was complete before the bailiff received notice of the rule nisi for a prohibition; but Patteson, J., sitting in the Bail Court, held that the application was in time. [Martin, B. The rule nisi was there obtained before execution; but a summons has no effect until it is returnable.] The authorities shew that prohibition may issue after execution. [Martin, B. "Prohibition lies to a temporal Court, even after judgment and execution, when the matter appears to be out of the jurisdiction:" Com. Dig. "Prohibition" (D.), and 2 Inst. 602. Channell, B. Must not the defect of jurisdiction appear on the face of the proceedings in order that prohibition may be granted at that stage of the proceedings?] The recent authorities are opposed to that view. Thus, in *Marsden v. Wardle* (3 E. & B. 695), prohibition went to a County Court after goods had been seized under a judgment, although no want of jurisdiction appeared on the face of the proceedings, and Coleridge J., said that principle had no application to the County Courts. [Channell, B. Has not that recently undergone some qualification? The want of jurisdiction may appear upon the face of the proceedings.] In general it would not do so. [Martin, B. To some extent the case of *Roberts v. Humby* (3 M. & W. 120) is in your favour.] There the opinion of Alderson, B., is express that the Court might have interfered after execution, even if the want of jurisdiction had not appeared upon the face of the proceedings, and that the cases where it had been held otherwise turned on acquiescence. The defendants here distinctly raised the objection upon the hearing, which, it is submitted, is equivalent to the want of jurisdiction appearing upon the face of the proceedings.

The Court having granted a rule nisi,

Raymond shewed cause in the first instance. The Act which created the County Court gave it jurisdiction in a case of this kind; then is that jurisdiction necessarily ousted because a subsequent enactment gives jurisdiction to another tribunal by words which are purely affirmative? It may be argued, against the jurisdiction of the superior Courts, that the policy of the legislature was to provide a cheap and speedy remedy. The County Court is, in this respect, as appropriate a tri[bunal] as that which the rules provide. [Martin, B. The legislature has expressed its intention of ousting the jurisdiction. Wilde, B. The statute prescribes the limits of the jurisdiction of the County Court in the settlement of such disputes.] When the want of jurisdiction was made apparent the defendants should have withdrawn. [Wilde, B. The right to prohibition exists if the jurisdiction be not acquiesced in.] The second objection is decisive. The defendants are too late. In *Ex parte Cowan* (3 B. & Ald. 123, 129) Abbott, C. J., in delivering the judgment of the Court, said: "It is a settled rule that you cannot apply for a prohibition after a judgment, unless there

(a) March 2, 1857. Watkin Williams for the defendant, Powell for the plaintiff.

be an original want of jurisdiction apparent upon the face of the proceedings." In *Roberts v. Humby* (3 M. & W. 120) the want of jurisdiction did so appear. [Pollock, C. B. If this defect of jurisdiction was distinctly brought to the notice of the County Court judge, that would, in my opinion, be equivalent to its appearing on the face of the proceedings.] There is now nothing to prohibit; the debt and costs are paid, and no cause is pending. In *Jones v. Owen* (5 D. & L. 669) the land was an existing thing, which had been wrongfully transferred, and the Court could order restitution. Here the money can no longer be reached. The registrar did indeed pay the money out of Court after the summons was returnable, but it does not appear that he had any notice of the summons. No substantial reason is assigned for the delay. The application is therefore too late.

Davison, in support of the rule. The delay in vacation was not unreasonable. [Pollock, C. B. The Courts are open throughout the vacation to transact all chamber business.] The plaintiff had notice that this application [660] would be made. The case is identical with *Jones v. Owen* (5 D. & L. 669), since the summons was returnable before the money was paid out of Court. The distinction between land and money is untenable. The difficulty of enforcing restitution exists equally in the case of land. Here the money is not beyond reach, since it is admitted to be in the hands of the plaintiff's solicitor.

POLLOCK, C. B. We are all of opinion that the rule, which, technically, has been granted, should be discharged. The defendants have, I think, made out that the objection which was raised to the jurisdiction of the County Court was brought distinctly under the judge's notice. The question, therefore, stands in my opinion on precisely the same basis as if the want of jurisdiction had appeared on the face of the proceedings. But my judgment proceeds on this, that those who seek redress must apply to the Court with promptitude, especially where the application is one of this character. In the present case, the defendants are not entitled to relief in consequence of the delay in their application. My brother Martin has pointed out that there is nothing to prohibit. There has been a judgment and an execution; the money has been paid over by the registrar, and is no longer within the control of any Court; the suit is at an end, and the possession of the plaintiff's attorney is the possession of the plaintiff. The rule must, therefore, be discharged.

MARTIN, B. I also think that this application is too late. The consideration which influences me is, that if this money was paid under the compulsion of process from a Court which acted without jurisdiction, a remedy is still available to the defendants, by an action against those persons whose act compelled the payment. But [661] where there has been a trial, judgment and execution, and the money has been paid over, I am unable to see how a writ of prohibition can issue, or, if issued, what object it can attain. There is, in such a case, nothing to prohibit. The forms of prohibition shew that before judgment, the prohibition to the inferior Court is to prohibit the holding of the plea; to the party to prohibit the following of the plea; after judgment, it is to prohibit the proceeding on the judgment. The latter form would, in the present case, be a mere nullity. If this point had now to be decided, I should wish to see some other authority than the case which has been cited (*Jones v. Owen*) in support of the proposition that the Court can, in prohibition, enforce the repayment of money which has been paid over by a proceeding against the party, or issue a writ of restitution. I do not understand by what mode this could be done, except in those cases which occur in the old entries. It could not be done by a mere order or rule of the Court. In the present case, after a step had been taken on the judgment, the application was too late.

CHANNELL, B. I also think that this rule must be discharged, upon the ground that the application was too late. The question which in my view arises, and upon which alone I desire to express an opinion, is what locus standi the defendant in the County Court has obtained by applying at chambers for a summons for a writ of prohibition. By making that application, I think that he placed himself in the same situation as if the Court had been sitting at the time when the summons was taken out, and the application had been made to the Court. That is the point of time which appears to me material. I think, however, that the application was then too late.

Rule discharged.

[662] WATSON, SOUTHERN AND MAYER v. GEORGE EVANS. Jan. 19, 1863.—Document as follows:—"On demand, we jointly and severally promise to pay to Messrs. W., S., and M., or to their order, or the major part of them, the sum of 100l." Held a valid promissory note, upon which the three payees might maintain an action.

[S. C. 32 L. J. Ex. 137.]

Declaration. That the defendant and William Patrick Evans and George Thomas Evans, on &c., made their joint and several promissory note in the words, letters and figures following, and as follows, that is to say:—

"£100. Leamington, Dec. 2nd, 1858.

"On demand, we jointly and severally promise to pay Messrs. Joseph Watson, Thomas Southern and Daniel Mayer, or to their order, or the major part of them, the sum of one hundred pounds, with lawful interest, for value received.

"GEORGE EVANS.

"WILLIAM PATRICK EVANS.

"GEORGE THOMAS EVANS."

That the said makers, by the said names following in the said note contained, that is to say, Joseph Watson, Thomas Southern and Daniel Mayer, meant the plaintiffs; but the defendant and the said other makers did not, nor did either of them, pay the said note.

Demurrer and joinder therein.

Hayes, Serjt. (C. E. Coleridge with him), in support of the demurrer. The document is void for uncertainty. Is the money to be paid to the three payees, or any two of them? Again, do the words "or the major part of them" refer to the payment or the indorsement, or to both? [Pollock, C. B. Is it not a promise to pay to the three persons, or their order, or the order of the major part of them?] Suppose two of them said "pay to us;" and the other said "pay all three." If two alone sued, could the [663] maker plead in abatement the non-joinder of the third? Assuming that the promise is to pay all three provided they agree, if not to pay any two of them, suppose they all disagree, and each says, "Do not pay to the other." [Martin, B. Payment to one of several joint creditors is a payment to all.] The general rule of law is qualified by the express words of the contract. In Bayley on Bills, p. 34, 5th ed., it is laid down that "uncertainty as to the person to whom the payment shall be made will prevent the document from being a bill or note; as making it payable to A. or B." The authority there cited is *Blanckenhagen v. Blundell* (2 B. & Ald. 417), where Abbott, C. J., and Holroyd, J., agreed that such a document cannot be a promissory note within the statute 3 & 4 Anne, c. 9, the promise being conditional, to pay A. only if the maker had not paid B. [Martin, B. Here the three payees are suing, which distinguishes the case from *Blanckenhagen v. Blundell*.]

Who is to indorse the note, the three or any two of them? [Martin, B. The words, "or to their order, or the major part of them," mean the order of all three or of any two of them. The words "or the major part of them," must refer to the last antecedent order. Wilde, B. It is, "I promise to pay to all three or their order, but I allow any two to sign for them all."] If the indorsement may be made by the three, or any two of them, *Blanckenhagen v. Blundell* is an authority that the document is not a promissory note within the statute 3 & 4 Anne, c. 9. [Martin, B. There cannot be any doubt in this case, as the three payees are suing. In the Author's Life, prefixed to the 9th edition of Noy's Maxims, by Bythewood, p. viii., the following anecdote is related:—"Three graziers at a fair left their money with their hostess while they went to market: one of them returned, received the money, and [664] absconded; the other two sued the woman for delivering what she received from the three before they all came to demand it together. The cause was clearly against the woman, and judgment was ready to be pronounced, when Mr. Noy, not being employed in the cause, desired the woman to give him a fee, as he could not plead in her behalf unless he was employed; and, having received it, he moved in arrest of judgment that he was retained by the defendant, and that the case was this: the defendant had received the money from the three together, and was not to deliver

it until the same three demanded it; that the money was ready to be paid whenever the three men should demand it together. This motion altered the whole proceedings. (a)]

Mellish appeared for the plaintiffs, but was not called upon to argue.

Per Curiam. (b)—There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

ANONYMOUS. Jan. 22, 1863.—The six months during which a writ of summons continues in force, after its renewal, are to be computed inclusive of the day of renewal.—Therefore where a writ of summons was originally issued on the 23rd of January, 1861, and successively renewed, the last renewal being on the 19th of July, 1862, and on Monday the 19th of January, 1863, the officer, on being applied to, declined to impress the renewal seal on the writ: the Court held that the writ had expired, and refused to direct the officer to impress the seal, *nunc pro tunc*, as of that date.

[S. C. 32 L. J. Ex. 88; 11 W. R. 293; 7 L. T. 718.]

This was an application to the Court, to direct its officer to impress the renewal seal upon a writ of summons, *nunc pro tunc*, as of the 19th of January, 1863.

[665] The original writ was issued on the 23rd January, 1861, and under sect. 11 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), it had been renewed successively, on the 22nd of July, 1861, the 21st of January, 1862, and the 19th of July, 1862.

On Monday, the 19th of January, 1863, application was made at the Writ Office, to have the renewal seal affixed, but the officer declined to affix it, on the ground that six months had elapsed since the last renewal.

Channell, B., was applied to at Chambers, but refused to make any order.

Griffiths, in support of the motion. By the 13 & 14 Vict. c. 21, s. 4, the word "month," when it occurs in an act of parliament, signifies "calendar month," unless words are added shewing "lunar month" to be intended. The question, therefore, is, whether the six months, during which the renewal writ is in force, are to be calculated inclusively or exclusively of the day on which it is renewed. The 11th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), enacts that "no original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date; but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal, bearing the date of the day, month, and year of such renewal, such seal to be provided and kept for the purpose at the offices of the Masters of the said Superior Courts, and to be impressed upon the writ by the proper officer of the Court out of which such writ issued," &c. Where the section deals with [666] the time during which the original writ is to be in force, it expressly says that the day of its date is to be included in the computation; but where it deals with the duration of the writ, after its renewal, no such words occur. In the case of *Black v. Green* (15 C. B. 262) the Court, upon a precisely similar application, ordered the seal to be affixed *nunc pro tunc*. The authority of that case was followed by Crompton, J., in an *Anonymous case* (24 L. J. N. S. Q. B. 23), in the Bail Court. [Wilde, B. The point was not in either of those cases decided.] That is not contended. The cases do shew, however, that the Court thought the point doubtful, and on that ground were unwilling to deprive the applicant of the opportunity of having the question considered by a Court of error. If the 174th rule of Hilary Term, 1853, applies, the plaintiff is clearly in time. [Wilde, B. The rule cannot control the statute, the terms of which are imperative.] There is no hardship on the defendant in granting this application, since he could still raise the point by a plea, that the writ had not been properly renewed. On the other hand, if the application be refused, the plaintiff's claim is for ever barred. [Martin, B. By granting the applica-

(a) See *Brandon v. Scott*, 7 E. & B. 234.

(b) *Pollock, C. B., Martin, B., and Wilde, B.*

tion, we might impose a liability on the defendant, who might assume that it was a decision in the plaintiff's favour. Pollock, C. B. If we entertained any doubt, it would be right to afford the parties the opportunity of formally raising the question upon the record. We think the point is free from doubt.]

Per Curiam.(c) The rule must be refused.

Rule refused.

[667] HARTLAND, Public Officer of the Gloucestershire Banking Company *v.* JUKES AND OTHERS (Executors and Executrix of William Steward, Deceased). Jan. 23, 1863.—C., being about to open an account with a banking Company, gave them a promissory note, dated the 4th of December, 1855, whereby he and S., the defendant, jointly and severally promised to pay to the Company, on demand, 200l. At the same time they signed and delivered to the Company a memorandum stating that the note was given as a collateral security for the banking account intended to be kept by C., and that the Company should be at liberty at any time thereafter to recover from them, or each of them, up to the full amount thereof, every sum which C. should at any time thereafter become indebted or liable to the Company, for any monies paid, lent or advanced by them to or for him; and in case of the Company suing on the note, its production should be conclusive evidence of the amount claimed by them from C. being due and owing by him. The banking account was accordingly opened with C., and on the 31st December, 1855, he was indebted to the Company in 173l. No demand of payment was made, or balance struck, until the 30th June, 1856, when 194l. was due from C. to the Company. A balance was afterwards struck every half-year, the Company from time to time making advances, and C. paying money into the bank with which his account was credited. The sums so credited exceeded the amount of the note. The account continued until February, 1861, when it was closed with a balance due to the Company of 175l. In March, 1862, the Company commenced an action against the defendant on the note: Held, that the cause of action was not barred by the Statute of Limitations.

[S. C. 32 L. J. Ex. 162; 9 Jur. (N. S.) 180; 11 W. R. 519; 7 L. T. 792: at Nisi Prius, 3 F. & F. 149.]

The first count of the declaration stated that the said William Steward, in his lifetime, on the 4th day of December, A.D. 1855, by his promissory note now overdue, promised to pay the said banking Company 200l. on demand, but did not pay the same, and the same has not been paid.

Second count. That, at the time of the making of the contract hereinafter mentioned, the said William Steward, in his lifetime, and one William Courtney made their promissory note in writing, and thereby jointly and severally promised to pay to the said banking Company 200l. on demand, and then delivered the same to the said banking Company; and the said W. Steward and W. Courtney then also made and signed and delivered to the said banking Company, together with the said promissory note, a certain instrument in writing or guarantee in the words and figures following, that is to say:—

“Memorandum. That the joint and several promissory note, dated the 4th day of December, 1855, given by us the undersigned William Steward, of, &c., and William [668] Courtney, of, &c., to the Gloucestershire Banking Company for 200l. payable on demand, is so given by us and each of us as a further and collateral security to the said banking Company for the banking account intended to be kept by the said W. Courtney with them, and shall be held by them, and they shall be at liberty at any time hereafter to recover thereon from us and each of us, up to the full amount thereof, all and every sum and sums of money which the said W. Courtney shall or may at any time hereafter become indebted or liable to the said banking Company, for or by reason or on account of any monies paid, lent or advanced by the said Company to or for or on account of the said W. Courtney, or of any bills or notes discounted for or bearing the acceptance, signature or indorsement of the said

W. Courtney, or otherwise howsoever, with interest, commission and other usual banker's charges thereon, and our and each of our liability on the said note shall not be withdrawn while the said Company shall be the holders of any bills or notes so discounted for or bearing the acceptance of the said W. Courtney, although the same may not be at maturity; and in case of the said Company suing on our promissory note, the production thereof by the said Company shall be conclusive evidence as against the said W. Steward of the amount claimed by them from the said W. Courtney, being due and owing by him to them, and they shall not be called upon or required to give any further or other proof of the amount so claimed by them being so due and owing. Dated the 4th day of December, 1855.

"W. M. COURTNEY.

"WILLIAM STEWARD."

Averments: that the promissory note in the instrument or guarantee mentioned was and is the promissory note above mentioned; and that the banking Company in the [669] instrument or guarantee also mentioned was and is the banking Company mentioned; and that the said W. Steward in the said instrument or guarantee also mentioned was the said W. Steward (now deceased) mentioned; and that, for the considerations in the instrument or guarantee mentioned, expressed and implied, and in consideration that the banking Company would suffer and permit the said W. Courtney to open a banking account with them and would give him credit upon the same, the said W. Steward then promised the banking Company to do and perform all things in and by the instrument or guarantee mentioned on his part to be done and performed: that afterwards the banking Company did suffer and permit the said W. Courtney to, and he did open and keep a banking account with the said banking Company, and they then gave him credit on the same, and that, whilst he kept such banking account, he became indebted and liable to the banking Company in a large sum of money, to wit, the amount of the sum mentioned in the first mentioned promissory note, for, by reason and on account of divers monies paid, lent and advanced by the said Company to, for and on account of the said W. Courtney, and of divers bills and notes discounted for and bearing the acceptance, signature and indorsement respectively of the said W. Courtney, and otherwise, with interest, commission and other usual banking charges thereon. And although the banking Company have done all things necessary, and all things and conditions have happened and been performed necessary, and all times have elapsed and passed necessary to entitle the banking Company to be paid the said last mentioned sum of money by the said W. Courtney: Yet, he has not paid the same, or any part thereof. And although the banking Company did all things necessary, &c., to entitle the banking Company to have their last mentioned sum of money paid by the said W. Steward in his lifetime, and by the defendants [670] as executors and executrix as aforesaid after his death: Yet the said W. Steward did not in his lifetime, nor have the defendants, as executors and executrix as aforesaid, since his death, paid the same, or any part thereof, but the same and the said first mentioned promissory note, and each of them and every part thereof, still remains unpaid and due and owing to the banking Company, &c.

Pleas (inter alia). Thirdly, to the first count: that the promissory note was made by the said W. Steward and by the said W. Courtney jointly and severally, and before this suit the said W. Courtney satisfied the said note and all causes of action in respect thereof by payment. Fourthly, to the second count: that the said W. Steward did not promise as alleged. Fifthly, to the second count: that, before this suit, the said W. Courtney paid the said debts and liabilities in which he was so indebted and liable to the said banking Company, and all causes of action in respect thereof. Sixthly, to the whole declaration; that the alleged causes of action did not accrue within six years before this suit. Issues thereon.

At the trial, before Martin, B., at the London Sittings after last Trinity Term, the following facts appeared:—In the year 1855, one William Courtney, being about to open an account with the Gloucestershire Banking Company, they required of him some security for monies which they might from time to time advance to him, and he gave them a promissory note, dated the 4th December, 1855, whereby he and William Steward (the defendant's testator) jointly and severally promised to pay the banking Company 200l. on demand (which is the promissory note mentioned in the first count of the declaration). At the same time they signed and delivered to the banking

Company the instrument or memorandum set out in the second count. The banking account was accordingly opened with W. Courtney, and, on the 31st December, 1855, he was indebted to the [671] banking Company upon it to the amount of 173l. 1s. 11d. No demand of payment was made, nor was any balance struck, until the 30th June, 1856, when 194l. 5s. was due from W. Courtney to the banking Company. A balance was afterwards struck every half year, the banking Company from time to time making advances to W. Courtney, and he from time to time paying money into the bank with which his account was credited in the usual way. The sums so credited exceeded 200l. The promissory note was never carried to the credit of Courtney in his account. The account continued until February, 1861, when it was closed with a balance due to the banking Company, of which a sum of 172l. remained due at the time this action was brought. The defendants were required to pay that amount, and, not having done so, this action was commenced on the 28th March, 1862, more than six years from the date of the note.

Upon these facts the learned Judge was disposed to think that the remedy on the note was barred by the Statute of Limitations, and that there was no contract apart from the note, inasmuch as the memorandum set out in the second count was only explanatory of the terms upon which the note was given; and his lordship directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for 172l.

Macnamara, in last Michaelmas Term, obtained a rule nisi accordingly, on the grounds, first, that the promissory note was taken out of the Statute of Limitations by part payments made by W. Courtney; secondly, that the document set forth in the second count of the declaration kept alive the remedy of the banking Company on the promissory note, and prevented the statute from running against it.

Collier (March with him) shewed cause, in the present term (Nov. 21). The sole question is whether the plaintiff is entitled to recover on the promissory note, for the [672] document set out in the second count does not amount to a contract, but is a mere memorandum of the terms upon which the note was given. The promissory note was not included in the account, and no payment was made in respect of it, but it was a mere security for whatever might be due from W. Courtney to the banking Company. [Bramwell, B. Suppose the agreement had been to guarantee the payment of the balance from time to time due, and the account went on for ten years without any balance being struck, during which time it was sometimes in favour of the customer of the bank and sometimes against him, would the bank be barred by the Statute of Limitations from recovering the amount found to be due to them when the balance was struck?] The statute would run from the time the balance became due, not from the time it was first ascertained. Either nothing has been paid on account of the note, or the payments have satisfied it, and there is no agreement that it shall be revived whenever a balance is found due.

Macnamara, in support of the rule. The manifest intention of the parties was that the promissory note and memorandum should be read together and constitute one agreement. There was no cause of action when the note was given, but only when an advance was made, and a new cause of action accrued upon each subsequent advance, otherwise the note would be no security. This case is not within the mischief contemplated by the Statute of Limitations, because so long as the account continues no presumption can arise that the note has been satisfied. [Bramwell, B. According to the argument for the defendant, a cause of action arose when the first advance was made, but, when that was paid, all right of action on the note was gone for ever; whereas the very object of the note was to provide a [673] security for a fluctuating balance.] *Irving v. Veitch* (3 M. & W. 90) is an authority in support of the proposition contended for. The judgment of the Exchequer Chamber in *Webb v. Spicer* (13 Q. B. 894) assumes that if the agreement and the promissory note had been between the same parties they would have formed one contract. If, in this case, the memorandum had been written on the back of the promissory note, the instrument could not have been declared on as a note, but would have been an agreement, and must have been stamped as such: *Leeds v. Lancashire* (2 Camp. 205), *Cholmeley v. Darley* (14 M. & W. 344). The 14th section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97) does not apply to payment by a co-debtor before that Act: *Jackson v. Woolley* (8 E. & B. 784). There having been no direction as to the appropriation of the payments, it must be taken that they were made on account of the existing debt: *Hammersley v. Knowllys* (2 Esp. 666).

The judgment of the Court was now delivered by

POLLOCK, C. B. This is an action by the public officer of the Gloucester Banking Company against the executors of one William Steward. The first count is upon a promissory note, dated the 4th day of December, 1855, made by the testator and one William Courtney, whereby they jointly and severally promised to pay the banking Company 200l. on demand. The second count is upon a special contract alleged to be contained in the instrument hereafter mentioned, and the breach is for non-payment of the money secured by the promissory note. The important pleas are, the Statute of Limitations to the count upon the note, and non-assumpsit to the second count.

[674] The facts were these: In the year 1855, William Courtney proposed to open a banking account with the Gloucestershire Banking Company, and thereupon he and the testator, as his surety, executed to the Company the promissory note declared on, and at the same time an instrument in writing was signed by them and delivered to the banking Company. It was in the form of a memorandum, and was to the effect that the promissory note was given as a further and collateral security to the banking Company for the banking account intended to be kept by Courtney with them, and that it should be held by them, and they should be at liberty to recover thereon, to the full amount thereof, all the money which Courtney should at any time thereafter become indebted or liable to the banking Company on his banking account. The banking account was accordingly opened, and on the 31st December, 1855, Courtney was indebted to the bank upon it to the amount of 173l. 1s. 11d., but no balance was then struck. The account was continued down to February, 1861, when it was closed with a balance due to the banking Company, of which a sum of 172l. is now due. The defendants were required to pay this balance, and, this not being done, this action was brought on the 28th March, 1862, more than six years from the date of the note.

The cause was tried before my brother Martin at the sittings at Guildhall after last Trinity Term, when the learned Judge directed a nonsuit, with leave reserved to the plaintiff to enter a verdict. A rule for this purpose was obtained, and the case has been argued, and, after much consideration, we have arrived at the conclusion that the Statute of Limitations is not an answer to the first count. Had the security been in the form of a bond for 200l. and a defeazance to the effect of the memorandum, the operation and effect of the security would have been clear; and not-[675]-withstanding that the instrument is a promissory note payable on demand, which *prima facie* indicates a present existing liability enforceable without demand, and as to which the Statute of Limitations runs from the date, we think we are bound to read it and the memorandum together in order to ascertain the true meaning and character of the transaction. It is clear that, until an advance was made by the banking Company to Courtney, no action could have been maintained upon the note. Until then there would have been no consideration, and until there was consideration no action would be maintainable, and the Statute of Limitations only runs from the time when the cause of action accrued. The question, therefore, is, when did the cause of action accrue? And unless it accrued before the 2nd March, 1856, the statute is no bar. It was contended before us that the statute began to run from the 31st December, 1855, by reason of the debt of 173l. 1s. 11d., then due from Courtney, the customer, to the bank; but no balance was then struck, and certainly no claim was made by the bank upon the defendant's testator in respect of that debt; and we think that the mere existence of the debt, unaccompanied by any claim by the bank, would not have the effect of making the statute run from that date.

Our judgment, therefore, is that the rule should be made absolute to enter the verdict for the plaintiff.

Rule absolute.

[676] HALL v. LUND. Jan. 16, 1863.—In 1855 S., the owner in fee of two mills, leased one to P., who carried on therein the business of a bleacher. The refuse from his works was discharged through a drain, partly open and partly covered, into a natural stream or watercourse, 300 or 400 yards distant, and upon which the other mill was situate. This discharge of the refuse took place about seven times a fortnight and polluted the stream. In 1858 P. surrendered his lease, and S. granted a new lease to the defendant. In this lease the defendant was described

as a "bleacher," and the demise was of the premises "late in the occupation of P." There was a clause that all buildings erected by the defendant for the purpose of bleaching should, at the end of the term, become the property of S. In 1858 the plaintiff purchased both mills. The defendant discharged the refuse from his works through the drain into the stream in the same manner that P. had formerly done. The plaintiff, who carried on in the other mill the business of a paper maker, brought an action against the defendant for polluting the stream. Held, that the lease might be explained by the state of the premises at the time it was granted, and the mode in which they had been previously enjoyed; and that, thus explained, there was an implied grant by S. to the defendant to use the stream for the purpose of his business of bleaching, and therefore the plaintiff, who was in the position of S., could maintain no action against the defendant.

[S. C. 32 L. J. Ex. 113; 9 Jur. (N. S.) 205; 11 W. R. 271; 7 L. T. 692. Referred to, *Thomas v. Owen*, 1887, 20 Q. B. D. 232; *Birmingham Banking Company v. Ross*, 1888, 38 Ch. D. 301. Explained and distinguished, *Pwellbach Colliery Company, Limited v. Woodman*, [1915] A. C. 634. Referred to, *Schwann v. Cotton*, [1916] 2 Ch. 130.]

The declaration stated, that the plaintiff was possessed of a mill and premises, called "Yew Tree Mill," situate at Diggle, in the county of York, and therein carried on the trade and business of a paper manufacturer, and by reason of his possession thereof the plaintiff was entitled to the flow of a stream or watercourse to, into and through his said mill and premises, for the use and enjoyment of the same, and for the carrying on of his said trade and business thereon, without such fouling and pollution of the said stream or watercourse as hereinafter mentioned: Yet the defendant on divers days and times wrongfully and injuriously caused the said stream or watercourse to be fouled and polluted with fibrous matters, pulp, refuse, drugs, and other noxious materials, liquids and fluids; and by reason thereof the said stream or watercourse ran and flowed to, into and through the said mill and premises of the plaintiff in such foul and polluted state as aforesaid, whereby the plaintiff was greatly damaged in the use and enjoyment of his said mill and premises, &c.

Sixth plea. That long before any of the said times, when, &c., and before the plaintiff had any estate, right or title to the said mill and premises or any part thereof, to wit, on the 28th day of September, 1858, one Hugh Shaw, then being seised or possessed of the land whereon the said mill and [677] premises have since been erected, with the appurtenances, for an estate not yet determined but still in force and existence, and being also then seised or possessed of a certain other mill, situate higher up the said stream or watercourse (hereinafter called the mill of the defendant), with the appurtenances, for an estate not yet determined but still in full force and existence, by deed demised and granted to the defendant the said mill of the defendant with the appurtenances, including a right to use the said stream or watercourse for the purposes of the said mill of the defendant and for carrying on there his, the defendant's, trade and business of a bleacher, for a certain term of years which has not yet elapsed, but which is still in full force and existence. And the defendant under and by virtue of that deed, before any of the said times, when, &c., entered and became and was possessed of the said mill of the defendant with the appurtenances, and continued so thereof possessed until and at the said several times, when, &c.: that the grievances complained of were uses by the defendant of the rights, easements and privileges so granted to him as aforesaid: that all the estate, right and title of the plaintiff of, in, and to the land upon which the said mill and premises in the declaration mentioned were erected, were derived by the plaintiff under or by virtue of a grant or conveyance thereof from the said Hugh Shaw to the plaintiff, made after the execution of the said deed hereinbefore mentioned, and after the said entry by the defendant hereinbefore mentioned, and that the said mill in the declaration mentioned was erected by the plaintiff on the said land after such grant and conveyance as last aforesaid. Issue thereon.

At the trial, before Wilde, B., at the last Yorkshire Summer Assizes, it appeared that the plaintiff, who was a paper maker, carried on his business at a mill, called "Yew Tree Mill," which was situate on a natural stream or water-[678]-course. The defendant, who was a bleacher, carried on his business at a mill, called "Ridge Mill," which was not situate on the stream, but about 300 or 400 yards from it; and the water which he used in his business was not taken from the stream, but from another

and independent source. After the water thus taken had been fouled by the process of bleaching, it was discharged into the stream, a little above the plaintiff's premises, by means of an artificial drain, partly open but covered up for several yards from the defendant's premises. This discharge of refuse water took place about seven times a fortnight, and caused the fouling of the stream of which the plaintiff complained.

On the part of the defendant it was proved that one Hugh Shaw was formerly the owner in fee of both the plaintiff's and the defendant's mill, and that in the year 1855 Shaw leased the defendant's mill to one Matthew Pullan, who carried on therein the business of a bleacher. In the year 1858, the defendant agreed to take from Pullan his business and premises, and, Shaw having assented to the arrangement, in the September of that year Pullan surrendered his lease to Shaw, and Shaw granted a new lease to the defendant.

By this lease, which was dated the 28th September, 1858, Shaw demised to the defendant (who was described as a bleacher), "all that messuage or tenement, with the garden, outbuildings and closes or parcels of land therewith occupied, containing, with the said garden and land on which the said buildings are erected, 9 acres, 1 rood, late in the occupation of Matthew Pullan and his undertenants, &c., with the appurtenances:" habendum, "all and singular the before described premises, with the appurtenances," for the term of eleven years from the first of January then next. The lease contained a covenant by the defendant to repair and keep in repair all the interior of the said messuage, edifices, and buildings, &c., and also "all and singular the gates, [679] stiles, posts, rails, locks, goits, weirs, sluices, waterbanks, dams and reservoirs for water, hedges, ditches, mounds, ponds, trenches and fences of and belonging to the said premises." The last clause in the lease was as follows:—"And lastly, it is expressly understood and agreed by and between the parties hereto, that all improvements, buildings and erections made and built by the said lessee, his executors, &c., for the purpose of carrying on the business of bleaching, are at the end of the said term to become and be the property of the lessor, his heirs and assigns, although expressly erected for the said business."

In the following November, the defendant entered upon the premises under the lease, and carried on his business there in the same manner as Pullan had previously done. At the time Pullan quitted the mill, the premises, including the drain, were in precisely the same state as at the time this action was brought.

On the 4th of October, 1859, the plaintiff purchased of Shaw the fee simple in possession of the Yew Tree Mill, and the reversion in fee of the defendant's mill. In the year 1860, the plaintiff converted the Yew Tree Mill, which was formerly a silk mill, into a paper mill.

It was submitted, on behalf of the defendant, that the lease of the 28th September, 1858, contained an implied grant of a right to use the stream or watercourse for carrying on the business of a bleacher; and the learned Judge, being of that opinion, directed a verdict for the defendant on the sixth plea, reserving leave to the plaintiff to move to enter a verdict with 1s. damages; the defendant to be at liberty to amend the plea, if necessary, and the Court to have power to draw inferences of fact.

Monk, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that neither the lease to the defendant, nor the facts proved, supported the plea; against which

[680] Bliss and W. R. Cole now shewed cause. The plaintiff cannot be in a better position than Shaw, under whom he claims; and by the lease of the 28th of September, 1858, Shaw granted to the defendant a right to use the stream or watercourse for carrying on his business of a bleacher. A way appurtenant to land will pass with the land without any express grant; *Beaudeley v. Brook* (Cro. Jac. 189). So a conduit to a house over the land of the grantor will pass by a grant of the house cum pertinentiis: *Nicholas v. Chamberlain* (Cro. Jac. 121). Again, in *Pyer v. Carter* (1 H. & N. 916) it was held that where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit and is subject to the burthen of all existing drains communicating with the other house, without any express reservation or grant for that purpose. In order to ascertain what passed to the defendant under the lease, regard must be had to the state of the premises at the time the lease was granted: *Hinchliffe v. The Earl of Kinnoul* (5 Bing. N. C. 1), *Roberts v. Karr* (1 Taunt. 495). In *Blackesley v. Whieldon* (1 Hare, 176, 180) Sir J. Wigram, V. C., said: "The general principle of law, that where a person makes a grant of any given

thing, he impliedly grants that also which is necessary to make the grant of the principal subject effectual, does not admit of dispute: (*g*) *Pomfret v. Riccroft* (1 Saund. 320, and notes). And this principle is carried to the extent, that the implied grant entitles the lessee to whatever is necessary to the full enjoyment of the subject of the grant: *Senhouse v. Christian*." (1 T. R. 560). Here there is a demise of the premises "late in the occupation of Matthew Pullan," and therefore all rights passed which Pullan enjoyed: Vin. Abridg., tit. Grant (Q.).

[681] Monk, Mellish, and Kemplay, in support of the rule. There is no implied grant of a right to foul the stream. The defendant does not claim an easement or a mere right to use the water, but to pollute it. [Martin, B. It is not, strictly speaking, an easement, but a right to use the stream in the manner in which it was enjoyed at the time the lease was granted.] Such a right can only be claimed where the user has been apparent and continuous: Gale on Easements, p. 85, 3rd ed. [Channell, B. In *Ewart v. Cochrane* (4 Macq. Sc. App. 117) the House of Lords confirmed the principle of the decision in *Pyer v. Carter*.] In those cases the question was not, as here, whether the occupier of one tenement had a right to foul a stream so as to create a nuisance to his neighbour, but whether the one could deprive the other of a servitude which was essential to the enjoyment of his property. In both those cases the easement upon the servient tenement was apparent and continuous, and a great deal turned on what evidence was admissible for the purpose of shewing a grant. Here nothing can be looked at except the terms of the lease and the apparent state of the premises at the time it was granted, and it is not competent to inquire how they have been used. [Martin, B. In ascertaining what passed by a conveyance evidence may be given of the state of the property at the time it was conveyed, and of the mode in which it had been enjoyed. Here the lessee sees a drain, and he naturally assumes that some use has been made of it: the refuse must be got rid of, and surely evidence may be given that the drain was reasonably necessary and had been used for that purpose.] Whatever inference may be drawn from an inspection of the premises may be made; but the easement must be apparent on the face of the premises. [Pollock, C. B. In *Ewart v. Cochrane* (4 Macq. Sc. App. 117) Lord Campbell, C., said: "But the ground on which I proceed is this, that this is a [682] servitude which the grant implies. I cannot entertain the slightest doubt upon that. I mean the grant accompanied with the enjoyment which existed at the time the grant was made." Martin, B. In *Phear on the Rights of Water*, p. 73, it is laid down that "whenever the owner of land divides his property into two parts, granting away one of them, he is taken, by implication, to include in his grant all such easements over the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. If the grantor has already treated this portion as separate property, the mode in which he enjoyed it, or allowed it to be enjoyed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it." In Gale on Easements, p. 85, 5th ed., it is said, that by apparent easement must be understood "not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject." That observation was cited and approved by the Court in *Pyer v. Carter* (1 H. & N. 922). There was no evidence that Shaw was aware of the mode in which Pullan had used the stream. General words in a lease, such as "appertaining," "belonging," will not, upon a severance of a tenement, pass such a right as that now claimed: *Dodd v. Burchell* (1 H. & C. 113), Gale on Easements, p. 77, 5th ed. In *Wardle v. Brocklehurst* (1 E. & E. 1058, 1065) the farm was conveyed together with "all waters, watercourses, easements and appurtenances belonging to, or held, used, occupied or enjoyed therewith." Here there is no implied grant by Shaw to the defendant to pollute the water.

POLLOCK, C. B. I am of opinion that the rule ought to [683] be discharged. The question is, what rights passed to the defendant under the lease granted to him. Pullan, the previous lessee, had carried on the business of a bleacher upon the premises in question, and when he surrendered his lease a new lease was granted to the defendant of the same works and premises for the purpose of bleaching. I cannot conceive why there should be any difference, either on technical or common sense grounds, between an assignment of a lease by a lessee with the concurrence of the lessor, and

a surrender of a lease by a lessee and grant by the lessor of a new lease of the same premises. If Pullan had assigned his lease to the defendant, it is clear that all rights would have passed to him which Pullan possessed under that lease, and it seems to me that there is no distinction between that case and the surrender of the lease and the grant of a new lease to the defendant.

It has been argued that no apparent easement was granted by the lease, and that the previous mode of user of the premises cannot be inquired into; but I think that we are at liberty to ascertain the mode in which the premises had been enjoyed by the former lessee; their enjoyment as bleaching works being the object intended by the lessor in granting the lease. It is conceded that the former lessee used this stream for the purpose of carrying off his refuse, and I cannot see any difference between that case and taking water from a stream, and returning it in a foul condition. It is said that it is turning a watercourse into a drain, but in one sense all watercourses operate as drains. But, however that may be, the lessor, with full knowledge of the mode in which the premises had been used by the former lessee, grants to the defendant a new lease of the premises for the same purpose; and the plaintiff, who purchased the reversion, stands in the same position as the lessor, and cannot derogate from his own grant.

[684] MARTIN, B. I am of the same opinion. Shaw could grant to the plaintiff no more right than remained to him after his lease to the defendant; therefore it is necessary to ascertain what Shaw granted to the defendant. As a general rule, in considering what is granted by a lease, the parties have a right to prove all the circumstances connected with the state of the property at the time of the demise. Therefore I think that it was competent to the defendant to shew that these premises were leased to him for the purpose of bleaching, and that the refuse had been usually carried away by means of this stream. If, as suggested by Mr. Kemplay, there had been some concealed mode whereby the former lessee got the use and benefit of the stream without the knowledge of the lessor, the case might assume a different complexion; but the circumstance that the lessor allowed the former lessee to discharge his refuse into the stream is a fact to be proved, and, that being proved, there is no doubt as to what was granted by the lease. Mr. Bliss pointed out that the demise was of the premises as in the occupation of Pullan. That might carry the case a little further; but I desire to rest my judgment on the decision of the House of Lords in *Ewart v. Cochrane* (4 Macq. Sc. App. 117), that where there is a demise of premises with which certain rights have been usually enjoyed, it must be taken that the lessor has granted those rights. It is not necessary to consider what is appurtenant or what is not appurtenant,—there is the decision of the House of Lords to the effect which I have stated. This may not be an easement in the strict sense of the term, but it is in point of fact a grant of a right, for that which Shaw granted to the defendant was the premises and bleaching works as they existed at the time Pullan surrendered his lease. I therefore think that our decision is both consistent with good sense and justice, and fully borne out by *Ewart v. Cochrane*.

[685] CHANNELL, B. I am also of opinion that this rule ought to be discharged. The right claimed by the defendant is not strictly speaking an easement, but a right founded on a particular grant; and therefore, in order to ascertain what was granted, we must look at the mode in which the premises were enjoyed at the time of the grant. If this had been a secret use of the stream of which the lessor had no knowledge whatever, that might have altered the case, as my brother Martin observed, but there is nothing to lead to that conclusion; and I found my judgment on the fact that Shaw knew of the discharge of the refuse water into the stream.

It is said that there was no continuous user of the stream, but I cannot attach any weight to that argument. In order to be continuous, the user need not be on every day in the week; and there was clearly a continuous user when the refuse was discharged into the stream, on an average, seven times a fortnight. I should have come to the same conclusion independently of authority, but the case of *Pyer v. Carter*, which was confirmed and its principle explained by the House of Lords in *Ewart v. Cochrane*, compels me to come to this conclusion.

WILDE, B. I agree with the rest of the Court; but I by no means mean to say that in every case of a new demise the premises may be used with all the liberties and privileges enjoyed by the former lessee. It seems to me that, in cases of implied grant, the implication must be confined to a reasonable use of the premises for the

purpose for which, according to the obvious intention of the parties, they are demised. Some uses are obvious enough. A demise of a brewery would carry with it the right to use the premises for brewing; although that might be a nuisance to the lessor or his assigns. So, if a mill were demised the [686] lessee would have a right to grind there, although the noise might annoy the lessor or his assigns. If so, why, in the case of a demise of bleaching premises, may there not be an implied grant that they may be used, as they have been theretofore used, for the purpose of bleaching? Each case must depend on its own circumstances and the intention of the parties, to be ascertained from the character, state, and use of the premises at the time of the grant, and in this case there is no doubt of the intention of the parties to be derived from the existing circumstances.

Rule discharged.

JOHN METTERS v. BROWN. Jan. 31, 1863.—In ejectment by the plaintiff, as administrator of his mother, it appeared that she had been in possession of the land sought to be recovered from the year 1818 until her death, and in order to rebut the presumption of a seisin in fee, the plaintiff, after evidence of the loss of the original, gave secondary evidence of an assignment to his mother of the premises in question for the remainder of a term of ninety-nine years, subject to two lives; but there was no evidence of the creation of the term. It also appeared that the plaintiff had, in his mother's lifetime, mortgaged the premises to a person whose interest vested in the defendant.—Held. First, that there was evidence for the jury of the existence of a term, and that they might presume that the possession of the plaintiff's mother was referable to that term and not to a seisin in fee.—Secondly, that the plaintiff was not estopped by his mortgage in his mother's lifetime from setting up the term.

[S. C. 32 L. J. Ex. 138; 9 Jur. (N. S.) 416; 11 W. R. 429; 7 L. T. 795.]

Ejectment to recover possession of meadow ground and two cottages, &c., situate at Beaworthy, in the county of Devon.

At the trial, before Williams, J., at the last Devon Summer Assizes, the plaintiff, who claimed as administrator of his mother, Elizabeth Metters, proved that from the year 1818 until her death in 1847 she was in possession of the land in question; and that about forty years ago she built two cottages upon it, in one of which she lived up to the time of her death, and the other she let to successive tenants who paid her rent. The plaintiff also proved that [687] about twenty-five years ago his cottage was destroyed by fire, when the deed under which his mother held the premises was burnt. Evidence was then given of the execution and attestation of the deed, and that it was an assignment by one Thomas Metters to the plaintiff's mother of a lease granted in 1798 by the guardian of Sir A. Molesworth, an infant, to one Richard Metters for a term of ninety-nine years, subject to two lives. A draft of this lease was produced, and it was proved that search had been made in the proper quarters, but neither the original nor a counterpart could be found. Entries were produced, in the handwriting of a deceased steward of Sir A. Molesworth, of the receipt of rent in 1801 and the four following years from Richard Metters for the premises in question, in which they were described as held for two lives. In June, 1861, the plaintiff obtained letters of administration to his mother's effects.

The defendant proved that the plaintiff in the year 1844, in his mother's lifetime, had executed a mortgage in fee of the premises in question to one Jago. The mortgage deed contained a covenant by the plaintiff, in the usual form, that he had good title and right to convey. It was admitted that the interest of Jago in the premises in question had vested in the defendant; and that the plaintiff had three sisters, children of his mother.

It was objected, on behalf of the defendant, first, that the plaintiff had not shewn any title in himself, inasmuch as, his mother having been in possession in her lifetime, the legal presumption was that she was seised in fee, and there was no sufficient evidence that she held under a lease for years: secondly, that the plaintiff was estopped by his mortgage to Jago from claiming title under a lease for a term of years. A verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

[688] Collier, in the present term, obtained a rule nisi accordingly; against which Montague Smith (C. A. Turner with him) shewed cause (Jan. 24). First, there was evidence that the plaintiff's mother was possessed of the premises in question for a term of years, determinable on lives, which has vested in the plaintiff as her administrator. It appeared that she had built two cottages on the land, one of which she occupied and the other she let, and thereupon it was objected that the legal presumption was that she was seised in fee. But that presumption was rebutted by evidence that she was possessed of a chattel interest only. It is true neither the deed creating the term nor the assignment were produced, but their nonproduction was accounted for, and secondary evidence given of their contents. [Martin, B. How can it be said that there was no evidence for the jury?] Assuming that there was evidence of the existence of a term, it vested with plaintiff as administrator. By the Statute of Frauds, 29 Car. 2, c. 3, s. 12, an estate per autre vie, where there is no devise and no special occupant thereof, shall go to the executors or administrators of the party who had the estate thereof by virtue of the grant, and shall be assets in their hands: (a) Williams on Executors, vol. 1, p. 603, 5th ed.

Secondly, the plaintiff, who claims as administrator of his mother, is not estopped by his mortgage in her lifetime from setting up the term. Though an estoppel may bind a party who claims in one character, it will not have that effect where he claims in a different right. Thus, where an executor de son tort verbally agreed with the landlord of the intestate to deliver up the premises demised, and afterwards took out letters of administration, it was held that he [689] was not concluded from bringing an action of ejectment against the landlord who had actually obtained possession under the agreement: *Doe d. Hornby v. Glenn* (1 A. & E. 49). In *Middleton's case* (5 Rep. 28 b.) it was adjudged "that an executor before probate might release an action although before probate he could not have an action, for the right of the action is in him; but if A. releases and afterwards takes administration, it shall not bind him, for the right of the action was not in him at the time of the release." So a party suing as executor, in an action of debt upon a bond, will not be estopped by having been barred in an action upon the same bond, when he sued as administrator; but he may shew that the letters of administration have since been repealed: *Robinson's case* (5 Rep. 32 b.). In Com. Dig. tit. "Estoppel" (C.), it is said: "So an heir, who claims as heir of his father, shall not be estopped by an estoppel upon him as heir of his mother." [Channell, B. A declaration made by a person who afterwards assumes and is sued in the character of administratrix cannot be used as an admission made by a party in the cause, although she may combine the character of cestui que trust with that of administratrix: *Legge v. Edmonds* (25 L. J. Chan. 125).]

Collier and Kingdon, in support of the rule. First, the plaintiff has failed to prove that there was an outstanding term in his mother, which has vested in him. There is no evidence of the creation of a term by the owner in fee. [Pollock, C. B. The plaintiff's mother was shewn to have been in possession of the land.] That raised a presumption that she was seised in fee. There was secondary evidence of an assignment by Thomas Metters to the plaintiff's mother of a lease granted in 1798, but there was no evi-[690]-dence that she held the premises in question under that lease. It was not shewn that Thomas Metters was ever in possession, or that he derived any title from Richard Metters who in 1801 had paid rent to Sir A. Molesworth. [Martin, B. There was evidence of an assignment to the plaintiff's mother of a lease for years, subject to lives, and a jury might infer that the mother's possession was referable to that lease and not to a seisin in fee.] It was not shewn that the assignment was made by a person who had a right to make it.

Secondly, the plaintiff is estopped from setting up the term. In general, a mortgagee is estopped from denying the title of his mortgagor. A mortgagor is equally estopped, as between himself and his mortgagee, from setting up the title of a third person: *Doe d. Ogle v. Vickers* (4 A. & E. 782). Then, does it make any difference that the plaintiff is suing as administrator of his mother? It is submitted that it does not. Suppose his mortgagee had brought ejectment against him in his mother's lifetime, *Doe d. Ogle v. Vickers* is an authority that he could not have set up his mother's title as against the mortgagee. The plaintiff is bound to prove that there was an

(a) There is a similar provision in the Act for the amendment of the laws with respect to wills: 7 Wm. 4 and 1 Vict. c. 26, s. 6.

outstanding term in his mother, and that it vested in him as her administrator; but the moment he proves the first proposition he is as much estopped from setting up the term as he would have been in his mother's lifetime. In taking out administration, the plaintiff was a mere volunteer. He has also a beneficial interest as one of the next of kin, and to that extent at least he is estopped. In *Doe d. Hornby v. Glenn* (1 A. & E. 49) the agreement was not under seal, and that case may be supported on the ground that it was not a valid surrender within the Statute of Frauds. In a note to *Middleton's case* (5 Rep. 28 b.) its authority is doubted, and reference is made to *Whitehall v. Squire* (1 Salk. 295), where the [691] majority of the Court held that an administrator cannot bring trover for a chattel after his consent, before administration granted, that the defendant should have it. [Martin, B. There the plaintiff agreed that the defendant should keep the chattel in part satisfaction of the expense he had incurred in burying the intestate. Channell, B. That case is thus explained in *Williams on Executors*, vol. 1, p. 355, 5th ed.: "The principle, however, of this decision appears to have been, that the plaintiff, being a particeps criminis in the very act of which he complained, should not be permitted to recover upon it against the person with whom he colluded."] In *Smith v. Morgan* (2 Moo. & R. 257) Tindal, C. J., ruled that the declarations of a party suing as a representative of others, made before he became such, are evidence. [Pollock, C. B. In that case the plaintiff, on whose behalf the objection was taken, obtained the verdict, so that there was no necessity for questioning the law as laid down by Tindal, C. J. In *Fenwick v. Thornton* (Moo. & M. 51) Abbott, C. J., ruled that the declarations of a party suing as assignee of a bankrupt, made before he became such, are not admissible against him.] They also referred to *Pickard v. Sears* (6 A. & E. 469).

Cur. adv. vult.

CHANNELL, B., now said,—This was an action of ejectment, which was tried before my brother Williams at the last Devonshire Summer Assizes, when a verdict was found for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit.

The action was brought to recover possession of a piece of land, consisting of about an acre and a half upon which two cottages and some outhouses were built. The plaintiff [692] sued as administrator of his mother, and he sought to recover the premises in question by reason of a term of which it was said his mother died possessed, and which devolved upon him as her administrator, and continued to subsist at and after the time when the action was brought. Administration had not been taken out by the plaintiff until nearly fourteen years after his mother's death; and the defence was that the defendant had been in possession of the premises under a mortgage, dated the 9th January, 1844, by the plaintiff, in his mother's lifetime, to one Jago, whose interest had vested in the defendant. Two objections were made by the defendant to the plaintiff's right to recover: first, that there was no evidence on the part of the plaintiff to establish the existence of the term; and secondly, assuming that there was, the plaintiff was estopped from setting it up by reason of the mortgage.

The first question, therefore, is whether there was any evidence of the existence of a term. It appeared that the plaintiff's mother in her lifetime was in possession of the land; that she built upon it two cottages, in one of which she lived, the other she let, and received the rent. There was, therefore, evidence from which it would be presumed that she was seised in fee, unless her title was cut down or explained. It was necessary for the plaintiff to rebut the presumption of a seisin in fee, and shew that his mother had only a chattel interest for a term which subsisted at and after the commencement of the action. No deeds were produced, and in order to account for their non-production the plaintiff proved that about twenty-five years ago his cottage was destroyed by fire, when the deed under which his mother held the premises was burnt. Parol evidence was then admitted to shew what interest the plaintiff's mother took; and it appeared that she had an assignment of a lease [693] granted in 1798, for a term of 99 years, subject to two lives. A draft of that lease was produced, and it was proved that search had been made in the proper quarters for the original or a counterpart, but neither could be found. No objection was made to the admissibility of the parol evidence, and therefore the case is the same as if deeds had been produced tallying with that evidence. It is true that one witness stated that the term of 99 years was subject to three lives, but that in our view makes no difference. It was said by the defendant's counsel, and truly, that there was no evidence of the

creation of the original term of ninety-nine years, but it was proved that the steward of the Molesworth family had received from Richard Metters rent in respect of the premises in question, and it is impossible to deny that the enjoyment of them by the plaintiff's mother was a rightful enjoyment under the assignment of which parol evidence had been given. It therefore seems to us that there was evidence that a term of years existed; and that removes the first objection.

The second point is whether, assuming there was evidence of an existing term, the plaintiff, as administrator of his mother, is estopped by his mortgage of the premises in her lifetime from setting up that term. We think he is not. In *Doe d. Hornby v. Glenn* (1 A. & E. 49), which was cited on the argument, it was held that an agreement entered into by an executor de son tort did not bind him after he had become rightful administrator. In our opinion the plaintiff, who sues as administrator of his mother, must be considered in the position of a stranger, and therefore the rule as to estoppel does not apply; for whenever a person sues, not in his own right, but in right of another, he must for the purpose of estoppel be deemed a stranger. The authorities on the subject are not very distinct, but reference may be [694] made to Com. Dig. "Estoppel" (C.), where it is laid down, that generally a stranger shall not be bound by an estoppel.

For these reasons we think that the rule ought to be discharged.

Rule discharged.

MARIA HOWARTH v. BROWN. Jan. 16, 1863.—Where a defendant pleads a matter of defence which in fact arose after the last pleading, the plaintiff may, under 23 Reg. Gen. T. T., 1853, confess the plea and sign judgment for his costs, although it contains no allegation that the matter of defence arose after the last pleading.

[S. C. 32 L. J. Ex. 99; 11 W. R. 270; 7 L. T. 638.]

This was an action against the acceptor of two bills of exchange, and on accounts stated. The declaration was delivered on the 26th October, and the defendant then pleaded to the counts on the bills, a denial of the acceptance, and to the count on accounts stated, never indebted. On the 17th November, the defendant obtained a Judge's order for leave to withdraw those pleas, and plead a defence under the 164th section of the Bankruptcy Act, 1861.

On the 18th November the defendant accordingly pleaded as follows:—"And the defendant says, that he was duly adjudged a bankrupt, and that afterwards, and after the commencement of this action, he passed his final examination and obtained his order of discharge: that the bills were drawn and accepted by the defendant as a security for a debt due from him and proveable under the bankruptcy, and were made and accepted, and the causes of action in the declaration mentioned accrued, pending the proceedings in such bankruptcy; and the consideration for the acceptances was the said debt so proveable, and no other consideration; and the said accounts stated were stated of and concerning the money payable under the said bills."

On the 1st of December, the plaintiff delivered the following replication:—"The plaintiff confesses the truth [695] of the matters contained in the said plea of the defendant by him above pleaded after the last pleading herein, and she prays judgment for her costs of suit in this behalf." On the 4th of December, the plaintiff signed judgment for her costs. The defendant then took out a summons at Chambers to set aside the judgment, which was heard before Martin, B., who referred the matter to the Court.

C. Pollock now moved for a rule calling on the plaintiff to shew cause why the replication or confession, and the judgment signed thereon, should not be set aside for irregularity. Under the old practice, on a plea puis darrein continuance the plaintiff was entitled to discontinue his action without payment of costs: *Woolten v. Smith* (9 A. & E. 505), but there is no case which decides that a plaintiff who abandons his action can sign judgment for his costs. [Martin, B. The 69th section of the Common Law Procedure Act, 1852, provides that where a plea puis darrein continuance has heretofore been pleadable, "the same defence may be pleaded, with an allegation that the matter arose after the last pleading." Then by rule 23: "When a plea is

pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea." A form of a confession and judgment is given in Chitty's Forms, p. 462, 9th ed.] The 23rd rule must be read in connection with the 22nd.^(b) This case is not within rule 22, because it is not pleaded [696] with other pleas; and it is not within rule 23, because there is no allegation that the matter of defence arose after the last pleading. [Wilde, B. Unless the plaintiff signs judgment for his costs, how is he to get them?] He should have gone to trial: *Cook v. Hopewell* (11 Exch. 555). [Martin, B. All that case decides is, that the plaintiff was not bound to confess the plea, when it was untrue, and he had not accepted the sum paid to him in satisfaction of his costs.]

POLLOCK, C. B. I am of opinion that there ought to be no rule. If the 22nd and 23rd Rules of Trinity Term will admit of any construction by which the plaintiff may obtain her costs, we ought to put that interpretation upon them. It is not denied that if the plaintiff went to trial, and it turned out that the plea was a good defence to the action, she would get her costs up to the time when it was pleaded; but it is contended that if she simpliciter confesses the plea to be a good defence, she is not entitled to any costs. In my opinion it would be inconsistent and discreditable to administer the law in such a way.

MARTIN, B. I am of the same opinion. Reading the 69th section of the Common Law Procedure Act, 1852, together with the 22nd and 23rd Rules, the case is plain. Under the old law, if a defendant pleaded a defence puis darrein continuance, that operated as a withdrawal of all the other pleas; and the defence rested on that plea alone. If the plea was true the plaintiff could not go to trial, but was obliged to confess it. He could get no costs, because, under the Statute of Gloucester, 6 Ed. 1, c. 1, there must be a judgment to entitle a plaintiff to costs. But ordinary justice points out that, if a defendant is liable to an action at the time it is brought but has subsequently an answer to [697] it, the plaintiff ought to have his costs up to that time. And, accordingly, the Rules referred to have attempted to put the practice on a reasonable foundation. The Court of Queen's Bench had decided that matter of defence which arose after action brought could not be pleaded together with matter of defence which arose before action brought (*Suckling v. Wilson*, 4 D. & L. 167). The 22nd Rule was framed for the purpose of obviating that, and it says that "a plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action." But, inasmuch as the plaintiff, if he admitted the facts contained in the plea, ought to have his costs up to the time it was pleaded, the rule goes on to provide "that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first mentioned plea." Then comes the 23rd Rule, which applies to this case. That rule provides, that if a defendant shall plead a matter of defence which arose after the last pleading, the plaintiff shall be at liberty to confess the plea, and shall be entitled to his costs up to the time it was pleaded. That is simply carrying out the same principle as the 22nd Rule. No doubt the plea ought to contain an allegation that the matter of defence arose after the last pleading, and but for the license in pleading now allowed, it must have been so alleged; but, however that may be, this is, in substance, the old plea of puis darrein continuance, which was pleaded when matter of defence arose after plea or continuance; if it arose before plea or continuance, it was pleaded to the "further maintenance" of the action.

But then it is said that the plaintiff might have obtained his costs by going to trial, and *Cook v. Hopewell* (11 Exch. 555) has [698] been cited as an authority for that position. But that case is very different from this. There the plea alleged that the defendant paid, and the plaintiff accepted, a certain sum in satisfaction of the debt and all damages accrued in respect thereof; upon which the plaintiff took issue. Therefore the question to be tried was whether the plaintiff did accept that sum in respect of the debt and damages. My brother Wightman thought that the 22nd Rule

(b) Rule 22. A plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defence arising before the commencement of the action: provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first mentioned plea.

applied, and that the plaintiff, instead of going to trial, ought to have confessed the plea and signed judgment for his costs, and he directed a verdict for the defendant. The question was, who was entitled to the verdict upon that issue; that is, who was right upon the matter of fact. It was clear that the plaintiff had not accepted the money in satisfaction of his costs, and therefore my brother Platt, my brother Bramwell and myself considered that the plaintiff was entitled to a verdict with 1s. damages. I there stated, as I now state, that the 22nd Rule has no application to the issue raised in that case.

CHANNELL, B. I am entirely of the same opinion. Reading the 22nd and 23rd Rules together, I entertain no doubt whatever upon the point now raised. I agree with my brother Martin that the case of *Cook v. Hopewell* is clearly distinguishable from this case.

WILDE, B. I am of the same opinion, and I will only add that I am glad that the Court, on a matter of practice, can arrive at a conclusion so consonant with reason and justice.

Rule refused.

[699] COCKRILL v. SPARKES. Jan. 29, 1863.—In 1853 H., as principal, and the defendant as surety, gave to the plaintiff their joint and several promissory note for payment of 200l. on demand. In 1861 H. assigned all his property for the benefit of his creditors, and the defendant signed and gave to the plaintiff the following letter:—"I hereby consent to your receiving the dividend under H.'s assignment, and do agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff accordingly received the dividend, and in 1862 sued the defendant for the balance of the promissory note.—Held: first, that the letter was not an acknowledgment of the debt, so as to take the case out of the Statute of Limitations.—Secondly, that the letter, coupled with the payment, did not render it more than "only payment" by a co-debtor, so as to take the case out of the 14th section of the Mercantile Law Amendment Act, 1856.

[S. C. 32 L. J. Ex. 118; 9 Jur. (N. S.) 307; 11 W. R. 428; 7 L. T. 752. Distinguished, *In re Powers*; *Lindsell v. Phillips*, 1885, 30 Ch. D. 291. Referred to, *Re Wolmershausen*, 1893, 62 L. T. 544. Questioned, *Read v. Price*, [1909] 1 K. B. 589.]

Declaration on a promissory note dated the 9th of November, 1853, whereby the defendant promised to pay to the plaintiff, on demand, 200l., with interest at 5l. per cent.

Plea (inter alia), the Statute of Limitations. Issue thereon.

At the trial, before Martin, B., at the Middlesex Sittings, after last Trinity Term, it appeared that on the 9th of November, 1863, the defendant signed the promissory note (which was a joint and several note), as surety for one Henry Hilder, who received the proceeds. In the year 1861 Hilder was in pecuniary difficulties, and assigned all his property for the benefit of his creditors. In April of that year, the plaintiff requested the defendant to sign a document, which he stated was necessary to enable him to receive certain dividends under Hilder's assignment, and the defendant accordingly signed the following document:—

"Mr. Charles Cockrill.

"Sir,—I hereby consent to your receiving the dividend under Mr. Henry Hilder's assignment, and do agree that your so doing shall not prejudice your claim upon me for the same debt.—Yours, &c.

"SETH SPARKE.

"5th April, 1861."

The plaintiff afterwards received a dividend amounting [700] to 39l. 14s. 1d., and he also received goods to the amount of 58l. 18s. 6d., leaving 101l. 7s. 5d. due to him on the note. The writ issued on the 6th March, 1862.

It was submitted, on behalf of the defendant, that there was no payment on account, or acknowledgment of the debt, to take the case out of the Statute of Limitations. The learned Judge directed a verdict for the plaintiff for the amount claimed, reserving leave to the defendant to move to enter a verdict for him.

Beresford, in last Michaelmas Term, obtained a rule nisi accordingly; against which

H. T. Cole shewed cause in the present term (Jan. 12). First, the letter of the 5th of April, 1861, was a sufficient acknowledgment, within the 9 Geo. 4, c. 14, s. 1, to take the debt out of the Statute of Limitations, 21 Jac. 1, c. 16, s. 3. The letter clearly admits that some debt was due from the defendant to the plaintiff, and extrinsic evidence was admissible to shew that it related to the debt due on the promissory note. The case is distinguishable from *Smith v. Thorne* (18 Q. B. 134); for there the letter contained no absolute acknowledgment of a debt, nor unqualified promise to pay, but merely expressed a hope that in a certain event it might be paid. [Martin, B. Is not the meaning of the letter this: "As the receipt of the dividends might prejudice your right against me as a surety, I hereby agree that your receiving them shall not prejudice your claim against me?" Pollock, C. B. The letter merely amounts to this: "By receiving the dividends, you shall not be prejudiced in any claim which you may have against me."] The plaintiff could not be prejudiced if no debt was due to him and therefore the letter must amount to an admission that some debt is due. [Martin, B. The acknowledgment must be [701] such that a promise to pay on request may be inferred from it. Pollock, C. B. It is now sought to use the letter for a purpose not contemplated either by the person who wrote it or the person who asked for it.]

Secondly, the payment of the dividend would, before the "Mercantile Law Amendment Act, 1856" (19 & 20 Vict. c. 97), have been sufficient to take the case out of the Statute of Limitations; and the 14th section of that Act merely provides that a co-debtor shall not lose the benefit of the Statute of Limitations "by reason only of payment" of principal or interest by another co-debtor. Here there is a payment coupled with an acknowledgment of the debt, so that the cause is not within the 14th section of the "Mercantile Law Amendment Act, 1856."

Beresford, in support of the rule. First, the defendant's letter does not amount to an acknowledgment of the debt, so as to take the case out of the Statute of Limitations. It is only an agreement that the receipt of dividends from the principal debtor shall not prejudice the plaintiff's rights against the defendant, as surety. Secondly, the letter has not altered the effect of the payment. It is simply a payment by a co-debtor, which, before the Mercantile Law Amendment Act, 1856, would have prevented the operation of the Statute of Limitations: *Whitcomb v. Whiting* (Doug. 652). It is clear that unless the letter amounts to an acknowledgment of the debt there was payment only by a co-debtor within the meaning of the 14th section of the Mercantile Law Amendment Act, 1856. He also referred to 1 Smith's Leading Cases, 557, 5th ed., and *Jackson v. Woolley* (8 E. & B. 778).

Cur. adv. vult.

The judgment of the Court was now delivered by

[702] WILDE, B. This is an action upon a promissory note payable on demand, made by one Hilder, being the principal, and the defendant as surety, and dated more than six years before the commencement of the action. There was a plea of the Statute of Limitations, and in order to take the case out of the Statute, it was proved that such was the relation of the parties; and that in the year 1861 Hilder became insolvent, and proposed to pay a composition to his creditors, and that thereupon the defendant, on the 5th of April, of that year, wrote and signed a letter to the plaintiff as follows:—"I consent to your receiving a dividend under Hilder's assignment, and I do agree that your so doing shall not prejudice your claim on me for the same debt." The dividend was paid, and this action was brought to recover the balance.

It was contended: first, that the letter took the case out of the statute. We do not concur in this construction. An acknowledgment of a debt, to have the effect, must be one from which a promise to pay the debt may reasonably be implied, but there is nothing in this letter to lead to such implication. It was obviously written with an entirely different object, viz., to prevent any release of the defendant as surety by reason of the receipt of a dividend from the principal debtor, and discharging him from the residue; but there is nothing in the letter to shew that the defendant proposed to do more. The receipt of the dividend was not to prejudice the plaintiff's claim, but the letter shews no new contract or fresh liability.

But it was contended: secondly, that the payment of the dividend and the letter, together, took the case out of the statute. Upon the original construction of the Statute of Limitations, it was decided that a part payment by one of several joint,

or joint and several, debtors kept alive or revived the remedy against the other, although the latter [703] was a surety only, and even although the payment was not made until the statute had run out. The cases will be found referred to in Chitty upon Contracts, 5th ed., 733, and this must be taken as indisputable law. Then came Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 1, which enacted that nothing therein contained should alter or lessen the effect of any payment of principal or interest made by any person. The law therefore remained unaltered, but by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 14, it is enacted that where there shall be two or more joint debtors, no co-debtor shall lose the benefit of the Statute of Limitations so as to be chargeable by reason only of payment by any other co-debtor.

The letter above set out has already been construed by the Court, and does not appear to us to carry the matter further than a "payment only" by the co-debtor.

The last statute therefore applies, and the defendant is entitled to the benefit of the Statute of Limitations.

The rule will, therefore, be absolute to enter the verdict for defendant.

Rule absolute.

FLIGHT v. REED. Jan. 21, 1863.—Bills of exchange given after the repeal of the usury law, in renewal of bills given while that law was in force, to secure payment of money lent with usurious interest, are valid, the receipt of the money being a sufficient consideration to support a new promise to pay it. Per Pollock, C. B., and Wilde, B. Dissentiente Martin, B.

[S. C. 32 L. J. Ex. 265 ; 9 Jur. (N. S.) 1016 ; 12 W. R. 53 ; 8 L. T. 638.]

Declaration on six bills of exchange, drawn in the years 1855 and 1856, by the plaintiff upon and accepted by the defendant.

Plea. That before the making of the said bills of exchange in the declaration mentioned, or any or either of them, to wit, on the 31st day of October, A.D. 1845, it was [704] corruptly and against the form of the statute in that behalf made and provided, agreed between the plaintiff and defendant, and one Robinson, that the plaintiff should lend and advance to the defendant and the said

Robinson a certain sum of money, to wit, 1500l., and that the plaintiff should forbear and give day of payment to the defendant and the said Robinson, until a day then to come, to wit, until the bills of exchange next hereinafter mentioned should become due and payable, and that for such forbearance the defendant and the said

Robinson should pay to the plaintiff more than lawful interest at the rate of 5l. per centum per annum, upon the said sums of money so lent and forborne by the plaintiff to the defendant, that is to say 100l. And that for securing the repayment of the said sum of 1500l. and interest, the defendant and the said Robinson

should accept and deliver to the plaintiff certain bills of exchange, drawn by the plaintiff upon them, whereby they should engage to pay to the plaintiff or his order 1600l., ten weeks after the date thereof and of the said loan. And the defendant further says, that in pursuance of the said unlawful agreement the plaintiff accordingly, to wit, on the day and year aforesaid, made the said loan and advance to the defendant, and the said Robinson, and they then accordingly accepted bills of

exchange, drawn by the plaintiff on them for the sum of 1600l., payable as aforesaid. And that save as aforesaid there never was any consideration for the acceptance by the defendant of the said last mentioned bills of exchange, or any or either of them. And the defendant further says that the said bills were dishonoured at maturity, and that the bills of exchange in the declaration mentioned were accepted and given, after the passing of the statute 17 & 18 Vict. c. 90, by way of renewal of the said other bills of exchange, to secure the payment to the plaintiff of the money [705] secured by the said other bills of exchange so given to the plaintiff as aforesaid, including the said sum of 100l. heretofore mentioned, and in the said other bills included as interest as aforesaid ; and that save as aforesaid there never was any value or consideration for the acceptance by the defendant of the bills of exchange in the declaration mentioned, or any or either of them.

Demurrer, and joinder therein.

Lush (Philbrick with him), in support of the demurrer. The 3 & 4 Wm. 4, c. 98, s. 7, exempted from the operation of the usury law, bills of exchange and promissory notes

payable at or within three months after date. The 7 Wm. 4 and 1 Vict. c. 80 extended the exemption to bills and notes not having more than twelve months to run. That enactment was continued by the 2 & 3 Vict. c. 37, s. 1, which excepted from its operation loans on the security of land. The 17 & 18 Vict. c. 90, which passed in the year 1854, entirely repealed the usury law. This plea is bad for not alleging that the original bills were given while the usury law was in force: *Thibault v. Gibson* (12 M. & W. 88). But even assuming that they were, the bills declared on were given after the usury law was repealed, and therefore they are not affected by the previous illegal contract. [Martin, B. The 12 Anne, stat. 2, c. 16, rendered an usurious contract utterly void; then what consideration is there for the new bills?] By the 2nd section of the 17 & 18 Vict. c. 89, it is provided "that nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any act done previously to the passing of this Act." Therefore, as the original bills were void at the time they were given they could not now be enforced, but the receipt of money which [706] the defendant was under a moral obligation to repay is a sufficient consideration to support a new contract after the usury law was repealed. *Barnes v. Hedley* (2 Taunt. 184) decided that after usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is founded on a sufficient consideration, and is binding. *Wicks v. Gogerley* (Ry. & M. 123) is an authority to the same effect. So in *Wright v. Wheeler* (1 Camp. 165, note), where an obligee cancelled a bond by which usurious interest was payable, and the obligor gave him another bond for principal and legal interest only, Lawrence, J., ruled that it was valid. [Martin, B. It appears by the report in Camp. 157, that *Barnes v. Hedley* was first tried before Chambre, J., and he ruled that, if money is lent at usurious interest, a subsequent contract to repay the principal with legal interest was void under the 12 Anne, stat. 2, c. 16.] Though the contract is void, the original debt is a sufficient consideration to support a new promise. [Pollock, C. B., referred to *Fitzroy v. Gwillim* (1 T. R. 153).] *Mather v. Lord Maidstone* (18 C. B. 273) shews that a person may be liable on a new security although the one for which it was substituted could not be enforced against him.

Macnamara, in support of the plea. At the time the original bills were given an usurious contract was not only void but also illegal, for the person who received money under it was subject to a penalty of treble the value. The 3 & 4 Wm. 4, c. 98, s. 7, and 7 Wm. 4 and 1 Vict. c. 80, do not affect this question, because they only created an exemption in certain cases from the penalties imposed by the 12 Anne, stat. 2, c. 16; and therefore it is sufficient for [707] the defendant to shew that the contract was usurious within that statute, and if the plaintiff relies on the exemption, that should come by way of replication: *Thibault v. Gibson* (12 M. & W. 88), *Washbourn v. Barrows* (1 Exch. 107), *Derry v. Toll* (5 Exch. 741). It appears that the bills declared on were drawn and accepted in the years 1855 and 1856, and therefore after the usury law was repealed by the 17 & 18 Vict. c. 90; but the plea shews that they were accepted to secure the payment of money lent upon an usurious contract, and secured by bills given while the usury law was in force. Therefore the substituted bills were tainted with the original usurious contract, and that being void, there was no consideration for them. The case falls within the 2nd section of the 17 & 18 Vict. c. 90, which preserves all rights and liabilities in respect of transactions previous to that Act. There is no new contract, but merely a renewed security for payment of money under an usurious contract. [Wilde, B. If, before the usury law was repealed, the parties to an usurious contract destroyed the securities, and made a new contract to pay the principal and legal interest, that contract was valid, then why is not a new contract valid since the usury law has been altogether repealed?] *Barnes v. Hedley* (2 Taunt. 184) is distinguishable on two grounds: first, the destruction of the usurious securities by mutual consent was a sufficient consideration to support a new promise; and secondly, the promise was to pay the principal and legal interest. Here the bills declared on were given to secure payment of the usurious interest. Where a bill of exchange tainted with usury was in the hands of an innocent holder, and, on being informed of the usury, he took a fresh bill in lieu of it, drawn by one of the parties to the [708] usurious contract, and accepted by a third person for his accommodation, it was held that the holder could not maintain an action against the acceptor of the substituted bill: *Chapman v. Black* (2 B. & Ald. 588). [Pollock, C. B. If the innocent

holder of a promissory note made for an usurious consideration took from the maker of it a bond for payment of the amount, the bond was valid; *Cuthbert v. Haley* (8 T. R. 390). Channell, B. The 58 Geo. 3, c. 93, enacts that no bill of exchange or promissory note given upon an usurious contract shall be void in the hands of an indorsee for valuable consideration without notice.] *Cuthbert v. Haley* does not support the proposition contended for. There the Court expressed an opinion that a substituted security given for a security tainted with usury is void if given to a party to the original contract. *Wicks v. Gogerley* (R. & Moo. 123) is an authority in favour of the defendant, for it decided that a new promise to pay the principal originally lent on an usurious agreement is invalid, unless all payments beyond legal interest are repaid or deducted. Here the substituted security is for the principal and usurious interest. The receipt of the money under the usurious contract is no consideration for a new promise to pay it. There is a distinction between cases where there is a moral consideration for payment of a debt not enforceable at law, as where an infant after attaining his majority promises to pay a debt contracted during infancy, and where a statute has expressly declared that a particular contract shall be illegal and void. In the former case the duty constitutes a sufficient consideration for a promise to pay the debt, but in the latter, the contract being declared void and an offence at law, there can be no consideration for any new promise.

Cur. adv. vult.

[709] The learned Judges having differed in opinion, in the ensuing term (May 8) the following judgments were delivered:—

MARTIN, B. This is a demurrer to a plea. The action is upon several bills of exchange. The plea is, that before the making of the bills declared on it was corruptly and against the form of the statutes agreed between the plaintiff and the defendant and one Robinson that the plaintiff should lend them 1500*l.*, and that he should forbear and give day of payment to them until a future day, and that for such forbearance they should pay to him more than lawful interest at the rate of 5*l.* per cent. per annum upon the sum so lent and forborne, and that for securing the repayment of the said sum of 1500*l.* and interest, the defendant and Robinson should accept and deliver to the plaintiff certain bills of exchange drawn by the plaintiff upon them, whereby they engaged to pay to the plaintiff, or his order, 1600*l.* ten weeks after the date thereof and of the loan. That in pursuance of the said unlawful agreement the plaintiff made the loan, and the defendant and Robinson accepted the bills, and that save as above there was no consideration for these acceptances. That these bills of exchange were dishonoured at maturity, and that the bills of exchange declared on were given, after the passing of the statute 17 & 18 Vict. c. 90, by way of renewal of the said first mentioned bills, and accepted to secure the payment to the plaintiff of the money secured by the first named bills so given to the plaintiff and the said usurious interest, and that save as aforesaid there was not any value or consideration for the acceptance by the defendant of the bills sued on.

The plea disclosed this state of things, viz. that when the loan was made and the first bills of exchange given the statute 12 Anne, stat. 2, c. 16, was in operation, but [710] that when the bills of exchange declared on were given the statute 17 & 18 Vict. c. 90, had passed. The latter statute repeals the statute of Anne, but the second section provides that nothing in it shall prejudice or affect the rights or remedies, or diminish or alter the liabilities of any person in respect of any act done previous to its passing. The original loan and bills of exchange were therefore left unaffected by it. The statute of Anne enacts that no person upon any contract shall take for a loan of money above 5*l.* per cent. for a year, and that all contracts for payment of any principal so lent shall be utterly void, and that any person who shall take above 5*l.* per cent. for a year shall forfeit and lose for such offence treble the value of the money lent. The loan was therefore an illegal transaction, and the original contract to repay it and the bills of exchange given for it were utterly void; and the plea states that save these there was no other consideration for the bills declared on.

It is quite clear that a bill of exchange is a simple contract; it and promissory notes differ from other simple contracts in this, that *prima facie* they import consideration; but when it is proved that there was no consideration, or an illegal one, the bill of exchange or note is of no avail. It does seem superfluous to cite any authority for the above positions, but in my brother Byles's book upon Bills, page 111 (8th edition), it is stated that the defendant is at liberty in all cases (when the issue raised

admits of it) to shew affirmatively, by his own witnesses, absence or failure of consideration; and again, page 124, the consideration given for a bill must not be illegal and at page 132, if part of the consideration of a bill be illegal, the instrument is vitiated altogether; and at page 288, usury is said to be an indictable misdemeanor at common law, for which Comyns's Digest, title Usury, is cited. Now the consideration for the bills declared on was the usurious loan, and the bills of exchange given to secure it. But the statute of [711] Anne has declared these to be utterly void; and, speaking for myself, I cannot understand how an utterly void and illegal contract or transaction can be a legal consideration for a new contract. But the case does not rest here, for at page 294 the same learned author states that if an usurious bill be in the hands of a holder who was a party to the usurious transaction, and he gives it up for a substituted security, the original usurious taint infects the subsequent security, and either is void. Now, applying the above statement of the law, the consequence seems to be inevitable that the bills of exchange sued on are not of avail in the hands of the plaintiff, who was the usurious lender, and that the plea is good.

But a case of *Barnes v. Hedley* (2 Taunt. 184) was cited. According to the statement in the report, a person called Webb had agreed to lend money at 5l. per cent. interest, but with a proviso that he should also receive a commission of 5l. per cent. upon sugars to be bought of him or provided by him, and certain deeds and securities were given to him to secure the balance due. It was admitted at the trial that this was an usurious contract, but it was proved that in consequence of its being intimated to Webb that it was so, it was agreed that Webb should make out fresh accounts, leave out all the usurious charges, charge only for the principal money and legal interest, and that the original deeds and securities in the possession of Webb should be given up and cancelled. Webb accordingly made out such fresh accounts, in which he omitted the usurious charges, and the balance sought to be recovered in the action was composed of the principal monies actually advanced, with lawful interest fairly and legally calculated, the whole commission and every objectionable charge being omitted. The account was delivered to the debtor, who acknowledged the balance, and promised to pay it, and [712] thereupon the deeds and securities originally given to Webb were produced, and cancelled and burnt in the presence of the debtor. The Court of Common Pleas held that the balance so arrived at and promised to be paid was recoverable at law, and so certified to the Lord Chancellor, the case being an issue from Chancery. I cannot myself see the application of this case to the present. If it had appeared upon the record that the plaintiff and defendant had accounted together and struck off the usurious interest, and the latter had given the bills declared on for the amount of the original loan and legal interest, it would have been an authority in favour of the plaintiff, but nothing of the kind appears upon the plea; indeed the contrary appears, for the bills declared on are stated to have been given to secure the payment to the plaintiff of the money secured by the bills of exchange given to him in furtherance of the illegal and corrupt contract, and that there was no other consideration for them. The case has been put thus, that when the bills declared on were given there was no usury law, and it was competent for the defendant to pay or contract to pay interest to any extent, and that the bills were lawful, assuming them to have been given for a loan then made. This is quite true, but it has no application to the real and true case under consideration. There was no loan after the repealing statute was passed. There was no correction of the original unlawful transaction. There is nothing whatever shewn on the record except bills given upon and in respect of a transaction which the law had declared to be utterly void, and which at one time seems to have been considered an indictable crime.

Another case was cited, *Wright v. Wheeler*, which will be found in a note to *Barnes v. Hedley* (1 Camp. 165). This was an action upon a bond. There had been an usurious [713] contract, but afterwards the parties agreed that some usurious interest which had been paid should be deducted from the principal, and a bond given for the balance of the principal, with lawful interest. Mr. J. Lawrence was of opinion at nisi prius that the bond was lawful. The parties, he said, had rectified their error, and substituted for an illegal contract one which was fair and legal. The case has no bearing upon the present. There is here no substitution of a legal contract for an illegal one; it is a mere continuance of the old unlawful contract. *Cuthbert v. Haley* (8 T. R. 390) is to the same effect.

A case of *Wicks v. Gogerley* (R. & Moo. 123) was also cited by the leading counsel

for the plaintiff, but according to the statement of the law laid down there by C. J. Best, the plaintiff is not entitled to recover. He says the principle is, that where parties to an usurious agreement "state an account and agree upon the sum which would be due for principal and legal interest, after deducting all that has been paid beyond legal interest, and a fresh promise is made to pay that sum, such promise is free from the original usury, and is perfectly valid in law. But, in order to bring this case within the principle, all beyond legal interest must be repaid or deducted." In the report of *Barnes v. Hedley* in 1st Campbell, which I have before referred to, there is a judgment of Mr. J. Chambre, which seems to me to be well worthy of consideration by any one who desires to ascertain what is the true law upon this subject. There is also a case which was not mentioned in the argument, *Preston v. Jackes* (2 Stark. 237), which was tried before Mr. J. Holroyd, who held that a party could not recover on a note which operated as a security for any usurious interest. This case seems to me in point for the defendant, and any [714] opinion of Mr. J. Holroyd, wherever given, is entitled to the greatest weight and is of the highest authority.

The result is, that in my opinion an usurious loan within the statute of Anne, and usurious interest contracted to be paid for it, is not a good consideration for a bill of exchange, and that a bill given upon such consideration is not of avail; and this opinion does not contravene the case of *Barnes v. Hedley*, reported in 2 Taunton, or any other case or authority which I have met with or has been referred to; but on the contrary, in my opinion, is in conformity with them all.

POLLOCK, C. B. The judgment which I am about to deliver is that of my brother Wilde and myself.

My brother Martin having stated the pleadings, it is not necessary to repeat them.

The real question raised by this demurrer is, whether there is a good consideration for the bills declared upon.

The original bills were given for an advance of money with usurious interest at a time when such a transaction was forbidden by law, and were therefore void and of no legal obligation.

The bills sued on were given since the repeal of the usury law, and at a time when the giving or confirming an obligation to pay any amount of interest however high was perfectly legal and binding.

But the altered law did not render valid the original bills; they were void when given, and remained void and of no legal obligation up to the time when they were renewed by the bills in question.

The original bills, therefore, could not form a legal consideration for those now sued upon. Indeed, there was, when the fresh bills were given, no legal obligation whatever upon the defendant to repay a single farthing of the large advance he had received. But for that advance he has [715] voluntarily given these bills, and whether the law will permit and enforce such a contract is the question.

During the existence of the usury law the Courts of law were bound to enforce them—to deal with interest above the statute rate as an unlawful and forbidden thing—and to discover and defeat all attempts, direct or indirect, to give or enforce it.

But the legislature has since repealed the laws against usury, and upon a fuller and wider view of public policy declared the rate of interest on loans to be unlimited and free.

The Courts of law are bound with equal fidelity to give effect to this new and opposite view of the legislature. Interest above 5l. per cent. should no longer be regarded as of necessity illegal or unrighteous, and no facility should be given to escape from an obligation to repay a real advance of money, or evade a contract willingly made, though interest should have been contracted for, which used to be at a rate called usurious rate.

We make these remarks, because in argument the expression "taint of an usurious transaction" was often repeated, and the Court was pressed in language, commonly and properly used while the usury laws were in force, to give no countenance to a contract of which the origin was an advance of money with more than 5l. per cent. interest.

Such remarks have no application to or bearing on a contract made like that in question since the usury laws have been repealed.

We therefore pass them by to consider the true question in the case, viz., whether

an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an express promise to do so.

Such a consideration has been sometimes called a moral consideration. And we think unfortunately so; for the term [716] used as a definition tends to include too wide a range of objects.

And there are many conjunctures in which a man may feel himself morally bound to pay money and promise to do so, which the law would not recognise as forming a good consideration.

But a loan of money is a very different thing. The very name of a loan imports that it was the understanding and intention of both parties that the money should be repaid.

And though at the time of the advance the law, for reasons of public policy, forbid any liability, and incapacitate the parties from making a binding contract, there is no reason why a binding contract should not be made afterwards if the legal prohibition be removed.

And the consideration which would have been sufficient to support the promise, if the law had not forbidden the promise to be made originally, does not cease to be sufficient when the legal restriction is abrogated.

There is, therefore, reasonable ground, as it seems to us, for this qualified proposition, viz., That a man by express promise may render himself liable to pay back money which he has received as a loan though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt.

There is likewise authority for it. The general doctrine within which such a proposition falls is, we believe, first found promulgated in Lord Mansfield's time. It is the subject of a long note to the report of the case of *Wennall v. Adney* (3 Bos. & P. 249). It has been the subject of much discussion in many subsequent cases. It was stated most widely, and perhaps too widely, in the case of *Lee v. Muggeridge* (5 Taunt. 45). And it has consequently been much qualified and some [717]-times disparaged since: see *Eastwood v. Kenyon* (11 A. & E. 447); *Beaumont v. Reeve* (8 Q. B. 487); *Cocking v. Ward* (1 C. B. 870).

But it was repeated and stated to be undoubted law by Baron Parke, in *Earle v. Oliver* (2 Exch. 71, 89), who says, "the strict rule of the common law was no doubt departed from by Lord Mansfield in *Hawkes v. Saunders* (Cowp. 290) and *Atkins v. Hill* (Cowp. 284)."

The principle of the rule laid down by Lord Mansfield is, that where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by law to perform it.

There is a very able note to the case of *Wennall v. Adney* (3 Bos. & P. 247) explaining this at length. The instances given to illustrate the principle are, amongst others, the case of a debt barred by certificate and by the Statute of Limitations, and the rule in these instances has been so constantly followed, that there can be no doubt that it is to be considered established law.

The case of *Fitzroy v. Gwillim* (1 T. R. 153) is an example of the view that has been taken of the subject even in a Court of law, but although that case is certainly not law, it is quite true that Courts of equity have relieved (where their interference was wanting) only on the terms of the principal and legal interest being paid.

We think the view we have taken receives considerable support from the case of *Barnes v. Hedley* (2 Taunt. 184), which, if not a direct authority for the plaintiff, is somewhat similar in its [718] circumstances; the usurious interest was in that case struck out, but now, since the repeal of the statute of Anne, there is nothing unlawful in usurious interest. Here the defendant says, "I could not then make the promise: I can now, and I am willing to do so."

The plaintiff is therefore, in our opinion, entitled to the judgment of the Court.
Judgment for the plaintiff.

BEST v. HAYES. *JANE GALLAGHER, Claimant.* Jan. 23, 1863.—A Court of law is not bound by the principles which govern Courts of equity upon a bill of interpleader, and may give relief although one of the parties has incurred to another a personal obligation independently of the question of property, and the claims are not identical.—The defendant, an auctioneer, sold for the plaintiff some furniture and paid him a part of the proceeds; but whilst the balance was in his hands G. gave him notice that the furniture belonged to her. The plaintiff having brought an action against the defendant for the balance, he sought to deduct his charges for commission, &c., and applied for an interpleader order between the plaintiff and G. as to the residue; G. being willing to allow the defendant his charges. Held, that a Judge had power to make the interpleader order, if not under the 1 & 2 Wm. 4, c. 58, under the 12th section of the Common Law Procedure Act, 1860.

[S. C. 32 L. J. Ex. 129; 11 W. R. 71. Followed, *Tanner v. European Bank*, 1866, L. R. 1 Ex. 261. Applied, *Attenborough v. St. Katharine's Dock Company*, 1878, 3 C. P. D. 455. Approved, *Robinson v. Jenkins*, 1890, 24 Q. B. D. 278. Referred to, *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q. B. 556.]

This was a rule calling on the defendant and the claimant, Jane Gallagher, to shew cause why an interpleader order, made by Wilde, B., on the 15th of May, 1862, should not be rescinded.

The affidavit of the defendant, in support of the interpleader order, stated that the action was brought for money had and received, to recover the proceeds of certain furniture and effects, which, in March, 1862, had been intrusted by the plaintiff to the defendant, an auctioneer, to sell by auction. The furniture and effects were sold by the defendant on the 3rd, 4th and 7th of April, and produced the sum of 610l. 7s. 5d. The expenses attendant upon such sale for printer's bills, advertisements, &c., with the amount of the defendant's commission, were 48l. 13s. 3d. The defendant had paid 2l. 19s. 6d. to a person for taking care of the furniture and effects, by direction of the plaintiff, and 25l. for rent levied by the landlord of the premises on which the furniture and effects were sold, which, together with 11s. the cost of [719] the distress, amounted to 77l. 3s. 9d., leaving a balance of 533l. 3s. 8d. On the 5th of April, the defendant paid the plaintiff 300l. on account, leaving a balance in his hands of 233l. 3s. 8d.; and he afterwards received a notice, on behalf of Jane Gallagher, that she claimed the proceeds of the furniture and effects. The action was commenced on the 23rd of April, and the declaration was delivered on the 28th. The affidavit also stated that the defendant did not claim any interest whatsoever in the sum of 233l. 3s. 8d.

The claimant, Jane Gallagher, made an affidavit in which she stated that the furniture was purchased by the plaintiff for her and on her sole account, but in his own name, under an order of the Court of Chancery of the county palatine of Lancashire, in which Johnson and others were plaintiffs and the deponent defendant. There was also an affidavit by the attorney of Gallagher, in which he stated that she was willing that the plaintiff should pay the balance into the Court of Chancery of the county palatine to the credit of the suit; and that the defendant should be relieved from any further liability, and be allowed to retain all his proper fees, costs and charges.

The interpleader order (so far as material) was as follows:—"Upon hearing counsel, &c., I do order that as to the sum of 248l. 3s. 8d., (a) in which the defendant claims no interest, the parties do proceed to the trial of an issue, in the Court of Exchequer, in which the said plaintiff shall be plaintiff and the said Jane Gallagher, the claimant, shall be the defendant; and that the question to be tried shall be, whether the proceeds of the sale of the goods alleged to belong to the plaintiff, and claimed by the said Jane [720] Gallagher, are the property of the said Jane Gallagher as against the said plaintiff. . . . The said sum of 248l. 3s. 8d. to be paid forthwith into Court, to abide the further order of this Court. And I further order that the

(a) On the hearing of the interpleader summons, the plaintiff having objected to the amount of commission claimed by the defendant, he consented to give up 15l., and the order was accordingly drawn up as to 248l. 3s. 8d. instead of 233l. 3s. 8d.

said Jane Gallagher and the plaintiff shall be barred from prosecuting their claim against the defendant for or in respect of the said sum of 248l. 3s. 8d.

"I reserve the question of costs until after the trial of the issue; and as to the remainder of the money claimed to be in the defendant's hands, the plaintiff shall be at liberty to continue this action, if he think fit, at his peril; the defendant only to set up his own claim for detention of such sum."

Morgan Lloyd, in last Trinity Term, obtained a rule nisi to rescind the above order. The affidavit of the plaintiff, in support of the application, stated that the furniture had been purchased by him under an agreement with the claimant, Jane Gallagher, that she was to pay for it by weekly instalment, and that she had made default in payment.

Willis now shewed cause. Whatever objection might formerly have been made to this interpleader order, on the ground that the plaintiff merely seeks to enforce against the defendant the performance of his contract, is now removed by the 12th section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which enables the Court to grant relief "though the titles of the claimants to the money, goods or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another." Where a defendant contracted with the plaintiff for the completion of certain work, which he finished, and after part of the price had been paid to him a third person claimed the residue, alleging that the plaintiff was merely his agent in making the contract, Blackburn, J., considered that relief might probably have been granted under the 1 & 2 Wm. 4, c. 58, but he decided the case on the broad ground that the 12th section of the Common Law Procedure Act, 1860, enabled the Court to give relief whenever it appeared that in the particular case the relief would be complete and just: *Maynell v. Angell* (32 L. J. Q. B. 14). The case of *Baker v. The Bank of Australasia* (1 C. B. N. S. 515) is distinguishable, because there no issue could have been framed which would have determined the question in dispute between the parties who were called upon to interplead. Here complete justice may be done, for the claimant is willing to allow the defendant his charges against the plaintiff and to accept an issue as the residue of the proceeds of the goods. [Martin, B. It would seem from the case of *Thorne v. Tilbury* (3 H. & N. 534) that the defendant is not estopped from setting up the claimant's title.]

The Court then called on

Morgan Lloyd, to support the rule. The defendant has contracted with the plaintiff to pay over this money to him, and the plaintiff seeks to enforce the performance of that contract. The Interpleader Act, 1 & 2 Wm. 4, c. 58, s. 1, was intended as a substitute for the old mode of obtaining relief by bill in equity, and Courts of law are guided by the principles which govern Courts of equity: *Slaney v. Sidney* (14 M. & W. 800); *Lindsey v. Barron* (6 C. B. 291, 294). A party cannot obtain relief by interpleader where he has incurred a personal liability to either of the contending parties: *Patoni v. Campbell* (12 M. & W. 277). There Rolfe, B., referred to *Crawshaw v. Thornton* (2 Myl. & C. 1), where Lord Cottenham, C., laid down that if a plaintiff in an interpleader suit has incurred to one of the defendants a personal obligation, independently of the question between the defendants themselves, he cannot compel them to interplead. Again, there can be no interpleader in equity unless the litigant parties claim the same debt or duty: *Glyn v. Duesbury* (11 Sim. 139). Here the claims are not identical, because they are of different amounts. [Channell, B. Might not the claimants have separate rights to parts of the money? In *Glyn v. Duesbury* the two debts were originally and substantially different in their nature.] In *Diplock v. Hammond* (2 Sm. & G. 141) it was held a fatal objection that the plaintiff in the interpleader suit called upon the defendants to interplead as to a less sum than they claimed against him. [Martin, B. It was, no doubt, stated by Parke, B., that, in cases of interpleader, Courts of law would follow the rules of Courts of equity, but the Interpleader Act does not require it.] *Mitchell v. Hayne* (2 Sim. & S. 63) decided that where an action is brought against an auctioneer for a deposit, he cannot sustain a bill of interpleader, if he insists upon retaining either his commission or the duty. [Martin, B. The defendant does not claim any interest in the corpus of the money. His claim to deduct the expenses of the sale is not an interest within the meaning of the Interpleader Act. The only interest he claims is by reason of his contract with the plaintiff.] He has no right, as against Gallagher, the claimant, to deduct the expenses of the sale. [Martin, B. That might be an objection on her part, but

she assents to the deduction.] Moreover the claim of Gallagher is merely of an equitable nature, and therefore not the subject of interpleader: *Roach v. Wright* (8 M. & W. 155). At all events, as the solvency of Gallagher is doubtful, the Court will not call upon the plaintiff to interplead with her without requiring her to give him security for his costs: *Deller v. Prickett* (15 Q. B. 1081).

[723] POLLOCK, C. B. I am of opinion that the rule ought to be discharged. This order is in conformity with the practice which has prevailed in this Court (and I believe in every other Court in Westminster Hall) ever since they have had jurisdiction to make interpleader orders. No doubt, Judges have occasionally looked at what was the practice of Courts of equity upon a bill of interpleader; but in my opinion it would be injurious to the public if we were to adopt that as a rule, for the consequence would be that, whenever a plaintiff brought an action in respect of a claim which might be the subject of interpleader in a Court of common law, if there was combined with it some matter which did not admit of a bill of interpleader, the party against whom the action was brought would be deprived of the benefit of an interpleader order. It is a common occurrence for a defendant to come before a Judge at Chambers and say: "I am sued by A. and B. With respect to B., I have no defence, and what he claims I am ready to give up to him. As to the claim of A., I am sued by another person in respect of it, and I ask for the protection of the Court by an interpleader order." Under such circumstances what is there unreasonable in making an order? On the contrary it seems to me that it would be unjust to adopt a different course and refuse relief.

MARTIN, B. I am of the same opinion. The authority of the Court or a Judge in matters of this kind depends on two Acts of Parliament, the Interpleader Act (1 & 2 Wm. 4, c. 58) and the Common Law Procedure Act, 1860 (23 & 24 Viet. c. 126). I am aware that in many cases stress has been laid, and by no means improperly, on the proceedings of Courts of equity upon a bill of interpleader; but the authority given by the Interpleader Act to Courts [724] of common law is to make an order as to the trial of an issue and "such other rules and orders as to costs and all other matters as may appear to be just and reasonable." There is no reference in any part of the Act to the practice of Courts of equity. Therefore what the Legislature has prescribed and the Court or a Judge must do, is that which is just and reasonable between the parties. There were some matters with respect to interpleader, as to which, with a more enlarged and enlightened construction of the Act, more ample justice might have been done; but now a remedy is provided by the 12th section of the Common Law Procedure Act, 1860. I can state that the order of my brother Wilde is in accordance with the practice for the last twelve years. It seems to me that it is a beneficial practice, and a great saving of expense to the parties, and I am at a loss to know why he should alter it.

CHANNELL, B. I agree that the order of my brother Wilde was right; and I think it would be so independently of the authority given by the 12th section of the Common Law Procedure Act, 1860. Under the 1 & 2 Wm. 4, c. 58, there were some decisions which appear to conflict. I think the true view is that given in *Meynell v. Angell* (32 L. J. Q. B. 14), but, however that may be, since the authority under 1 & 2 Wm. 4, c. 58, has been extended by the 12th section of the Common Law Procedure Act, 1860, I entertain no doubt that the order was correctly made, upon the facts presented to the Judge, and that there is no ground for this application.

WILDE, B. The argument for the plaintiff has failed to convince me that the order is wrong; and it certainly is in accordance with the usual practice at Chambers. It now [725] appears that the reason why the order was questioned was, that some doubt existed as to the solvency of the other party who was made a defendant in the interpleader issue. That may afford ground for an application at Chambers for security, but it is no reason for questioning an order which is in conformity with the usual practice.

Reliance has been placed upon the proceedings of Courts of equity in giving relief upon bill of interpleader. No doubt, when Courts of law were first empowered to grant a summary remedy by interpleader order, they naturally turned to Courts of equity to ascertain the general principles upon which those Courts acted in the case of interpleader; and Mr. Lloyd is right in saying that those principles have been the guides of Courts of law. But the reference to Courts of equity was a reference for principles, not for practice, or minute and technical rules for working out the justice

of a case. The powers of a Court of law are only restricted by the acts of parliament which have conferred them: and it is now too late to contend that they have no power to do that which they have, for so long a period, been in the habit of doing. I therefore think that the rule ought to be discharged with costs.

Rule discharged with costs.

[726] DEWHURST v. KERSHAW. Jan. 30, 1863.—A deed of assignment by a debtor of his estate and effects for the benefit of such creditors as shall execute it within a certain specified time, is not valid within the 192nd section of the Bankruptcy Act, 1861, and the certificate of registration of such a deed is no protection to the debtor under the 198th section.

[S. C. 32 L. J. Ex. 146; 11 W. R. 315; 7 L. T. 720. Overruled, *Lloyd v. Harrison*, 1866, L. R. 1 Q. B. 502. Considered, *Ames v. Colnaghi*, 1868, L. R. 3 C. P. 363.]

This was an action against the defendant under "The Summary Procedure on Bills of Exchange Act, 1855." The action was commenced on the 10th of October, 1862, and on the 14th the defendant assigned all his estate and effects for the benefit of his creditors.

The indenture was between "John Kershaw (the defendant) of the first part, Elizabeth Ramsay and David Roberts, trustees for themselves and the rest of the creditors of the said John Kershaw, parties thereto, of the second part, and the several other persons whose names and seals are hereunto subscribed and set, being respectively creditors of the said John Kershaw, of the third part:" After reciting that "the said John Kershaw is justly indebted unto the said parties hereto of the second and third parts in the several sums set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full, he has therefore proposed and hath agreed to assign all his estate and effects unto the said trustees for the benefit of his creditors as hereinafter mentioned:" It was witnessed, that in pursuance of the said agreement and in consideration of the premises and of 5s. &c., "the said J. Kershaw doth by these presents bargain, sell, assign, transfer, and set over unto the said trustees, their executors &c., all and singular the household furniture, &c., books of account, debts, sum and sums of money, and all securities for money, &c., and all other the personal estate and effects whatsoever and where-soever of him the said J. Kershaw in possession, reversion, remainder or expectancy." Habendum: "The said stock in trade and all other the estate, effects and premises hereby assigned, or intended so to be, unto the said trustees, their executors, [727] &c., absolutely, upon trust nevertheless to collect and receive, or sell and dispose of the said hereby assigned premises, and every part thereof, either by public sale or private contract, &c.: And upon trust out of the monies to be received by virtue of these presents, to pay all costs and expenses of proposing, preparing, engrossing and executing these presents, and attending or relating to the said hereby assigned premises or the trusts hereby created; and in the next place to pay, retain and satisfy, rateably and proportionably and without any preference or priority to themselves, the said trustees and their partners, and the other persons parties hereto of the third part, who shall execute these presents within twenty-one days from the date hereof, the several debts or sums set opposite to their respective names in the said schedule hereto, and to pay the residue, if any, of the said monies unto the said J. Kershaw, his executors, &c.: Provided, nevertheless, that such creditors of the said J. Kershaw as shall not execute, or assent in writing to take the benefit of these presents on or before the 14th day of January next, or within such further time, not exceeding thirty days, as the said trustees shall by writing under their respective hands and seals declare, shall be excluded from all benefit under these presents."

The indenture was executed by a majority of three-fourths in value of the creditors whose debts amounted to 10l. and upwards, and was duly filed and registered in the Court of Bankruptcy, under the 193rd and 194th sections of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), and a certificate of the filing and registration was delivered to the defendant.

On the 20th of January the defendant was arrested by the sheriff of Monmouthshire under a writ of ca. sa. issued on a judgment signed in this action on the 27th of October.

Gray now moved to discharge the defendant out of [728] custody. The question is, whether the deed is valid under the 192nd section of "The Bankruptcy Act, 1861." It is objected that it is invalid because it provides that such creditors as shall not execute it before the time named shall be excluded from all benefit under it. [Wilde, B. The 198th section says, that a certificate of the filing and registration of the deed "shall be available to the debtor for all purposes as a protection in bankruptcy." Channell, B. The words are "such deed," that is, a deed valid under the 192nd section.] In *Harris v. Petit* (31 L. J. Chan. 552) a similar objection was raised to a deed of assignment under the 68th section of the Bankrupt Law Consolidation Act, 1849, and Stuart, V. C., held that the argument, that the assignment was not for the benefit of all the creditors because some of them might not choose to avail themselves of it, was not maintainable. [Martin, B. In *Ex parte Godden* (32 L. J. Bank. 37) the Lords Justices decided that a deed of assignment of a debtor's estate was not valid under the 192nd section of the Bankruptcy Act, 1861, unless it was for the benefit of all the creditors.] Before that Act passed, under an ordinary bankruptcy all the creditors did not necessarily participate, for they were not entitled to any dividend unless they chose to prove their debts. If a creditor refuses to execute a deed of assignment, he ought to be in the same position as a creditor who refused to prove his debt.

Per Curiam.(c) The case of *Ex parte Godden* is conclusive against this deed, and there ought to be no rule.

Thrupp appeared to shew cause in the first instance.

Rule refused.(d)

[729] MOUNSEY v. ISMAY. Jan. 20, 1863.—A custom for the freemen and citizens of a town, on a particular day in the year, to enter upon a close, for the purpose of holding horse racing thereon, is a good custom, and, in pleading it, it is not necessary to aver that the particular day was a seasonable time.

[S. C. 32 L. J. Ex. 94 ; 9 Jur. (N. S.) 306 ; 11 W. R. 270 ; 7 L. T. 717. Distinguished, *Sowerby v. Coleman*, 1867, L. R. 2 Ex. 99. See further, 3 H. & C. 486.]

Declaration. That the defendant broke and entered a certain close of the plaintiff, abutting, &c., and broke down, prostrated and destroyed the fences of the plaintiff of and belonging to the said close of the plaintiff, and divers posts and rails then standing and being in and upon the said close of the plaintiff, and affixed thereto, and also prostrated, levelled and destroyed a bank then erected and being parcel of the said close, and pulled up and destroyed the thorns there and thereon then growing: Whereby the plaintiff has sustained damage, &c.

First plea. That from time whereof the memory of man runneth not to the contrary, on a certain day in each and every year (to wit, on Ascension Day, commonly called Holy Thursday), horse races have been and of right ought to have been, and still ought to be, holden on a certain piece of land in the extra-parochial hamlet of Kingsmoor in the said county, being in the neighbourhood of the city of Carlisle ; and from time whereof the memory of man runneth not to the contrary, there hath been and still of right ought to have been, and still of right ought to be, an ancient and laudable and reasonable custom, used and approved of in the said hamlet and in the said city of Carlisle, that is to say, that the freemen of the said city of Carlisle, on the day aforesaid in each and every year, have during all the time aforesaid been used and accustomed to enter and of right ought to have entered, and still of right ought to enter, into and upon the said piece of land in the said hamlet, for the purpose of holding horse races thereon. And the defendant says, that the close in which, &c., at the [730] time when, &c., was parcel of the said piece of land in the said hamlet ; wherefore the defendant, being one of the freemen of the said city of Carlisle, broke and entered the said piece of land and the said close in the declaration mentioned, on Ascension Day 1862, for the purpose of holding the said horse races ; and because the plaintiff a short time before the time when, &c., had wrongfully placed and erected fences, posts and rails, and a bank and thorns upon and over the said land and the

(c) Pollock, C. B., Martin, B., Channell, B., and Wilde, B.

(d) See *Ex parte Morgan*, 32 L. J. Bank. 15.

part of the said land where the said horse races were accustomed to be held as aforesaid, and continued to keep the same placed and erected until the time, when, &c., insomuch that the said freemen were prevented from holding and were unable to hold the said horse races as they were accustomed and of right entitled to do, wherefore the defendant, being one of the freemen of the said city of Carlisle, for the purpose of enabling the said horse races to be held as aforesaid, did on the said day remove the said fences, posts and rails, and the said bank and thorns, doing no more damage thereto than was necessary for the purposes aforesaid, which are the trespasses alleged in the declaration.

Second plea. The defendant repeats all the allegations in the first plea, except so much of the said plea as alleges that the said custom therein mentioned was a custom for the freemen of the city of Carlisle. And the defendant says, that the said custom was a custom for all the citizens of Carlisle instead of the freemen of Carlisle, and that the defendant, being one of the said citizens, committed the acts in the declaration and first plea mentioned.

Third plea. That from time whereof the memory of man runneth not to the contrary, on a certain day in each and every year (to wit, on Ascension Day, commonly called Holy Thursday), horse races have been and of right ought to have been, and still ought to be, holden on certain land [731] in the extra-parochial hamlet of Kingsmoor in the said county, being in the neighbourhood of the city of Carlisle; and from time whereof the memory of man runneth not to the contrary, there hath been and still of right ought to have been, and still of right ought to be, an ancient and laudable and reasonable custom, used and approved of in the said hamlet and in the said city of Carlisle, that is to say, that the freemen of the said city of Carlisle have been used and accustomed to enter and of right ought to have entered, and still of right ought to enter, into and upon the said land in the said hamlet on the day aforesaid in each and every year during all the time aforesaid, for the purpose of holding horse races thereon, and to enter into and upon the said land in the said hamlet at a reasonable time before the holding of the said horse races in each year and every year during all the time aforesaid, for the purpose of preparing and making ready the said land for the more conveniently holding the said horse races on such day as aforesaid. And the defendant says, that the close in which, &c., at the time when, &c., was parcel of the said land in the said hamlet; wherefore the defendant, being one of the freemen of the said city of Carlisle, broke and entered the said land for the purposes aforesaid, at a reasonable time before the said horse races held on Ascension Day, 1862: and because the plaintiff a short time before the time when, &c., had wrongfully placed and erected fences, posts and rails, and a bank and thorns upon and over the said land and the part of the said land where the said horse races were accustomed to be held as aforesaid, and continued to keep the same placed and erected until the time when, &c., insomuch that the said freemen would have been prevented from holding, and would have been unable to hold the said horse races on the said day as they were accustomed and of right entitled to do, wherefore the de[732]-fendant, being one of the freemen of the said city of Carlisle, for the purpose of enabling the said horse races to be more conveniently held, did then remove the said fences, posts and rails, and the said bank and thorns, doing no more damage thereto than was necessary for the purposes aforesaid, which are the trespasses alleged in the declaration.

Fourth plea. The defendant repeats all the allegations in the third plea, except so much of the said plea as alleges that the said custom therein mentioned was a custom for the freemen of the city of Carlisle. And the defendant says, that the said custom was a custom for all the citizens of Carlisle instead of the freemen of Carlisle, and that the defendant, being one of the said citizens, committed the acts in the declaration and third plea mentioned.

Demurrer to pleas, and joinder therein.

Temple (Crompton Hutton with him), in support of the demurrers. The custom is unreasonable and bad in law. First, it is not claimed for a seasonable time of the year, but for a day uncertain, viz., Ascension Day, which may fall on any day between the 1st of May and the 4th of June, at which time crops must be growing. In *Bell v. Wardell* (Willes, 202) a custom for all the inhabitants of a town to walk and ride over a close of arable land at all seasonable times of the year, was held bad, because it appeared that the trespasses were committed when the corn was growing. [Martin, B. In *Abbot v. Weekley* (1 Lev. 176) a custom for all the inhabitants of a

town to dance at all times of the year for their recreation in the plaintiff's close was held good.] That case was commented on by Willes, J., in *Bell v. Wardell* (Willes, 202), who observed that "it was after a verdict which found the custom," and that "the Court said, that perhaps it might not be good upon a demurrer." Mr. Durnford, however, in a note to [733] *Bell v. Wardle*, observes, "that this part of the opinion of the Court was given, not in answer to the principal objection, which was that the prescription was bad, but in answer to the second objection that the right or easement should have been claimed by way of custom, not prescription; though indeed it appears extraordinary that the verdict should have removed either of the objections." In a note to *Bell v. Wardell*, a case of *Millechamp v. Johnson* is cited from Willes, C. J., MSS., where a plea of a custom for the inhabitants of a certain town to play at rural sports in the plaintiff's close at all times of the year was held, after verdict, to mean "legal and seasonable times of the year." [Martin, B. It must be assumed that the custom has existed since the time of Richard the First; and why may it not have been reasonable in the then state of the land? Channell, B. In *Cocksedge v. Fanshaw* (1 Doug. 118, 132) Lord Mansfield said that "the rule of law is, that whenever there is an immemorial usage, the Court must presume everything possible which could give it a legal origin." Wilde, B. In *Bell v. Wardell* the declaration was not for treading down the corn on a particular day, but on divers times between the 2nd of May and the 12th. The plea alleged a custom to walk and ride over the plaintiff's close "at all seasonable times," and that in walking and riding the plaintiff necessarily trod down the grass and corn there growing, so that it appeared by the plea that the times were not seasonable, although alleged to be so.] Here the plea ought to have averred that the time was a "seasonable time." [Channell, B. The custom is claimed for a particular day; where it is not for a day certain, it may possibly be necessary to aver that the time was "seasonable."] The Court will judicially notice the time on which Ascension Day falls, and that it is not a "seasonable time." In *Fitch v. Rawling* (2 H. Black. 393) the cus-[734]-tom was for the inhabitants of a parish to play at all lawful games in the plaintiff's close "at all seasonable times of the year;" and which, as the Court said in *Millechamp v. Johnson*, would not take away all the profits of the land, and might therefore have had a legal origin. Secondly, the custom is bad because it is claimed for the freemen and citizens of Carlisle, not inhabitants only. Such a custom, to be good, must be confined to residents in the city: *Gateward's case* (6 Rep. 59), *Chafin v. Betsworth* (3 Lev. 190).

Mellish (Maule with him) appeared for the plaintiff, but the Court said that they would consider whether it would be necessary to hear him.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B. In this case, in which Mr. Temple argued in support of the demurrer, we intimated to Mr. Mellish, who appeared in support of the plea, that probably it would not be necessary to hear him, and we are of that opinion.

It was an action of trespass for breaking and entering a close of the plaintiff, and the pleas in substance alleged a custom for the freemen and citizens of Carlisle on Ascension Day to enter upon a piece of land, of which the plaintiff's close was parcel, for the purpose of horse-racing. The question is whether that custom is good; and we are of opinion that it is, and that the defendant is entitled to judgment.

The custom here alleged is a custom confined to a particular day.

It has been argued that the allegation of such a custom is bad on demurrer, unless it is alleged that the particular [735] day is a "seasonable day." The case of *Millechamp v. Johnson* (in notes to *Bell v. Wardell*) was cited, in which it was held that a custom alleged to enjoy rural sports, &c., at "all times," must be intended, after verdict, to have been proved to be at all "legal and reasonable" times, thereby implying (it was argued) that the restriction of the words "legal and reasonable" was necessary to make the custom good.

The other two cases cited, *Bell v. Wardell* (Willes, 202) and *Fitch v. Rawling* (2 H. Black. 393) were cases in which the custom was alleged as for "all seasonable times," and do not therefore decide anything as to the necessity of such an allegation.

But the case of *Abbot v. Weekley* (1 Lev. 176) was also cited, in which the allegation of a custom to dance &c. on the plaintiff's land was alleged "at all times" without any qualification, and this was distinctly held to be good, although not restricted to "seasonable times." There is, therefore, no authority cited for the proposition, that

in the case of a custom like the present, if alleged for a certain day, it is necessary to allege further that the day was a "seasonable one." Our opinion is, therefore, that the pleas are good and that the defendant is entitled to judgment.

MARTIN, B. The only observation I have to make is, that the case of *Bell v. Wardell* has been evidently misunderstood. In Blackstone's Commentaries, vol. 2, p. 263, the case of *Abbot v. Weekley* is cited as good law; and it is expressly stated that such a custom is lawful. Therefore, assuming that *Bell v. Wardell* is at variance with *Abbot v. Weekley*, the latter case, being followed by *Fitch v. Rawling*, is an authority that such a custom is good. A great deal might be said to shew that the judgment in *Bell v. Wardell* was given under an erroneous impression. A custom to be good [736] must have existed from the time of legal memory, that is, the reign of Richard the First, and whether the land which is subject to the custom was then pasture or arable, it is now impossible to ascertain; and I think the circumstance of the land being pasture or arable at the time when the alleged trespass was committed is immaterial in considering whether the custom is good.

Judgment for the defendant.

GIBBINS v. BUCKLAND. Jan. 31, 1863.—A claimant in ejectment is entitled to a writ of possession, notwithstanding the lease under which he claims though, in force at the time the action was commenced, has expired before the time of trial, unless the defendant shews affirmatively that the claimant has no title whatever.

[S. C. 32 L. J. Ex. 156; 9 Jur. (N. S.) 207; 11 W. R. 380; 8 L. T. 87. Followed, *Knight v. Clarke*, 1885, 15 Q. B. D. 296.]

This was a rule calling on the plaintiff to shew cause why he should not be precluded from issuing or enforcing any writ of possession in this case.

The affidavits, in support of the application, stated that the plaintiff sought to recover possession of certain premises, comprised in and demised by an indenture of lease, dated the 26th of September, 1849, granted by Edward Thornton and William Griffith, executors of Edward Norton Thornton, to John Harris for the term of thirteen years from the 29th of September then next ensuing, less the last ten days thereof, which had been assigned to the defendant: that the plaintiff at the trial put in an indenture of lease, dated the 24th day of June, 1843, granted by Thomas Puckle to the said Edward Norton Thornton, of the said premises for the term of nineteen years and one quarter of another year from the 24th day of June, 1843, videlicet, to the 29th of September, 1862; and the plaintiff put in and proved an indenture of assignment, dated on or about the 18th of September, 1862, of the said last mentioned lease from the said William Griffith, as the surviving executor of the said Edward Norton Thornton, to the plaintiff.

The Lord Chief Baron, before whom the cause was tried, [737] directed a verdict for the plaintiff, reserving to the defendant leave to move to enter the verdict for him.

The writ in the action issued on the 24th of September, 1862, and the cause was tried on the 10th of December.

In the present term (Jan. 13) a motion was made to enter the verdict for the defendant pursuant to the leave reserved, (a) and refused. The defendant then took out a summons at Chambers, calling on the plaintiff to shew cause why the *postea* should not be entered up on the record according to the provisions of the 181st section of the Common Law Procedure Act, 1852. The Lord Chief Baron, before whom the summons was heard, declined to make any order; whereupon the present rule was obtained, against which

Joyce shewed cause. The plaintiff is entitled to issue a writ of possession. At the time he commenced the action he had a right to the possession of the premises, for the lease of the 24th of June, 1843, which was assigned to him, was then in force, but the lease of the 26th of September, 1849, which was assigned to the defendant,

(a) The grounds of the motion were, first, that as the term granted by the lease of the 26th September, 1849, was "for thirteen years, wanting ten days, to be computed from 29th of September then next ensuing," the lease did not expire until the 19th September, 1863. Secondly, that the solicitor for the freeholder had declined to produce at the trial an agreement for a new lease to the defendant.

had expired on the 19th of September, 1862. The defendant was bound to shew affirmatively that the plaintiff had no title whatever. It may be that he had an agreement for the renewal of his lease, or that he was tenant at will.

The Court then called on

Karslake, to support the rule. The plaintiff is not entitled to issue a writ of possession, for his lease expired before the [738] time of trial. That is provided for by the 181st section of the Common Law Procedure Act, 1852, which enacts that "In case the title of the claimant shall appear to have existed as alleged in the writ and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall, notwithstanding, be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit." [Martin, B. That section does not say that a writ of possession shall not issue.] It does, by implication, for judgment is to be entered for the costs only. Where the claimant's title has not expired, the form of the *postea* prescribed by Schedule (A.), No. 17, is that he "was, and still is, entitled to the possession of the land." [Pollock, C. B. Though the plaintiff's lease has expired, his title does not expire unless his landlord demands possession.] If the plaintiff had claimed in his writ to be entitled on the day after his lease expired, the verdict must have been found against him. Though a tenant cannot dispute his landlord's title, he may shew that it has expired. In an action for use and occupation it would seem that it is a defence that the plaintiff's title expired after the demise and before the period for which he claims, if there has been no eviction or surrender of possession by the defendant: *Mountnoy v. Collier* (1 E. & B. 630). If the plaintiff is entitled to recover, he might maintain an action against the defendant for mesne profits, and the defendant would also be subject to another action at the suit of the plaintiff's landlord. [Martin, B. The defendant should have given up possession on the day his lease expired.]

POLLOCK, C. B. I am of opinion that the rule ought to be discharged. The claimant's lease was in force at the time he commenced the action, and though it had expired [739] at the time of trial, that did not put an end to his title, which is good against everyone but his lessor. No doubt, if the lessor had demanded possession, he would have been entitled to it; but that he has not done: and therefore the claimant has a right to recover the possession from his tenant whose lease is at an end. The rule was granted upon the supposition that the affidavits would shew affirmatively that the claimant's title was at an end; but they do not. Nothing has been adduced to shew that the claimant is not entitled to possession; and it is clear that the defendant has no excuse for not having delivered up possession when his lease expired. The reversioner has not determined the claimant's interest by demanding possession from him, and whatever advantage possession might afford with reference to a renewal of his lease he is entitled to, and that right he is deprived of by the defendant's refusal to quit.

MARTIN, B. I am of the same opinion, and indeed I think that the rule ought never to have been granted. I am satisfied that, if we were to adopt the view of the defendant's counsel, great injustice might be done. The claimant was assignee of a lease of certain premises, of which a sublease had been granted to the defendant, in which the precaution was taken of making the term in the sublease ten days less than in the lease assigned to the plaintiff. The defendant ought, therefore, to have given up possession at the expiration of his lease, and whilst the claimant's lease was in force; but he did not do so, and he now attempts to keep the claimant out of possession, it not having been possible to terminate the action within the ten days. If he could have succeeded, the consequence would have been that he would have deprived the claimant of a right which was bargained for at the time the sublease was granted to the defendant. But, in my opinion, the defend-[740]-ant ought not, either in law or justice, to succeed. The law of estoppel, as between landlord and tenant, is, I think, applicable to this case; and we ought, so far as it lies in our power, to see that persons specifically perform these contracts.

With respect to the statute, the 181st section says that, in case the title of the claimant shall appear to have existed as alleged in the writ, but shall also appear to have expired before the time of trial, the claimant shall nevertheless be entitled to a verdict according to the fact, and to a judgment for his costs. It does not say that he shall not recover possession; and I think we are bound, so far as we can, to put

the claimant in the position in which he would have been if the defendant had done what he ought, viz. given up possession when his lease expired.

CHANNELL, B. I am also of opinion that the rule ought to be discharged. Where it appears at the trial that the claimant had the title alleged in the writ, it seems to me that it is not enough for the defendant to shew that such title has expired, for the claimant may have acquired a new title. Suppose, for instance, a new lease has been granted, could it be said that the claimant has no title? I think, therefore, that the defendant ought to shew affirmatively that the claimant is altogether without title, and that it is not enough to shew that the title alleged in the writ has expired without negating the existence of a new title. Moreover, a lessee who retains possession after the expiration of his lease, is, until the acceptance of rent, tenant at will to the lessor, subject to the terms of the lease, so far as they are applicable. Therefore, in this case, the claimant has a good title against everybody except his lessor.

My brother Wilde, who has left the Court, desired me to say that he fully concurs with the rest of the Court.

Rule discharged.

[741] RIDLEY AND OTHERS v. SUTTON. Jan. 23, 1863.—The costs of examination upon interrogatories under the 1 Wm. 4, c. 22, of a witness about to go abroad, will not be allowed as costs in the cause where the depositions are rendered useless by the subsequent attendance of the witness at the trial.

[S. C. 32 L. J. Ex. 122; 9 Jur. (N. S.) 358; 11 W. R. 314; 7 L. T. 693.

Disapproved, *Bartlett v. Higgins*, [1901] 2 K. B. 230.]

This was a rule calling on the defendant to shew cause why the Master should not review his taxation of the plaintiff's costs in the cause, as to the costs incurred in taking the examination of Henry Chapman, a witness on behalf of the plaintiff.

The action was brought to recover from the defendant, an underwriter, the amount of certain policies of marine insurance effected on a cargo of merchandise shipped on board a vessel which had been abandoned at sea on a voyage from Newfoundland. After issue joined, it was ascertained that Henry Chapman, one of the seamen on board the vessel at the time of her abandonment, was about to leave England on a voyage to Australia, and he was examined upon interrogatories on behalf of the plaintiff, under the 1 Wm. 4, c. 22, s. 4. A few days afterwards Henry Chapman sailed for Australia. In consequence of the difficulty in obtaining other evidence the cause did not come on for trial until the Liverpool Summer Assizes, 1862, when Chapman had returned to Liverpool, and was examined at the trial as a witness for the plaintiffs. The affidavit of the plaintiff's attorney stated that, notwithstanding the attendance of Henry Chapman at the trial, his evidence before the Commissioner was put in by the defendant, and read by his counsel. This fact, however, was denied by the defendant's attorney.

The plaintiff having obtained a verdict, on taxation before the Master the defendant's attorney objected to the allowance of 6l. 6s., being the costs incurred in taking the examination on interrogatories of Henry Chapman, on the [742] ground that he was examined as a witness at the trial; and the Master disallowed the costs.

T. Jones shewed cause. The Master was right in disallowing the costs. *Curling v. Robertson* (7 Man. & G. 525) decided that the successful party is not entitled to the costs of examining a witness upon interrogatories when such examination is not used at the trial. In that case the witness was not examined at the trial, but in this case he was, and therefore there is stronger reason for disallowing the costs. The Court will not interfere with the Master's discretion: *Cornet v. Dempsey* (1 Dow. N. S. 422). [Martin, B. The Masters of all the Courts say that the decision is right.]

Milward, in support of the rule. By the 19th section of the 1 Wm. 4, c. 22, the costs of the examination of a witness by virtue of that Act are costs in the cause, unless otherwise directed by the Judge who made the order, or the Judge before whom the cause was tried. It was no fault of the plaintiff which rendered the depositions unavailable, but the unexpected return of the witness to this country, so that, by the 10th section of the 1 Wm. 4, c. 22, the plaintiff was precluded from giving them in evidence. In *Bridges v. Fisher* (1 Bing. N. C. 510) the costs were disallowed

because the successful party obtained a peculiar benefit, by examining the witness under a commission instead of producing him before a jury. Here it was for the advantage of the defendant that there was an examination upon interrogatories, otherwise he would have had to pay a large sum of money for the subsistence of the witness while he remained in this country: *Howes v. Barber* (18 Q. B. 588), *Evans v. Watson* (3 C. B. 327), *Dowdell v. [743] The Australian Royal Mail Steam Navigation Company* (3 E. & B. 902). Moreover, the plaintiff's affidavit stated that the depositions were put in and read by the defendant's counsel.

POLLOCK, C. B. We are all of opinion that the rule ought to be discharged, and upon this ground, that where a witness is examined upon interrogatories for the security of the party who wishes the benefit of his testimony, and the witness appears at the trial, so that the examination is rendered useless, the party who has examined him cannot claim the expense of the examination. In discussing a question of costs, the Court only lays down some general rule for the directions of the Master, and leaves the details for the exercise of his discretion when the costs are taxed. No doubt, where an error has been committed the Court will rectify it, but, generally speaking, all they have to do is to lay down a general rule; and we think that where a witness who has been examined upon interrogatories appears and is examined as a witness at the trial, the costs which have been incurred for the safety and security of the party requiring his testimony ought not to be paid by the other party. It would be very proper, if it were possible, that a person should go to law and enforce a just claim or defend himself against an unjust one without incurring any expense, but everyone who has any experience in these matters must know that there are many things which a prudent man would do for his own protection in his endeavour to enforce a just claim, for which it would be unjust to make the other party pay. Counsel continually recommend a particular course to be taken for safety, the cost of which ought not to fall upon the other party.

With respect to the act of parliament, 1 Wm. 4, c. 23, the 9th section provides that the costs of every rule or order [744] for the examination of witnesses shall be costs in the cause, "unless otherwise directed either by the Judge making such rule or order, or by the Judge before whom the cause may be tried, or by the Court." It seems to me that can only apply to a case where the examination becomes part of the evidence at the trial, for otherwise how can the Judge who tries the cause know anything about it? The Judge who is applied to for the order may very well say, "I will make it, but in my opinion it is unnecessary, and the costs shall not be costs in the cause." So if the examination is read at the trial, for the purpose of proving a fact, which, though material, might have been proved at far less expense, the Judge may direct that the costs of it shall not be allowed. But where the party who has examined the witness does not use his testimony at the trial, I think that the enactment which makes the costs of the examination costs in the cause, unless otherwise directed by the Judge who tried it, does not apply; and it seems to me that a reference to it by the opposite party is not such a user as to make it costs in the cause.

MARTIN, B. I am of the same opinion. In a matter of this kind I should feel reluctant to doubt the correctness of the decision of all the Masters of all the Courts, who state that this is the rule upon which they act; but on full consideration I think that it is perfectly right. The party who succeeds is entitled to all costs which are properly and necessarily incurred in prosecuting or defending the suit. But if a party thinks it advisable for his own security to have a witness examined upon interrogatories, and the witness is afterwards present and may be examined at the trial, so that the depositions become useless, it seems to me most unreasonable that the opposite party should be obliged to pay the costs of them. At the time the rule was granted [745] my brother Bramwell expressed some doubt, and in consequence I have given the matter much consideration, and I am satisfied the Master is right.

CHANNELL, B. By the 9th section of the 1 Wm. 4, c. 22, the costs of the examination upon interrogatories are costs in the cause, unless the Judge who made the order or the Judge who tried the cause shall otherwise direct. Here there was no direction by the Judge who made the order, nor could there be any by the Judge who tried the cause, for the reasons stated by the Lord Chief Baron. Before the 1 Wm. 4, c. 22, there was no means of getting these costs although the examination was given in evidence at the trial; and I think the Act intended to remedy that

mischief, and to provide that the costs should be costs in the cause, where the examination was used as evidence.

WILDE, B. I am of the same opinion.

Rule discharged.(a)

ALLWOOD v. HEYWOOD. Jan. 19, 1863.—A legal tenant for life has a right to recover from a contingent remainderman the possession of the title deeds.

[S. C. 32 L. J. Ex. 153; 9 Jur. (N. S.) 108; 11 W. R. 291; 7 L. T. 640.
Adopted, *Leathes v. Leathes*, 1877, 5 Ch. D. 223.]

Detinue for title deeds of the plaintiff.

Plea. That the several deeds in the declaration mentioned are the title deeds of and relating to certain land and messuages, with the appurtenances, at Astley in the county of Lancaster, which said land and messuages were, in his lifetime, the property of one John Allwood, deceased, who by his last will devised them to the plaintiff for the term of the natural life of the plaintiff, with remainder to the testator's [746] child or children him surviving, in fee: that John Allwood, on, to wit, the 3rd of August, 1857, died, without having revoked the said devise in his said will contained, and leaving (among other children) one child him surviving, to wit, one Alfred Allwood: that by virtue of the premises, Alfred Allwood then took and had a property and a right and title in and to the several deeds, and to the possession of the same respectively, and then and before the detention in the declaration mentioned, and before the commencement of this suit, to wit, on the day and year aforesaid, he, the said Alfred Allwood, obtained and had possession of the said several deeds in the declaration mentioned: that Alfred Allwood, by indenture bearing date the 17th of February, 1858, and made between him of the one part and the defendant of the other part, and for the consideration in the said indenture mentioned, granted and conveyed unto and to the use of the defendant, his heirs and assigns, for ever, all the estate and interest of him the said Alfred Allwood of and in the lands and messuages, with the appurtenances, aforesaid: that under and by virtue of the said last mentioned indenture and the premises aforesaid, the defendant then took and had property and a right and title in and to the said several deeds in the declaration mentioned, and to the possession of the same respectively: that thereupon Alfred Allwood (so being theretofore possessed of the said several deeds in the declaration mentioned as aforesaid), at the request of the defendant, then and before the detention in the declaration mentioned, and before the commencement of this suit, delivered the said several deeds in the declaration mentioned to the defendant, who then thereby obtained and hitherto hath the possession of the same respectively, as he lawfully might and may for the cause aforesaid, which is the detention in the declaration alleged: that the estate and interest of the defendant of and in the said lands and [747] messuages, with the appurtenances, is still subsisting in him, the defendant, and that the plaintiff's property in and right and title to the said several deeds in the declaration mentioned, was and is derived and acquired from and by reason of the said devise to him of the said life interest in the said lands and messuages, with the appurtenances, and not further or otherwise howsoever.

Demurrer, and joinder therein.

Replication. That the plaintiff was and is the eldest son and heir-at-law of the said testator, John Allwood, and that the said devise by the said John Allwood in the said plea mentioned is as follows:—"And I" (meaning the said testator) "give and devise my messuage or dwelling-house, with the rights, members, and appurtenances thereto belonging, situate at Astley in the parish of Leigh, in the county aforesaid, together with the land" (meaning the said land and messuages in the said plea mentioned), "stock and farming utensils thereto belonging, unto my son John" (meaning the plaintiff) "for the term of his natural life without impeachment of waste, and upon the determination thereof to my child or children him" (meaning the plaintiff) "surviving as joint tenants: Providing always, that if there should be only one child surviving my said son John or his survivors, then to such survivor and his or her heirs for ever." That under and by virtue of the said devise the plaintiff

(a) See *The Duke of Beaufort v. Lord Ashburnham*, 13 C. B. N. S. 598.

became and now is the tenant for life in possession of the said messuage and land, and interested as therein mentioned.

Demurrer and joinder therein.

Milward (Crompton Hutton with him), for the defendant. It is conceded that the defendant has only a contingent remainder, which may be defeated by the death of Alfred Allwood in the plaintiff's lifetime; but having an interest [748] in the property he is entitled to retain possession of the deeds. No doubt if a stranger had the deeds, the person in possession of the estate might compel their delivery to him; but there is no instance of an action by a tenant for life against the remainderman to recover the deeds from him. Although at the time of the conveyance to the defendant he had no right to the possession of the deeds, yet, as they have come into his possession, they cannot be recovered from him: *Yea v. Field* (2 T. R. 708). The plaintiff sustains no damage by not having the deeds for he is in possession of the estate; and they are necessary for the defendant's title: *Lord Buckhurst's case* (1 Rep. 1). In *Foster v. Crabb* (12 C. B. 136) it was laid down that he who has occasion to use a deed is legally entitled to the custody of it; and where several are equally interested in it, either having possession may retain it against the others. In Viner's Abridg. tit. "Faits" (Z.), pl. 15, it is said: "If land be given to A. for life, remainder over to several by deed, any one of those who first gets the deed shall retain it." [Martin, B. That proposition is at variance with the authorities referred to in Mr. Thomas's note to *Lord Buckhurst's case*.]

Mellish (Baylis with him), for the plaintiff. As against the plaintiff the defendant has no right to the deeds, for he has merely a contingent remainder in the estate. According to the argument for the defendant, where an estate is conveyed in strict settlement, anyone having an interest in it, however remote, if he happens to get possession of the title deeds, is entitled to retain them. But that is not law. The person for the time being seised of an estate of freehold in possession is entitled to the deeds. The proposition cited from Viner's Abridg. tit. "Faits" (Z.), pl. 15, cannot be sup-[749]ported. In Sugden's Vend. and Purch. ch. 11, s. 5, note (1), it is said, that "as regards persons claiming several interests in the same estate, the tenant for life is entitled to the custody of the deeds." A purchaser from a contingent remainderman is not even entitled to an inspection of the title deeds in the possession of the tenant for life: *Noel v. Ward* (1 Mad. 322). *Garner v. Hannington* (22 Beav. 627) is also an authority that the legal tenant for life is entitled to the custody of the title deeds. (He was then stopped by the Court.)

Milward, in reply. In *Foster v. Crabb* (12 C. B. 136) the doctrine laid down in Viner's Abridg. tit. "Faits" (Z.), pl. 15, is cited in a considered judgment of the Court of Common Pleas, and recognised as law. It is also there said that although the case of *Yea v. Field* (2 T. R. 708) has been questioned in the Courts, it was properly decided.

POLLOCK, C. B. There must be judgment for the plaintiff. It is but reasonable that, being the legal tenant for life, he should have the custody of the title deeds.

MARTIN, B. The law seems correctly stated in Mr. Thomas's note to *Lord Buckhurst's case*.

CHANNELL, B., and WILDE, B., concurred.

Judgment for the plaintiff.

[750] THE ATTORNEY GENERAL v. M'LEAN. Jan. 20, 1863.—The words "reside or be" in the Assessed Taxes Act, 43 Geo. 3, c. 161, ss. 25, 27, do not necessarily mean "dwell" or "sleep." Section 27 imposes the obligation upon one, who in person carries on business, to make a return in the parish in which his place of business is situate, whether he sleeps there or not, of articles liable to duty kept, but not returned, elsewhere.—One penalty only is incurred by the omission in any one year to return several lists, and to make the return in several places.

[S. C. 32 L. J. Ex. 101; 9 Jur. (N. S.) 338; 11 W. R. 292; 8 L. T. 113.]

Information by the Attorney General for penalties, under the 43 Geo. 3, c. 161, s. 37, (a) and the 16 & 17 Vict. c. 90, for not making a return in the parishes of

(a) The 16 & 17 Vict. c. 90 repeals the duties of assessed taxes which previously existed and imposes new duties; but the 3rd section of that Act preserves and

St. Bride and St. Marylebone, of a male servant, carriage, horse, and dogs, kept by the defendant at Chertsey.

The information stated that Charles M'Lean, at the time appointed by the statute in such case made for delivering the several lists in this and the three several counts next following mentioned, resided and was in the parish of St. Marylebone, in the county of Middlesex, and that the said Charles M'Lean was then liable to a certain duty of assessed taxes, payable by him to her Majesty, in and for the year ending the 5th of April, A.D. 1861, in respect whereof a list and declaration ought to have been delivered by him, according to the form and directions of the said statute, to the assessors of the said duty for the said parish of St. Marylebone, to wit, in respect of certain male servants employed by him at the parish of Chertsey, in the county of Surrey, during the year preceding, which ended on the 5th of April, A.D. 1860. Averment: that all times and things and conditions necessary for enabling the said Charles M'Lean to deliver such list and declaration had elapsed and taken place: Yet the said Charles M'Lean neglected to deliver, [751] and did not deliver, such a list or declaration to the said assessors according to the directions of the said statute, contrary to the form of the said statute, whereby the said Charles M'Lean had forfeited for his said offence the sum of 50l.

The 2nd, 3rd and 4th counts were similar to the first, but the taxable articles, of which it was alleged that no return had been made, were in the second count stated to be a carriage, in the third count a horse kept for the purpose of riding or drawing a carriage liable to duty, and in the fourth count three dogs. A second set of four counts followed, which differed only from the first in substituting the parish of St. Bride for the parish of St. Marylebone.

Plea. Not guilty.

The case was tried, before Wilde, B., at the sittings after Trinity Term, 1862, when the following facts appeared:—The articles liable to duty, specified in the information, were kept and used by the defendant during his residence at Chertsey, where, during a part of the tax year, ending on the 5th of April, 1860, he was residing with his family, but before that date had ceased to reside there. Since that date it did not appear where he had slept, or where his family had resided. During the six weeks succeeding the 5th of April, 1860, within which time the return is by the 43 Geo. 3, c. 161, s. 27, required to be made, as well as before and afterwards, the defendant carried on business as a carver and gilder in two places: one in Fleet Street in the parish of St. Bride, the other in Oxford Street in the parish of St. Marylebone. His ordinary practice was to attend daily at one or other of these places of business. He was assessed to these premises for the house duty. It was proved that the usual notices were affixed, as required by the 43 Geo. 3, c. 161, s. 25, on the church doors of the parishes of St. Marylebone and St. Bride, but no notice was left by the assessors [752] at either of the defendant's places of business. The defendant made no return anywhere of the articles which formed the subject of the information, and refused to pay the duties, but after the period for making the return had expired, he did make a return of certain other articles to the assessor for the parish of St. Bride. The jury, under the direction of the learned Judge, found a verdict for the Crown for the four penalties claimed; leave being reserved to move to enter the verdict for the defendant, or to reduce the amount of the verdict to 50l., in respect of one penalty.

Hayes, Serjt., in Michaelmas Term, obtained a rule nisi accordingly, on the ground, first, as to entering the verdict for the defendant, that the defendant, not residing either in the parish of St. Marylebone, or the parish of St. Bride, was not liable to the penalty for not sending in a list there; secondly, as to reducing the verdict, that, under the 37th section of the 43 Geo. 3, c. 161, the defendant was only liable to one penalty.

The Attorney General, Locke and Beavan shewed cause. First, the defendant is liable upon this information to one penalty, at the least, for not making the return in either of the parishes, where he in person carried on his business during the period specified by the 43 Geo. 3, c. 161, s. 27. The question of liability depends on whether the defendant "resided or was" in either of these parishes within the meaning of the

embodies the machinery of the Acts then in force for collecting and enforcing the taxes, so that the sections of the 43 Geo. 3, c. 161, which are here material, remain unreppealed.

25th and 27th sections of that enactment. By the 25th section, (a)¹ the general notices [753] affixed to the church door of the parish are notice to all persons "residing or being" within the parish of the time within which the returns are required to be made. By the 27th section, (a)² the obligation is imposed on every person, [754] who has kept taxable articles during any part of the preceding tax year, to deliver one or more lists of those articles to the assessor of the parish where he shall "reside or be" within six weeks after the 5th of April, 1804; and by the 28th section the provisions of the 27th section are made to apply in every subsequent tax year. In construing the language of the legislature no uniform meaning has been assigned to the word "residence." Its signification has varied with the context and the object in view: *Blackwell v. England* (8 E. & B. 541). The object here is to afford the opportunity of seeing the public notice. That object is better attained by affixing it on the church doors of the parishes where the defendant conducts his business, than where he sleeps. [Wilde, B. The only return which the defendant in fact made was made in one of these parishes. [Martin, B. That is strong evidence that he "resided or was" there.] Whatever ambiguity may attach to the word "reside," no reasonable meaning can be assigned to the word "be" which would not include the place where a person conducts his business. He cannot evade the return by concealing the place where he sleeps.

Secondly, a separate penalty was incurred for each list of which the return was omitted. The 27th section requires a distinct list to be delivered to the assessor for each of the several classes of articles which it subjects to taxation; and for the omission to deliver a list the 37th section (b) imposes [755] a 50l. penalty, over and

(a)¹ Section 25 enacts: "That the assessors for the time being shall . . . within twenty-one days after the commencement of the respective duties for each year, cause general notices to be affixed on the doors of the church or chapel, or market-house or cross (if any) of the city, town, parish, or place for which such assessor shall act; and if such place shall not have a church or chapel, or market-house or cross, then on the nearest church or chapel door of any adjoining parish, requiring all persons residing in the said city, town, parish, or place, who are by this Act required so to do, to make out and deliver to the respective assessors, within fourteen days after the date of such notice, such lists or declarations as are herein required; and such general notice shall from time to time, when the same shall be affixed, be deemed sufficient notice of the time within which such returns shall be required to be made in each year, to all persons residing or being in such city, town, parish, or place, and the affixing the same in the manner before directed shall be deemed good service of such notice to all persons within the limits of such city, town, parish, or place," &c.

(a)² Sect. 27 enacts: "That every person who shall have retained or employed male servant or servants, or other male person or persons herein described or mentioned, or kept any carriage, horse, mule, or dog . . . in the course of the year ending on the day next before the respective days appointed for the commencement of the said duties in the year 1804, shall before the end of six weeks thereafter, whether any previous notice for that purpose shall have been delivered or not, cause to be prepared true and particular lists in writing, signed by such person, on his or her behalf, which shall contain the parish or place, and the parishes or places where such persons shall then or usually reside, and one of such lists shall also contain the greatest number of male servants retained or employed by such persons. . . . Another of the said lists shall contain the greatest number of carriages, mentioned or described in the schedules annexed to this Act, kept by such person at any one time within the like period. . . . Another of the said lists shall contain the greatest number of horses, &c. kept, and used by such person for the purpose of riding, or drawing any carriage chargeable with the duty made payable by this Act, at any one time within the like period. . . . Another of such lists shall contain the greatest number of dogs kept by such person within the like period. . . . And every such person shall deliver or cause such lists to be delivered to the assessor or assessors of the said duties for the district, parish, or place, where such persons shall reside or be, or leave or cause the same to be left at his or their dwelling-house or houses or one of them, at or before the expiration of the time appointed by this Act for the delivery thereof," &c.

(b) Sect. 37 enacts: "That if any person liable to the said duties, or any of

above the duty chargeable. It is not of course contended that each list need be on a separate paper. [Channell, B. The 37th section contains several alternatives, for all of which there is but one penalty. Pollock, C. B. Can any instance be cited of cumulative penalties, where the legislature has not used language which in terms imposes a specific penalty for every such offence?] At all events two penalties were incurred. An obligation existed to make the return in each parish where the defendant carried on his business. [Wilde, B. The obligation is one and complete in itself, viz., to make the return in every such parish. The penalty incurred by the omission to do so is 50l.]

The second point was then abandoned by the Crown.

Hayes, Serjt., and H. Matthews, in support of the rule. The first point only need be discussed. The defendant admits his liability to be surcharged for non-payment of the duties, but he denies that he has incurred a penalty under the 27th section by not making a return at his place of business. The Crown has relied on the words "reside or be." First, as to the word "reside." The ordinary meaning of "reside" is "dwell" or "inhabit." By the 27th section of the Reform Act (2 Wm. 4, c. 45) the right of voting in a borough is given to every person who, as owner or tenant, shall occupy a house, warehouse, counting house, shop or other building of the value of 10l., subject to the proviso that no such person shall be registered, unless he shall have resided for a specified time within a certain distance of the borough. The distinction is thus drawn by the legislature between "the occupation of a shop" and "residence." In the 26th (a)¹ and 27th sections of the 43 Geo. 3, c. 161, the context [756] shews that the word "reside" is used as an equivalent expression for "dwell." It is said, however, that this word should be construed by the object in view, viz., that the person to be affected by the notice may see it. He is more likely to do so on a Sunday in the parish where he sleeps, than on a week day where he transacts his business. Secondly, as to the word "be." Either it has no definite meaning as distinguished from the word "reside," which construction is favoured by the circumstance that the notice, framed under the 25th section, requires only residents to make the return; or else it refers to a casual residence at an hotel or lodging, as distinguished from the ordinary residence. Again, it is not "every person," but "every such person" who is required by the 27th section to deliver lists to the assessors. These words must refer to the class of persons previously mentioned viz., "The occupiers of dwelling houses, or distinct apartments." But the Crown is not without a remedy. The Act provides machinery for obtaining the return, which is expressly adapted to the present case. Section 39 (a)² imposes [757]

them, in respect whereof a list or declaration ought to be delivered, or coming within any of the exemptions contained in this Act, shall neglect to deliver a list or lists, or a declaration or declarations, according to the directions of this Act in every parish or place where the same ought to be delivered, or shall omit any person, or any description, article, matter, or thing which ought to be contained therein according to this Act, or shall make an untrue return of any particular therein, he or she, so offending shall forfeit and pay the sum of 50l. over and above any duty chargeable as aforesaid."

(a)¹ Sect. 26 provides: "That besides such general notices as aforesaid, the said respective assessors shall within the respective periods before mentioned in every year, give or leave at every dwelling-house where any person liable, or supposed to be liable to the duties hereby made payable . . . shall usually reside within the limits of the places for which such assessors act, one notice to and for the occupier thereof; and where such dwelling-house shall be let in different apartments, and occupied distinctly by different persons or families, a like notice to and for the occupier of each distinct story or apartment, provided any person liable, or supposed to be liable as aforesaid, shall reside there; and also a like notice to and for every person so liable then residing in such dwelling-house as a lodger or inmate within the knowledge of such assessor or assessors, requiring such persons respectively to prepare and produce within twenty-one days next ensuing the date of such notice, a list or lists, or declaration or declarations, in writing in the forms and in the manner hereinafter required."

(a)² Sect. 39 enacts: "Whereas divers persons may retain or employ servants, or keep carriages, horses, mules, or dogs at places where they themselves have no houses

the obligation on persons who keep taxable articles, where they have no residence, to make the return in the place where the [758] articles were kept, if a notice has been left there, as the section requires. [Channell, B. The period during which the articles were kept, and the period of the defendant's residence there, were in this case co-extensive.] That circumstance would be no defence if the Crown proceeded under that section. Before the expiration of the tax year, in which the articles were kept, the defendant had left his residence. Section 34 (a) imposes a similar obligation on persons who have several places of residence. The construction for which the Crown contends would deprive the defendant, if assessed at his place of business, of the ground of appeal given by the 30th section. (b) [Wilde, B. No assessment [759]

or places of residence, and other persons liable to the duties made payable by this Act, or some of them, may come into or to reside in places after the time appointed by this Act for returning the lists before mentioned, not having been charged therein, or may have no fixed place of residence : " That in every such case it shall be lawful for the assessor or assessors, surveyor or surveyors, inspector or inspectors, within and for such districts or places respectively, at any time or times, and they are hereby strictly required and enjoined in every case within their knowledge respectively, to deliver or leave such notices as are hereinbefore directed to be given, at the house or houses where such persons shall reside or be, or where such servants, or other male persons before described, carriages, horses, mules, or dogs, shall be kept ; and all and every such persons, and also all and every person or persons having the care, superintendence, or management of such servants, or other male persons before described, carriages, horses, mules, or dogs, shall deliver, or cause to be delivered such list or lists as aforesaid, signed by them respectively, conformably to the directions hereinbefore contained, to the assessors, surveyors, or inspectors, within and for the respective districts or limits where any such servants, carriages, horses, mules, or dogs, are or shall be kept, or where such persons shall then reside or be, within twenty-one days after the delivery of such notices, and shall also deliver to them respectively a declaration where they, or the persons to whom such servants, or other male persons before described, carriages, horses, mules, or dogs, do belong, have been assessed for that year to the duties hereby made payable together with the usual place or places of abode of themselves, or of the persons to whom the servants, or other male persons before described, carriages, horses, mules, or dogs under their care, superintendence, and management, do belong, and the names of such persons ; or in case no such assessment, or no sufficient assessment, shall then have been made, then where they or the persons to whom such servants or other male persons before described, carriages, horses and mules do belong, shall have delivered their lists, in order to their being so assessed under the like penalties, as are herein imposed on persons chargeable with the said duties for not delivering lists in the parishes and places where they respectively reside ; and every person who shall appear by such return or otherwise, not to have been assessed in the full sum of which he or she ought to be assessed, or not to have returned the lists hereby required for the purpose of being so assessed in some other parish or place in Great Britain, or who shall not make any such return, may be chargeable to all the said duties by this Act made payable, and for which returns ought to be made either in the parish or place where such last mentioned notice shall have been delivered in like manner as if such person actually resided in such parish or place, or in the parish or place where such persons shall have their ordinary residence ; and if any person, on whom such notice shall have been served, shall remove from such parish or place without having delivered such list or declaration, he or she shall forfeit the sum of 50."

(a) Sect. 34 enacts : " That every person who shall have divers places of residence within any part of Great Britain, or shall keep any servants, or other male persons herein described, carriages, horses, mules or dogs, at divers places within Great Britain ; and every person being an inmate or lodger at the time of such notices being given as aforesaid, and having an ordinary residence at some other place or places whereat, or at one of which places such person ought to be charged, shall be obliged to deliver all such lists as aforesaid at each and every such places," &c.

(b) Section 30 enacts : " That if any person shall neglect or refuse to make out, sign and deliver such lists as are herein directed, or any of them, within the respective times herein mentioned, then the assessor or assessors shall from the best informa-

can be made under that section, except where a notice has been served at a dwelling-house, as required by the 26th section, which section does appear to be confined in its operation to dwelling-houses. But the general notice, to which the 25th section refers, may well have a more extended operation.] Lastly, the information is not proved. It avers that the defendant "resided and was" in the parish where he carried on his business. The averment that he "resided" is material, and was not proved. [Channell, B. If that averment be struck out, the allegations would be, that the defendant was in the parish, and that he was there liable to duty. The conjoint effect of the two allegations would be, that he was so there as to be liable to duty.] The duty which is imposed on the defendant is in the alternative, viz. to make the return where he "resides" or where he "is." The evidence should have negatived both branches of the alternative. [Wilde, B. It was conceded at the trial that no return was made anywhere within the period which the Act specifies.] That would not cure the information, which alleges an absolute, not an alternative, duty. Section 27 is satisfied by a return in one place only. It can scarcely be contended that a return at the place of business would render a return at the residence unnecessary. They referred also to the 9th section.

POLLOCK, C. B. The claim to recover more than one penalty having been abandoned by the Crown, it is not necessary that we should hear the Attorney General in reply.

The form which the legislature uniformly adopts, when the intention is, that for each and every violation of an act [760] of parliament, there shall be a distinct penalty, is to impose a penalty by express words "for each and every offence." Of this the Excise Acts afford a familiar illustration. No authority has been produced on behalf of the Crown to shew, that for distinct offences, committed at the same time, cumulative penalties may be claimed and recovered, where no such words occur in the clause imposing the penalty. We are therefore all of opinion that so much of the rule as prays that the verdict may be reduced to 50*l.* should be made absolute.

With regard to the question of entering the verdict for the defendant, on the ground that he is not liable under the Act to any penalty, the rule must be discharged. The words of the Act, on the construction of which the defendant's liability depends, are "residing or being." The word "being" has, in my opinion, been introduced advisedly, that the ambiguous character of the word "residing" might never be relied upon to prevent the recovery and collection of the tax. Undoubtedly the word "be" is of the widest import. Thus a commercial traveller may in one sense be said to "be" in every county or parish through which he travels in the performance of his duties. But the legislature, no doubt, considered that this word would receive a judicial construction, founded upon what was reasonable. The true mode of interpreting it was, in my opinion, suggested by my brother Channell in the course of the argument, viz., where a man shall "be" or "abide," so as to be liable to duty.

It appears that in Fleet Street the defendant has a house, not merely a shop, but an ordinary place of residence. It may be he does not sleep there; it may be he sleeps elsewhere, and lets out the upper part of the house to lodgers; but there he certainly "is," occupying a house, and using the lower part as a shop in the exercise of his business. He is [761] charged with not having delivered lists to the assessor according to the directions of the Act, and the 27th section is imperative that he shall do so. By the 25th section, the notices affixed on the church doors in the parishes of St. Bride and St. Marylebone are respectively notice to him, because, in the words of

tion he or they can obtain, make an assessment upon such person so refusing or neglecting for or in respect of every servant, carriage, horse, mule, or dog retained or kept by him or her as aforesaid . . . according to the rates specified in the said schedules, and shall include the same in the certificate of the assessment to be delivered to the Commissioners as herein directed; and every such assessment so made upon any such neglect or refusal shall be final and conclusive upon the person thereby charged, who shall not be at liberty to appeal therefrom, unless such person shall prove that he or she was not at his or her dwelling-house at the time of delivery of such notice, nor between that day and the time limited for delivering such list as aforesaid to the assessor, or unless such person shall allege and prove such other excuse for not having delivered his or her list, as the Commissioners for executing this Act shall in their judgment think reasonable and sufficient."

that section, he is "residing or being" there; and, by the 27th section, the lists are to be delivered to the assessor by every person, where every person shall "reside or be." If the word "be" has any meaning, it must include that abiding which consists in the occupation of a shop for the purposes of business. It is true there are other sections of the Act which point to particular cases, such as the making returns where the articles subject to duty are kept, or the making returns where the person sought to be charged has no fixed residence. But this does not prevent the operation of the 27th section, where it in terms applies and makes it imperative on the defendant, having received notice, to return the lists to the assessor of the district where he "shall reside or be." I am clearly of opinion, that, for the purposes of this Act, the word "reside" does not necessarily mean "dwell," for, when the Act speaks of a place where people live and sleep, the word dwelling-house is used, as will be seen in the 32nd section, which enacts "that every occupier as aforesaid in whose dwelling-house or apartment any person liable to the duties shall reside," &c. I am, therefore, of opinion that the language of the enactment shews that it was a duty incumbent on the defendant to make a return to the assessor of St. Bride of the articles which he kept and used, and that having failed to do so he is liable to the penalty; but I think he is liable to one penalty only. The rule must be absolute to reduce the verdict in that respect, and so much of it as relates to entering a verdict for the defendant must be discharged.

[762] MARTIN, B. I am also of opinion that there was evidence for the jury that the defendant "resided or was" in the parish of St. Bride within the true meaning of the 27th section, and this is the only point which it is necessary to discuss. The evidence was that he kept a shop as a tradesman, trading in the parish of St. Bride; that he was there in the course of the day, as long as he thought convenient, and that he made a return in that parish in respect of other matters, in which he admitted he was liable to duty. No evidence was given as to where he slept at night. Upon this evidence my brother Wilde had to decide whether there was, or was not, any evidence for the jury. The question here is not one of law, but of fact. With regard to the word "reside," it is to be observed, that inasmuch as all persons in England are to be assessed to these duties where they are liable, and the object of the Act is to obtain them from all persons who are liable, it is, so far as the Crown is concerned, wholly immaterial whether the defendant makes the return where he sleeps or where he spends the day in the conduct of his business. If, therefore, it were necessary to give judgment upon the meaning of the word "reside" alone, without the words "or be," there would, I think, on the authority of *Blackwell v. England* (8 E. & B. 541), be strong ground for contending that one who spends the day at his shop attending to his business, and may there be seen and conversed with on matters of business, and does not choose to be communicated with elsewhere, is "residing" there, much more than at the place where he sleeps at night, but does not wish anyone to call on him, and where, if anyone does call, he cannot see him during the day. Again, the word "be" is conclusive. A man is not in Fleet Street, within the meaning of this Act, simply because he walks from Temple Bar to St. Paul's; but a man who is staying, abiding, and [763] to be found there, so that if anyone desired to see him on business he would go there to see him, must be said to "be" there. That would, both according to ordinary good sense and the meaning of this section of the Act, be the place where he resided. I think, therefore, there was not only evidence for the jury, but evidence on which a jury ought to act, that the defendant "resided and was" in the parish of St. Bride, in the city of London. It appears to me plain, from the language of the 27th section, that the duty is imposed on those who are subject to this tax to make the return. If they make no return at all, the place where they are is a circumstance which is not material. In substance, therefore, there can be no doubt that the defendant is liable to this penalty; and I agree that there is one penalty only, for the reasons stated by the Lord Chief Baron.

CHANNELL, B. I concur with the Lord Chief Baron and my brother Martin, in thinking that for the reasons given so much of the rule as seeks to reduce the penalty from 200l. to 50l. should be made absolute, and the rest of the rule be discharged.

WILDE, B. I am of the same opinion. The point raised is purely technical. The defendant contested his liability to duty in respect of a certain carriage and horse, and refused to pay. The jury found a verdict against him, because by law he was liable and had incurred the penalty. The point on which he now relies is,

that although he has made no return anywhere of the articles which it was his duty to return, he is not liable under this information, on the ground that he was only under an obligation to make the return at the place where he slept, and not where he carried on his business. For the reasons which have been given by the Lord Chief Baron, which have exhausted [764] the question, I am clearly of opinion that he was bound to make the return, not only at the place where he slept but at the place where he carried on his business. I think, therefore, that the rule should be absolute to reduce the penalty to 50*l.* but that the remainder of the rule should be discharged.

Rule accordingly.

CAINE AND ANOTHER v. COULTON. Jan. 13, 1863.—The plaintiffs' attorney wrote to the defendant requesting him to remit a balance due to the plaintiffs, with 13*s.* 4*d.* costs. The defendant sent a bank bill for the amount of the balance only. The plaintiffs' attorney wrote in answer that he would not receive the bank bill, unless the 13*s.* 4*d.* was paid, but did not return it. The jury having found that any objection to the remittance not being in money was waived, and that the bank bill was only refused because it did not include the costs: Held, that there was evidence of payment.

[S. C. 32 L. J. Ex. 97; 11 W. R. 239; 7 L. T. 636.]

Action for goods sold and delivered.

Plea. Payment before action. Issue thereon.

The cause was tried, before the Assessor of the Court of Passage at Liverpool, when the following facts appeared:—The plaintiffs, who were ironmasters at Liverpool, sought to recover 32*l.* 4*s.*, being the balance of their account for goods supplied to the defendant, who was a hardwareman at North Shields. On the 6th of June, 1862, the plaintiffs' attorney wrote to the defendant demanding payment of the 32*l.* 4*s.* and 5*s.* 1*d.* for his costs. The defendant remitted to the plaintiff 13*l.* 3*s.* 6*d.* On the 9th of June the plaintiffs' attorney wrote to the defendant as follows:—

“Sir,—Messrs. Caine and Kitchen inform me that you have sent them 13*l.* 3*s.* 6*d.* The balance now due from you to them is 19*l.* 2*s.*, inclusive of 1*s.* 6*d.* noting the dishonoured bill. Unless the balance, with 13*s.* 4*d.*, my charges, be remitted by return, I shall sue you.”

On the 12th of June the defendant remitted to the plaintiffs' attorney a bank bill for 19*l.* 2*s.*, payable at sight. On the 13th of June the plaintiffs' attorney again wrote to the defendant saying: “The credit has expired, and I decline to receive the draft sent, unless you remit me 13*s.* 4*d.* for letters and attendance.” The defendant, not having remitted [765] the 13*s.* 4*d.*, was served with the writ in this action. The plaintiffs' attorney retained the bank bill, but did not cash it.

The learned Assessor left it to the jury to say, first, whether the plaintiffs had waived any objection they might have had on account of the remittance not having been made in cash, and had only insisted on the payment of the attorney's claim in addition to the sum really due. Secondly, whether the defendant was prevented from sending cash by the course of dealing of the plaintiffs.

The jury found that the plaintiffs objected only because 13*s.* 4*d.* was not included in the remittance, and that they did not object to receive the order as so much cash. They also answered the second question in the affirmative. The learned Assessor then ruled that the facts proved were evidence of payment, and he directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter the verdict for them for 19*l.* 2*s.*

Milward, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground of misdirection in the learned Assessor holding that the facts proved shewed payment, or afforded evidence to support the plea of payment; against which

C. Russell now shewed cause. The ruling of the learned Assessor was correct; for the bank bill was accepted as cash and retained by the plaintiffs' attorney, so that there was in fact a payment. It is true that the defendant was requested to remit the 19*l.* 2*s.*, together with 13*s.* 4*d.* for the attorney's charges; but, the latter being an illegal demand, the defendant had a right to reject that part of the letter and act upon the rest. In *Gordon v. Strange* (1 Exch. 477) the defendant, in answer

to a letter from the plaintiff demanding payment of a debt, sent a post office order, which the plaintiff [766] retained but did not cash, and that was held no evidence of payment. But that decision proceeded on the ground that the creditor was described in the post office order by a wrong name. In *Hough v. May* (4 A. & E. 954) the defendant sent to the plaintiff a cheque which purported to be drawn for the balance of his account, and on that ground it was held no payment, although retained by the plaintiff, for a cheque to operate as payment must be unconditional. Here, although the plaintiffs' attorney wrote to say that he would not accept the bank bill unless his charges were paid, he nevertheless retained it. The delivery of a negotiable instrument may operate as payment, if accepted as such: *Kearlake v. Morgan* (5 T. R. 513), *Pearce v. Davies* (1 Moo. & R. 365). The defendant was requested to remit the balance and he did so, and no objection was made to the mode in which it was remitted: *Warwick v. Noakes* (Peake, 98). A tender of country bank notes or a cheque is good, if the creditor does not object to the form of the tender but only to the amount: *Polglass v. Oliver* (2 C. & J. 15); *Jones v. Arthur* (8 Dow. P. C. 442). He also referred to *Kington v. Kington* (11 M. & W. 233); *Price v. Price* (16 M. & W. 232); *Griffiths v. Owen* (13 M. & W. 58); *Morrison v. Summers* (1 B. & Adol. 559); *Thomas v. Cross* (7 Exch. 728).

Milward, in support of the rule. There was no evidence of payment. The plaintiffs' attorney was entitled to his charge for letters and attendance, so that the amount due at the time the writ issued was the debt and costs. The defendant was requested to remit the money, but he sent a bank bill for the debt only. The plaintiff had a right to [767] treat that as a nullity and commence his action. In *Hough v. May* (4 A. & E. 954, 957) Littledale, J., said that the plaintiffs "were not bound to suspend the commencement of the action until they had returned the cheque." In *Gordon v. Strange* (1 Exch. 477), although the plaintiff kept the post office order, knowing that he might at any time receive the money, it was held that there was no evidence of payment.

POLLOCK, C. B. We are all of opinion that the rule must be discharged. The difference between *Gordon v. Strange* (1 Exch. 477) and this case is of the very essence of the question. Here the defendant was desired to remit, and he did remit, the balance; and it was left to the jury to say whether the plaintiffs had waived any objection which they might have had on account of the remittance not having been made in cash, and the jury decided in favour of the defendant. In *Gordon v. Strange* there was no request to remit, and the remittance was not available, because a mistake was made in the name of the party to whom the post office order was sent. So, in *Hough v. May* (4 A. & E. 954, 957), there had been no direction to remit, and the remittance was by a cheque which contained in the body of it a statement which might have been some evidence against the person to whom the cheque was sent, if he had presented it, and which the party sending it had no right to insert. In the present case there was a direction to remit, and a remittance, the effect of which was left to the jury, who decided in favour of the defendant, and I think we ought not to disturb the verdict.

MARTIN, B. I am of the same opinion. Indeed, it seems to me that the matter is disposed of by the finding [768] of the jury. If a debtor has not paid his debt in the usual course, and the creditor is obliged to employ an attorney to enforce payment of it, I do not think it unreasonable that the attorney should say, "Remit me the money, with 6s. 8d., the costs of this letter." Neither do I think that any blame can be imputed to an attorney for so writing. But all that is due is the debt—the claim for writing the letter is no claim by the creditor. Here the defendant remitted to the attorney a bank bill payable at sight, which is an ordinary mode of payment, and the attorney had no right to keep it and then proceed as if he had never received it. I think there was evidence for the jury of payment, for, although the attorney said he would not accept the bank bill unless 13s. 4d. was remitted, he nevertheless kept it. It is a rule of common law, as well as common sense, to look at what is done, not at what is said. A man cannot deal with the property of another, and then turn round and say he never meant to do it. It seems to me that the learned Assessor would have done wrong if he had not left the question to the jury.

CHANNELL, B. I am also of opinion that the rule ought to be discharged. The application is not for a new trial on the ground that the verdict is against the evidence, but to enter a verdict for the plaintiffs for 19l. 2s. I think we ought not to accede

to that application, provided there was any evidence to warrant the Judge in leaving the case to the jury; and in my opinion there was. The case of *Gordon v. Strange* (1 Exch. 477), which has been relied on by Mr. Milward, is clearly distinguishable from the present, for the reasons stated by the Lord Chief Baron. There the application was for the payment of money; for, according to the report [769] in the Jurist (vol. 11. p. 1019), Parke, B., in his judgment, said: "Suppose, instead of cash, the defendant had paid this money by a quantity of coals or cyder, and left them at the plaintiff's house, would it support a plea of accord and satisfaction that the plaintiff did not take the trouble to send them back?"

WILDE, B. I am entirely of the same opinion.
Rule discharged.

BRUCE v. JONES. Jan. 24, 1863.—Where several valued policies of insurance are effected upon the same vessel valued differently, and upon a total loss, the assured receives under some of the policies part of the sums insured, in an action upon another policy he is only entitled to recover the difference between the amount received and the agreed value in that policy.—Therefore, where a shipowner effected upon the same ship four policies of insurance, in which respectively the agreed value of the ship was stated to be 3000l., 3000l., 5000l. and 3200l., and upon a total loss received under the three former policies sums amounting to 3126l. 13s. 6d., and then sued upon the latter policy: Held, that, as between the assured and the underwriter of that policy, the value of the ship must be taken to be 3200l., and the assured was only entitled to recover the difference between that sum and 3126l. 13s. 6d.

[S. C. 32 L. J. Ex. 132; 9 Jur. (N. S.) 628; 11 W. R. 371; 7 L. T. 748. Referred to, *Seagrave v. Union Marine Insurance Company*, 1866, L. R. 1 C. P. 318; *Burnand v. Rodocanachi*, 1880, 5 C. P. D. 426.]

Declaration on a policy of insurance for 2400l. on the ship "Hero," on a voyage from Cardiff to Manilla, and in which the ship was valued at 3200l. and underwritten by the defendant for 125l. The declaration alleged a total loss.

Plea (inter alia). That the plaintiff made other policies of insurance on the same ship on the same voyage, viz., a policy dated the 30th of July, 1860, in which the said ship was valued at 3000l., which said policy was underwritten for sums amounting altogether to 725l.; a policy, dated the 8th May, 1861, in which the same ship was valued at 3000l., and the policy underwritten for 500l.; a policy, dated the 20th June, 1861, in which the same ship was valued at 5000l. and underwritten for the sum of 3450l. Averments: that the said ship mentioned and insured in each of the said policies was the same ship, and the risk intended to be [770] covered the same risk; that the said ship was lost after the making of the said policies, and that divers of the said several insurers upon the said ship, whose names were subscribed to the said policies other than the policy in the declaration mentioned, paid to the plaintiff, and the plaintiff accepted and received of and from the said underwriters, sums amounting altogether to the sum of 3200l., and the plaintiff then and thereby became satisfied and indemnified for the said loss of the said ship as agreed upon in the said policy in the declaration mentioned. Issue thereon.

At the trial, before Willes, J., at the last Liverpool Summer Assizes, it appeared that the policy in question, which was dated the 6th August, 1860, was effected at Liverpool for 2400l. on the plaintiff's ship "Hero," valued at 3200l., and was underwritten by the defendant for 125l. The loss of the ship having been proved, the defendant gave in evidence three other policies effected by the plaintiff on the same ship for the same voyage, viz., a policy effected at Bristol, dated the 30th July, 1860, for 725l., in which the ship was valued at 3000l.; another effected at Aberdeen, dated the 8th May, 1861, for 500l., in which the ship was valued at 3000l.; and another effected in London, dated the 20th June, 1861, for 3450l., in which the ship was valued at 5000l. There was conflicting evidence as to the real value of the ship. The plaintiff had received from the underwriters of the Bristol policy 492l. 6s. 6d., from the underwriters of the Aberdeen policy 684l. 7s., and from the underwriters of the London policy 1950l., amounting in the whole to 3126l. 13s. 6d.

The learned Judge, in leaving the question of damage to the jury, told them that

insurance was a contract of indemnity, and that, for the purpose of the present action and as between the plaintiff and defendant, the value agreed upon and stated in the policy must be taken as the real value of the ship, [771] viz., 3200l.; and that, as the plaintiff was entitled to recover in respect of a total loss, he was entitled to be indemnified to that amount; but that the sums which the plaintiff had received on the three other policies, amounting to 3126l. 13s. 6d., must be deducted from the agreed value; so that there would only be due on the policy on which this action was brought 73l. 6s. 6d., of which the defendant's proportion as one of the underwriters was 3l. 16s., which was all that the plaintiff was entitled to recover against him: that the fact that the ship had been valued at a larger sum in another policy ought not to be taken into consideration. The jury found a verdict for the plaintiff for 3l. 16s.

Brett, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection as to the measure of damages; against which

Edward James (with whom was Milward) shewed cause (Jan. 23). The direction of the learned Judge was correct. The plaintiff is only entitled to recover from the defendant the balance of the amount insured, after giving credit for the sums already received by the plaintiff under the other policies. Insurance is a contract of indemnity: if there be an open policy, the assured is entitled to recover the value of the ship; but where there is a valued policy, the sum stated in it is the agreed value as between the parties, and the assured cannot recover more. In *Bousfield v. Barnes* (4 Camp. 228) the plaintiff had effected two policies; one for 600l., valued at 6000l.; and the other for 6000l., valued at 8000l. The ship having been wrecked the underwriters paid him the 6000l., and he then sued upon the other policy. Evidence was adduced that the ship was worth more than 8000l., and on that ground it was held that he was entitled to recover. Lord Ellenborough there said: "I will take care that the [772] assured do not recover upon the whole more than the real value of the subject-matter insured. But I think it is not enough for the underwriters on a particular policy to shew that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity." Where a person effects two policies of insurance in each of which the same value is declared, he is bound by that sum: *Irving v. Richardson* (1 Moo. & R. 153); *Morgan v. Price* (4 Exch. 615). [Wilde, B. Insurance is a contract of indemnity as respects the true value; and therefore, to the extent to which the assured has been damaged, he is entitled to recover. But where the policy is valued the assured is estopped from saying that he has sustained damage to a greater extent than the agreed value.] In *Park on Insurance*, vol. 2, p. 600, 8th ed., it is said: "Where a man has made a double insurance, he may recover his loss against which of the underwriters he pleases, but he can recover for no more than the amount of his loss." In *Lewis v. Rucker* (2 Burr. 1167, 1171) Lord Mansfield, C. J., said: "The only effect of the valuation is fixing the amount of the prime cost; just as if the parties admitted it at trial: but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity."

Brett and Quain, in support of the rule. It is not contended that an underwriter is liable to pay more than the agreed value of the ship as between him and the assured; but he is not entitled to any deduction in respect of sums received by the assured on other policies. The sum stated in each policy is not the actual but the agreed value of the [773] ship. It is well known that the value of a ship varies according to the demand for shipping. It depends on the state of trade, not on the cost of the ship. A ship may be undervalued at one time and overvalued at another, and therefore to avoid all dispute the parties agree to a value by which they shall be bound. Here the plaintiff, having sustained a total loss, is *prima facie* entitled to recover the agreed value. The defendant admits the loss but gives in evidence policies between the plaintiff and other underwriters for the purpose of shewing that he has been paid. But those documents being in evidence must be taken for all purposes. For instance, the London policy being given in evidence for the purpose of shewing a payment under it of 1950l., it must be taken that at the time that policy was effected the ship was of the value stated in it, viz., 5000l., and therefore only two-fifths of its value has been paid under that policy. Again, under the Bristol policy 492l. has been paid, which is only one-sixth of the agreed value; and under the Aberdeen policy 684l. has been paid, which is only seven thirty-seconds of the agreed value. This

mode of calculation shews a much larger sum due to the plaintiff on the present policy than was found by the jury. In *Arnould on Insurance*, vol. 1, p. 346, 2nd ed., it is said that the rule established by Lord Mansfield is as follows:—"In case of over-insurance the different sets of policies are considered as making but one insurance, and are good to the extent of the value of the effects put in risk; the assured can recover on the different policies no more than their value, but he may sue the underwriters on either of the policies, and recover from those he so sues to the full extent of his loss, supposing it to be covered by the policy on which he elects to sue, leaving the underwriters on that policy to recover a rateable sum, by way of contribution, from the underwriters on the [774] other policy." Reference is there made to *Newby v. Reed* (1 W. Black. 416), which was a case of open policies, and the question is whether the same rule applies to valued policies in each of which a different value is stated. If the rule contended for by the defendant is to prevail, this strange consequence will follow, that supposing the plaintiff sued on all the policies except the London one, and recovered their full amount, he would receive upon those policies 3625l.; and he might then sue upon the London policy and recover 1375l., being the difference between 3625l. and 5000l., the agreed value in the London policy. So that the amount which the plaintiff would be entitled to recover would depend upon which policy he first put in suit. The more rational rule is to take the average value of the four policies, by adding together the several agreed values in each and dividing it by four, which in this case would give 3600l. as the value of the ship.

POLLOCK, C. B. We are all of opinion that the rule ought to be discharged. I think my brother Willes was quite right in his direction, and that it is fortified by authority and reason. The action is brought on a policy of insurance for 2400l. effected on a ship valued at 3200l. It appears that the ship was insured by other policies and that the assured has received on them 3126l. 13s. 6d.; and the question is whether he is entitled to recover more than the difference between that and 3200l., viz. 73l. 6s. 6d. The plaintiff seeks to recover more, on the ground that the sums which he has received on the other policies ought not to be taken into consideration. The learned Judge who tried the cause did not adopt that view, and I think properly. He considered that, as between the plaintiff and defendant, the value of the vessel must be taken as 3200l., [775] and it appears to me that is the correct view. It may happen that when a vessel is insured for a long time or a long voyage, her value may not be the same at the beginning as at the end of the voyage. More freight being carried might increase her value, or she might have met with an accident and have been so thoroughly repaired that her value might be considerably increased. But in general the value must be taken to be that which is stated in the policy. If that is binding upon the underwriter, so that he cannot give evidence of the real value of the vessel, and so prevent the assured from recovering the amount stated in the policy, the assured is equally bound by the agreed value, and if he has received that amount he has no further claim upon any other underwriter. If he has received less he can only recover on other policies the difference. Upon these grounds I think that the rule ought to be discharged.

MARTIN, B. I am of the same opinion. I admit that a judgment given in a manner of this kind is not altogether satisfactory, which arises from the circumstance that Courts of law view policies of insurance in one light, whilst the assured views them in a totally different light. Courts of law are obliged to discuss these questions on the principle that the sum to be recovered is an indemnity for the value of the ship, but persons who insure entertain an entirely different notion, so that we have to decide on principles at variance with those of the parties when they enter into these contracts. It is therefore scarcely possible that the decision of a Court of law can be satisfactory to them. If the practice between the shipowner and the underwriter were founded on the principle alluded to by Lord Mansfield in his judgment in *Lewis v. Rucker* (2 Burr. 1167, 1171), viz., "that [776] the value is fixed in such a manner that the insured means only to have an indemnity," the matter would be plain. But that is not the mode in which shipowners and underwriters do business. I remember a case respecting a ship the owner of which, who was a witness, proved that he had effected a policy and valued the ship upon a principle which had no reference whatever to its real value. He had opened a debtor and creditor account between himself and the ship, and insured the ship for the balance owing to him. A lawyer would say that a shipowner had no right to insure on that principle, and that he

ought to value the ship on the principle stated by Lord Mansfield, to which I have referred.

It seems to me in this case that the view taken by my brother Willes was in accordance with authority. He considered that, by the agreement between the assured and the underwriters, the value of the ship was to be taken at 3200l., and that the plaintiff was entitled to recover that sum in respect of the loss of the ship. He then inquired what sum of money the assured had received, leaving out of consideration how he got it, and, finding that he had received 3126l. 13s. 6d., he treated it as if there had been a salvage of the ship, and the assured had received that amount after the ship was sold. He then placed that amount to the credit of the underwriter as against the 3200l.; and he entirely dismissed from his consideration what was stated as the value of the ship in other policies between the plaintiff and individuals to whom the defendant was a stranger. According to the best judgment I can form on the matter, that is the more correct mode of estimating the damage. It is in accordance with the view taken by Courts of law, that insurance is a contract of indemnity against the loss actually sustained. I am not insensible to the [777] observation that the amount which the assured is entitled to recover may depend upon which policy he first puts in suit; but, in point of fact, each policy is a separate contract, and the assured must deal with each underwriter according to his particular contract.

CHANNELL, B. I am of the same opinion. The damages were assessed under the direction of the learned Judge; and an application is made for a new trial on the ground that he misdirected the jury in stating his view as to the measure of damage. The broad question is whether the plaintiff is entitled as against the defendant to damages to a greater amount than he has recovered. If so, there would be ground for granting a new trial; but, being of opinion that the damages were rightly assessed, it is unnecessary to consider whether any other mode of assessment should be resorted to. The plaintiff has recovered from the defendant, not his proportion of the 3200l., the agreed value in the policy, but his proportion of the difference between that sum and the amount which the plaintiff received on the three other policies. I think that is all the plaintiff is entitled to; and that, when the defendant is sued for his proportion upon a policy in which the ship is valued at 3200l., that must be taken as the value of the ship for the purpose of his liability; and the question is how far that is lessened by the sums received on other policies. I agree that some inconvenience may result from the rule now laid down; and it is not satisfactory to find that, if the order of suing on the policies had been inverted, a different amount would have been recovered. But I think that is in a great degree attributable to the character of these insurances, as explained by my brother Martin; and that, at all events, as the plaintiff has effected an insurance [778] in which his ship is valued at 3200l., we must abide by the rule of law that, for the purpose of estimating the liability of the defendant, that amount must be taken as fixed by the policy.

Rule discharged.

BANCROFT v. GREENWOOD, HYDE, AND CHADDERTON. Jan. 30, 1863.—Where a writ of summons has issued against several defendants, who enter a joint appearance, and the plaintiff declares against some of them only, the others may, after notice to declare, sign judgment of non pros as against themselves.

[S. C. 32 L. J. Ex. 154; 9 Jur. (N. S.) 160; 11 W. R. 349; 7 L. T. 729.]

In this case the plaintiff issued a writ of summons against the three defendants, who were served with a copy of it; and on the 18th of October, 1862, they entered a joint appearance. On the 18th of December the plaintiff declared against the defendants Greenwood and Hyde, but not against the defendant Chadderton. On the 2nd of January, 1863, Chadderton served the plaintiff with the usual notice to declare against him within four days. The plaintiff not having declared, on the 10th of January Chadderton signed judgment of non pros. A summons was taken out at Chambers to set aside the judgment for irregularity, which was heard before Channell, B., who dismissed it with costs.

C. Hutton now moved to set aside the notice to declare and judgment for irregularity. Judgment has been signed by a person who is a stranger to the record. [Wilde, B. How is he to get his costs?] By application to a Judge under the

8 Eliz. c. 2, s. 2. A judgment of non pros differs from a nolle prosequi, which is merely a partial forbearance by the plaintiff to proceed any further either as to some of the defendants, or to part of the suit; but by a non pros the plaintiff is put out of Court against all the defendants; 1 Wms. Saund. 207 d., note; *Philpot v. Muller* (1 Doug. 169, note). In [779] *Powell v. White* (1 Doug. 169) it was held that in a joint action against several, the plaintiff cannot be non-processed unless by all the defendants. [Channell, B. There the writ was against three persons, one was arrested and put in bail, but the two other defendants did not appear. In Chitty's Archbold's Practice, p. 1466, 11th ed., it is said: "If the action be against several defendants, the plaintiff may be non-processed by any one on behalf of all, if all have appeared, and he is in default as to all, and he has their authority for signing the judgment." Martin, B. In *Hamlet v. Bingham* (5 Scott, N. R. 889; 4 M. & G. 909; nom. *Hamlet v. Bredon*) both Tindal, C. J., and Maule, J., said that where the plaintiff does not declare against one of several defendants, the proper course is for him to sign judgment of non pros as against himself.] In that case the plaintiff had not declared against any of the defendants. Where a plaintiff has elected to declare against one of several defendants only, it is the same as if the names of the others were struck out of the writ: *Davies v. Thomson* (14 M. & W. 161). [Martin, B. In Tidd's Practice, vol. 1, p. 459, 9th ed., the law is thus stated: "In a joint action, it is said, the plaintiff cannot be non-processed by one or more of the defendants, without the others. And this is universally true in actions by original, where the plaintiff cannot proceed against the defendants severally, upon a joint writ. But upon common process for a supposed trespass, in the King's Bench or Common Pleas, if the plaintiff declare, serve a notice of declaration, or even take out a rule for further time to declare, against one or more of several defendants, and do not proceed against the others, the latter may sign a judgment of non pros." That refers to the old proceeding by bill of Middlesex or writ of latitat, which was not the commencement of the action, but only a process to bring a defendant into Court. *Roe* [780] v. *Cock* (2 T. R. 257) was the foundation of the practice, and at that time a plaintiff might join several persons in one writ, though the causes of action against them were different, and afterwards declare against each separately, upon which they became separate actions. But now, by the Common Law Procedure Act, 1852, sect. 4, "every writ of summons shall contain the names of all the defendants, and shall not contain the name or names of any defendant or defendants in more actions than one." In *Butler v. Upton* (2 T. R. 258, note) four defendants were joined in the writ, and one signed judgment of non pros; but it appearing that the plaintiff had taken out a rule for time to declare against the one only, that was considered a sufficient indication of the plaintiff's intention to declare severally. Here, the plaintiff having already declared against two defendants, a declaration against the third would be irregular: *Pepper v. Whalley* (1 Bing. N. C. 71). The 8 & 9 Wm. 3, c. 11, s. 1, was the first statute which gave costs to one of several defendants, but that does not apply to a judgment of non pros; and the 23 Car. 2, stat. 2, c. 2, only extends to a judgment of non pros as against all the defendants. The 3 & 4 Wm. 4, c. 42, s. 32, gives costs on a nolle prosequi against one of several defendants, thus carrying out the distinction contended for between a judgment of non pros and a nolle prosequi.

POLLOCK, C. B. There ought to be no rule. This is not a question of principle, but purely of practice. There has been an inveterate practice for a great number of years, and it is now proposed that we should review the decisions on the subject from a very early period, and alter the practice. It appears to me that we are bound by the practice, and not called upon to alter it by any of the reasons [781] suggested. Moreover, we have the satisfaction of knowing that the practice is not only in conformity with the law, but also in accordance with good sense and justice.

MARTIN, B. I am of the same opinion. If this were a matter de novo, I should have thought that nothing could be more just and reasonable than, if a plaintiff thinks fit to sue three defendants jointly, and afterwards elects to declare against two only, the third should be enabled to get rid of the action by signing judgment of non pros. But the practice is not new. I do not propose to go further back than the year 1788, when there was a case of *Roe v. Cock* (2 T. R. 257), in which this matter was considered, and Ashurst, J., said: "It is true, as has been suggested, that a plaintiff may join four defendants in a writ, and afterwards declare against all, or only one, as he pleases. In *Powell v. White* (1 Doug. 169) the plaintiff had not declared; but when the plaintiff

has proceeded thus far against one defendant only, it becomes a separate action, and it would be absurd to say that neither of the three other defendants could sign a judgment of non pros." I find the practice so stated in Tidd's Practice, vol. 1, p. 459, 9th ed., and it is distinctly laid down in the Court of Common Pleas by Tindal, C. J., and Maule, J., in *Hamlet v. Bingham* (5 Scott, N. R. 889; 4 Man. & G. 909). I also find it adopted in the books on practice in common and ordinary use. I am content to act upon the judgments of Tindal, C. J., and Maule, J., without inquiring how or why the practice was introduced. But Mr. Hutton says that *Roe v. Cock* was the foundation of the practice, and that at that time it was competent to a plaintiff to deliver several declarations upon a single writ. If that be so, he is probably right; but when we find a positive rule of practice laid down and acted upon for a [782] series of years, why should we depart from it, or stop to investigate the reason of its adoption? It seems to me that the practice is just and reasonable, and ought to be adhered to.

CHANNELL, B., and WILDE, B., concurred.

Rule refused.

THE ATTORNEY GENERAL *v.* BRACKENBURY AND ANOTHER. Jan. 27, 1863.—In the absence of a contrary intention apparent on the face of a will, a general residuary bequest operates as an exercise of a general power of appointment, of which the testator is the donee, although the residuary legatees are the persons who would be entitled, in default of appointment, under the instrument creating the power.—If in such case the testator has in the first instance charged his residuary estate with the payment of debts and legacies, it is not competent for the residuary legatees to disclaim the fund under the appointment, and elect to take under the gift to them in the original instrument.—Quære, whether the disclaimer by an appointee operates to vest the fund appointed in the persons entitled in default of appointment?—A. by will bequeathed his residuary personal estate, on the death of his daughter B., unmarried, to trustees, for such purposes as she should by will appoint, and in default of appointment in trust for his brother C. and his sister D. B. died unmarried, having bequeathed her residuary estate (subject to the payment of debts, funeral and testamentary expenses, legacies and annuities) to her uncle C. and her aunt D.: Held, that B.'s will operated as an exercise of her power of appointment, and that C. and D. were liable to pay duty on the fund appointed at the rate of 5 per cent. and not 3 per cent., the rate at which they would have been liable if they could have taken directly under A.'s will.

[S. C. 32 L. J. Ex. 108; 9 Jur. (N. S.) 257; 11 W. R. 380; 8 L. T. 822.]

Information in equity by the Attorney General, as follows:—

1. The object of this information is to obtain from the defendants, who are the acting executors of the will of Harriette Mary Brackenbury, deceased, payment of the legacy duty in respect of certain property, which under the will of her father, James Blackledge Brackenbury, deceased, and in the event (which happened) of her death without having been married, she had power to dispose of as she might think fit, and which she did in fact dispose of by her will.

2. The said James Blackledge Brackenbury by his will, dated the 5th day of June 1843, appointed his brother the defendant Ralph Brackenbury and his sister Hannah Brac-[783]-kenbury, and his brother-in-law John Hobson, to be executors and trustees for the purposes thereafter mentioned. And after making certain pecuniary and specific bequests he devised all his real estates unto the said trustees upon trust to sell the same, and he directed that the money to arise by sale thereof should form part of the residue of his personal estate, and he also bequeathed to his trustees all his personal estate not thereinbefore disposed of, and authorized them to convert the same into money; and he directed his trustees to invest the net proceeds of the monies arising from the sale of his real estates, and from the conversion of his personal estate, in manner in his said will mentioned, and to stand possessed thereof and of the securities for the same upon certain trusts which, so far as it is necessary for the purposes of this suit to state the same, were in effect as follows, that is to say, upon trust to pay the net income thereof to his daughter the said Harriette Mary Bracken-

bury during her life, but so that in case of her marriage the same should be for her separate use. And after her decease in trust, as to the capital thereof, for her children or other issue as she should by deed or will appoint, and in default of appointment for such of her children as should attain the age of twenty-one years or marry under that age, and if more than one in equal shares. And in case (which happened) his daughter should not marry, then after her decease the said trust funds and the annual income thereof were to remain and be upon and for such trusts, intents and purposes as his said daughter by her will should direct or appoint; and in default of such direction or appointment, or so far as any such, if incomplete, should not extend, in trust for his said brother and sister, their executors, administrators and assigns, in equal shares.

3. The testator afterwards died without revoking or altering his said will, which was on the 4th of December, 1844, [784] duly proved in the Prerogative Court of the Archbishop of Canterbury.

4. The testator's daughter Harriette Mary Brackenbury survived him, and by her will, dated the 23rd of July, 1859, gave various pecuniary legacies and annuities. And after and subject to the payment of her debts, funeral and testamentary expenses, and the legacies and annuities thereinbefore given, she gave all the residue of her property, both real and personal, unto and equally between her uncle the defendant, Ralph Brackenbury, and her aunt, the said Hannah Brackenbury, their heirs, executors, administrators and assigns. And she appointed the defendants Ralph Brackenbury and Edward Lewis, and also Thomas Tomlinson (who renounced probate), executors of her will.

5. The said Harriette Mary Brackenbury afterwards died without having ever been married, and without revoking or altering her said will, which was, on the 20th of June, 1861, duly proved by the defendants, Ralph Brackenbury and Edward Lewis, in the principal registry of her Majesty's Court of Probate.

6. The will of the said Harriette Mary Brackenbury operated as an exercise of the general power of appointment to which, in the event, which happened, of her death without having been married, she became entitled, under her father's will, over the whole of his residuary estate. And thereupon legacy duty under his will, at the rate of 11. per cent., became payable in respect of the said residuary estate as if the same had been immediately given to her by such will, and was accordingly duly paid by the defendants as her executors, an allowance being made to them on account of the duty previously paid in respect of her life interest therein. And it is contended by the Attorney General, but not admitted by the defendants, that legacy duty after the rate of 51. per cent. is now pay-[785]-able under the will of the said Harriette Mary Brackenbury in respect of so much of the said testator's residuary estate as was, by the will of the said Harriette Mary Brackenbury, appointed and disposed of in favour of her uncle, the defendant, Ralph Brackenbury, and her aunt, the said Hannah Brackenbury, under the residuary gift contained in her said will as hereinbefore stated. The question for the decision of the Court is, whether or not duty at that, or any other, and what rate, is payable in respect of the premises.

The bill prayed a declaration (inter alia) that legacy duty was payable at the rate of 51. per cent. in respect of so much of the residuary estate of the testator, James Blackledge Brackenbury, as was appointed by the will of his daughter, in favour of her uncle, the defendant, Ralph Brackenbury, and her aunt, Hannah Brackenbury.

The answer of the defendants (so far as is material) was as follows:—

1. We submit to the judgment of the Court as questions of law, and not of fact, whether or no, as alleged in the said information, the property therein referred to, and in respect of which payment of legacy duty is claimed, is property which Harriette Mary Brackenbury, deceased, did in fact dispose of by her will, and whether her will did or did not operate as an exercise of the general power of appointment, to which, in the event, which happened, of her death without being married, she became entitled, under her father's will, over the whole of his residuary estate, or whether thereupon legacy duty under his will, at the rate of 11. per cent., became payable in respect of the said residuary estate, as if the same had been immediately given to her by such will; and we say that, although true it is that we, as her executors, and in order to avoid proceedings on the part of her Majesty's Attorney General against us, consented to pay, and did in fact pay, duty at the rate last [786] aforesaid on the amount of the said property, such payment being, as we submit, a payment in our own wrong,

cannot prejudicially affect us in respect to the claim now sought to be enforced against us.

2. With the exceptions above referred to, the statements contained in the first six paragraphs of the said information are, we believe, correct.

3. We do decline to pay legacy duty at the rate of 5l. per cent. in respect of so much of the testator's residuary estate as, in the events which have occurred, has, under his will, become the property of his daughter's uncle and aunt (and which, in the said information, is described as having, by the will of the said testator's daughter, been given to her said uncle and aunt). We decline to pay duty at that rate upon the ground that, in the events which have occurred, no duty at that rate is payable; but we have repeatedly offered, and are willing, to pay duty at the rate of 3l. per cent. in respect of the said property.

The Attorney General, the Solicitor General, Locke and Hanson, for the Crown. The question for discussion is, whether the rate of duty payable to the Crown is 3l. or 5l. per cent. If the will of the donee of the power operates as an execution of her power, and the appointees, who are the uncle and aunt of the testatrix and may be treated as the real defendants,^(a) take under the power, duty is payable at the rate of 5 per cent. If, on the other hand, the appointees, who are the brother and sister of the donor of [787] the power, and who under the will creating the power would take in default of appointment, can do so here, duty will, in that event, be payable at the rate of 3l. per cent. only. Two points are made by the defendants: first, that the general devise does not operate as an execution of the power of appointment: secondly, assuming that it does, the defendants are entitled to reject the appointment, and disclaim taking under it, so as to enable them to take under the bequest to them in default of appointment. To the first point a conclusive answer is given by the language of the 1 Vict. c. 26, s. 27,^(a) which is express, that a general bequest of personal estate shall include any personal estate, which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. Here there is no indication of any such intention. As to the second point, undoubtedly the appointees might reject the property altogether. That, however, is not their object. Their object is, by rejecting their better title, to take under an alternative title, which could only exist if their better title had no existence. A person [788] in possession by virtue of a worse title when his better title accrues has, by the common law, no power of election, but is remitted to his better title. The argument, that the appointees can elect to take in default of appointment, when there has been a valid appointment in their favour, involves a contradiction of language. This, however, is no abstract question, but depends upon the intention expressed by the legislature in the Acts which impose the duty. The 55 Geo. 3, c. 184, is the statute which regulates the rate of duty, but the 8th section of that Act incorporates the provisions of previous enactments. The provisions of 36 Geo. 3, c. 52, applicable to this case, which do

(a)¹ It was stated, in the course of the argument, that it had been arranged between the Crown and the defendants, as representing the residuary legatees, that the case should, with the permission of the Court, be argued without reference to any question as to the fitness of the parties, defendants on the record, or as to whether the time at which the duty became payable had arrived, but solely with reference to what the rate of duty was, which was payable. See the judgment of Channell, B.

(a)² Sect. 27 enacts: "That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

not relate to the amount of duty, remain in force. The 7th (a) and 18th (b) sections of that Act are in *pari materia*, and must be read together. The language of the 18th section is express, that it is the execution of the power, not the acceptance by the appointee, which renders the property, for the purpose of taxation, the property of the donee of the power and chargeable as such with duty, upon the principle that the donee has exercised absolute dominion over it. It follows that, under the 7th section, the property must be treated, for the purpose of taxation, as derived from the [789] estate of the donee, and not as a gift, which, if the appointees disclaim, they can take under their earlier title. It is true the donee cannot herself have the full enjoyment of the property on which the power operates, since she can only exercise it by will. It is, however, concluded by authority that such a power is a general power within the meaning of the 7th and 18th sections: *Platt v. Routh* (6 M. & W. 756). There, upon a case stated by order of the Master of the Rolls, it was held by this Court that a power which could only be exercised by will, and from the benefit of which certain individuals were excluded, was a power to dispose as the testatrix should think fit, within section 7, and a general and absolute power within section 18. The Master of the Rolls confirmed the certificate of this Court: *Platt v. Routh* (3 Beav. 257); and, upon appeal, the House of Lords affirmed his judgment: *Drake v. The Attorney General* (10 Cl. & F. 257). That case is also an authority that, by the execution of the power in the present case, the executors of the donee were made liable to the additional duty, and have not paid it in their own wrong. There, too, the fund was appointed to persons entitled in default of appointment, but no point of election was ever raised. Again, it is a settled principle of law that every appointment under a general power makes the property upon which it operates assets for the payment of debts: *Lord Townshend v. Windham* (2 Ves. 1), *Platt v. Routh* (6 M. & W. 789). By the terms of this will the fund appointed is expressly charged with the payment of debts, funeral and testamentary expenses, legacies and annuities, and the residue of the fund, after these charges have been paid, is blended in one mass with the residuary estate of the testatrix. Can the ultimate appointees elect to disclaim, [790] so as to prejudice these charges? Can they separate and reject the portion of the residuary estate which comes to them by appointment while they accept and retain the other portion? Further, the creation of charges, which the executors must satisfy, and the blending of the residue of the fund with the general residue, shew, by implication, that this fund, like the general residue, must vest in the executors. If so, it is clear, on the authorities, that if, by lapse or otherwise, the appointment fails, the fund would not go as in default of appointment, but to the next of kin of the testatrix: *The Attorney General v. Staff* (2 Cr. & M. 124), *Goodere v. Lloyd* (3 Sim. 538), *Chamberlain v. Hutchinson* (22 Beav. 444). The principles of construction applicable to the will which creates and the will which executes the power, the sections of the Acts cited, and the general principle which renders the exercise of a general power of appointment necessarily operative to make the property assets for the payment of the appointor's debts, all concur to exclude the notion that the appointees can elect, by a disclaimer, to take in default of appointment.

Mellish and Dart, for the defendants. To constitute a complete appointment there must be, first, a sufficient exercise of the power; secondly, a person competent and willing to take under the appointment. There is no such complete appointment here. The exercise of the power fails to carry out the intention with which the donor

(a) Sect. 7 enacts: "That any gift by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this Act," &c. .

(b) Sect. 18 enacts: ". . . and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof," &c.

created it, viz., to enable the donee to appoint to persons other than those who would take in default of appointment.

But, first, this general devise would, prior to the passing of the 1 Vict. c. 26, s. 27, have been no execution of the power, and this, it is submitted, is not a case to which the [791] 27th section of that Act was intended to apply. The object which the legislature had in view was to effectuate the presumed intention of testators to include in a general devise property over which they had a power of appointment. Such an intention can only be presumed where the general bequest is in favour of persons other than those who would take in default of appointment, or where, although the same persons, they would take in a different manner. Thus, in *Platt v. Routh* (6 M. & W. 756), even assuming that the same persons who there took the 10,000l. consols as appointees would also have taken in default of appointment, they would have taken in a different manner. Under the appointment they would take as tenants in common; in default of appointment as joint tenants, there being no words of severance.

Secondly, the defendants were entitled to repudiate the gift under the power, and elect to take in default of appointment. It must, however, be conceded, on the part of the defendants, that no disclaimer by them could in any way affect the charges, which, if not paid out of the residuary estate of the testatrix,^(b) would, no doubt, have to be satisfied out of this fund. [Martin, B. That admission appears to me conclusive against the defendants. Pollock, C. B. It is not competent for the appointees to take under the will in part and reject in part.] If apt words had been used, the will of the testatrix might have been so framed as to execute the power of appointment for the purpose of securing the debts and other charges, [792] and to leave it unexecuted as to the residue. [Wilde, B. That would be exercising dominion, not over a specific part of the property, but over the whole.] Only to the extent that might be necessary for the purpose of satisfying the charges. The language of the 36 Geo. 3, c. 52, ss. 6, 7, and the 55 Geo. 3, c. 184, sched. part 3, tit. Legacies (by which the rate of duty is fixed), shew that no legacy duty is payable until after the legacy shall have been paid and satisfied. It follows that if the legatees disclaim, no duty ever becomes payable. The Crown has relied on the fact, that, under the 36 Geo. 3, c. 52, s. 18, an additional duty became payable by the donee of the power, upon the execution of the power. It is clear however that such duty is payable in respect of the devise to the donee of the power, and would be equally payable if her estate were insolvent; while legacy duty on her will would only be payable in respect of the sums which the legatees took under it. The cases cited to shew that the property would, in the event of a disclaimer, go to the next of kin are obviously distinguishable. The power was in each case exercised in favour of the executors, and that was followed by a distinct bequest of the rest of the property; whereas here the general devise is, as regards the residue, the only execution of the power of appointment. In *Chamberlain v. Hutchinson* (22 Beav. 444), which more nearly resembles the present case, the testatrix, having a general power of appointment over a fund, first appointed it to her executor and charged it with debts and legacies, and then after blending it with her residuary estate bequeathed a moiety of the whole to the person entitled, in default of appointment, to a moiety of the appointed fund. Thus she executed the power to make the estate her own, and then proceeded to bequeath it, not for the purpose of executing the power, but [793] as part of her personal estate. The bequest having lapsed, the Master of the Rolls thought the appointor had shewn her intention to make the fund a part of her personal estate, and that therefore the next of kin were entitled. *The Attorney General v. Staff* (2 Cr. & M. 124) and *Goodere v. Staff* (3 Sim. 538) are distinguishable on similar grounds. So far as *The Attorney General v. Staff* was a decision that the property appointed to the executors became liable to probate duty, it was overruled by the subsequent case of *Platt v. Routh* (6 M. & W. 756). [Wilde, B. Is there any authority to shew that if one or more appointees reject the benefit of an appointment, that circumstance brings into operation the bequest in default of appoint-

(b) It was stated in the course of the argument, that, independently of her power of appointment, Miss Brackenbury died in the absolute possession of a large personal estate, which was amply sufficient to satisfy the debts and the charges upon her residuary estate. The Court, however, intimated that they could not take notice of fact unless it was formally raised on the record.

ment? No case has been found in which the benefit of an appointment has been rejected. On principle, however, it is contended that if real or personal estate be devised upon trust for such persons as A. shall appoint, and in default of appointment to B.; if A. appoints to a person, who disclaims, the estate will not go to the executors or next of kin of the person who executed the power, but it will go to B. as in default of appointment. The words "default of appointment" must mean default of an appointment under which the appointee takes. If so, the appointment would operate to secure the charges, but no further. Here, if the appointees had predeceased the donee of the power, could it be doubted that effect would be given to the gift in default of appointment? Again, if the donee had annexed an onerous condition to the enjoyment under the power, could not the appointees have disclaimed? But if the right to elect exist at all it must be independent of the reason for which it is exercised. In the case of *Re Barker* (7 H. & N. 109) Pollock, C. B., said that the Crown must shew itself entitled in substance and technicality. In [794] substance, beyond doubt, this gift has its origin in the bounty of the donor of the power.

The Attorney General was not called upon to reply.

POLLOCK, C. B. I am of opinion that the executors of the will of the testatrix are bound to pay legacy duty at the rate of 5 per cent. The testatrix, by the mode in which she framed her will, appointed and exercised dominion over the fund subject to her power of appointment, by making it liable to her debts, and to legacies and annuities. When Mr. Mellish was compelled to admit, that 'as to the debts, legacies, and annuities, there was a valid exercise of the power, there was, as my brother Martin remarked at the time, virtually an end of the case. The uncle and aunt of the testatrix, if they take the property, must take it by virtue of her will, and are therefore liable to a duty at the rate of 5 per cent.

MARTIN, B. I am of the same opinion. It is not necessary to say what my judgment might be in a case where, within a reasonable time after the death of the donee of a power, the appointees disclaimed all benefit accruing to them under the will which executed the power, and elected and declared their election to take under the gift in the will by which the power was created. That is not the case with which we have to deal. Upon the true construction of the statements in this information and answer, I think we ought to assume that the defendants, and the persons beneficially entitled whom they represent, were either entirely silent in the matter, or, if not, that they did consent to take under the will of the testatrix.

Now the facts are these: Mr. James Brackenbury by his [795] will bequeathed to his daughter an estate for life in this property, and he further provided that, after her decease, it should remain and be upon and for such trusts, intents, and purposes, as his said daughter by her will should direct and appoint, and in default of such direction or appointment, or so far as any such, if incomplete, should not extend, in trust for his said brother and sister, their executors, administrators and assigns. In point of fact the testator's daughter did deal with this property, and declared it to be liable to the payment of her debts, funeral and testamentary expences, and the legacies and annuities given by her will, and that, subject thereto, it should be equally divided between her uncle Mr. Ralph Brackenbury, and her aunt Miss Hannah Brackenbury. It would seem to follow from the case of *Chamberlain v. Hutchinson* (22 Beav. 444), that the testatrix, by electing to exercise her power so as to charge the property with her debts, funeral and testamentary expences, legacies and annuities, thereby took it to herself, and treated it as, and made it part of her personal estate; and that, in the event of a disclaimer, the next of kin, and not Mr. Ralph Brackenbury and Miss Hannah Brackenbury (assuming that they are different persons from the next of kin), would be entitled to the residue of the property. When Mr. Mellish admitted that to this extent there was a valid appointment, the case was at an end; because, when that admission is made, we are bound to assume that the appointees take under the will of the donee of the power. They must therefore pay the duty according to their relationship to her, and not to the original testator.

CHANNELL, B. Mr. Mellish has argued that, upon the construction of the statutes which have been referred to, no duty whatever is payable at this time. Upon that point, I [796] express no opinion, because I consider that the question upon which the parties have come here to obtain the opinion of the Court is, whether, assuming the event to have happened which entitles the Crown to some duty, that duty should be

payable at the rate of 3 or 5 per cent. I am of opinion that the Crown is entitled to duty at the rate of 5 per cent.

The defendants are in my judgment liable to that duty, if the uncle and aunt take under the will of their niece; and they do so take, unless they are entitled to disclaim the gift under the appointment, and elect and have elected to take it under their brother's will. As soon as Mr. Mellish admitted, what is really indisputable, that the will of the niece operated not merely upon that portion of the property which she derived from her father's will, but upon the whole property to this extent, that at least there was a valid appointment so far as to give effect to that portion of her will which made debts, legacies, and annuities chargeable upon her estate, the uncle and aunt were precluded from saying they could take under the bequest in their favour in the original will, and that they do not take under her will. The case of *Chamberlain v. Hutchinson* (22 Beav. 444) is an authority, which is here almost decisive. The distinction no doubt exists, which Mr. Mellish has pointed out, that the power was in that case exercised by the donee in favour of her executors in express terms; but that distinction would not prevent the application of the case as an authority, it would only remove one of the grounds of its application. Upon the whole, I am clearly of opinion that the Crown is entitled to duty at the rate of 5 per cent.

WILDE, B. I am of the same opinion. The testatrix in this case has executed a valid appointment in favour of [797] creditors and others, with a direction of the residue to her uncle and aunt. It is nevertheless contended that the uncle and aunt, by refusing to take the benefit of the appointment, can bring into operation the bequest, which the original will created in their favour in default of appointment. No authority has been cited for the proposition, that the rejection by one or more of the appointees of the benefit of an appointment, is equivalent to a default of appointment; and it would to my mind be strange if it could be so. The appointment is a valid appointment; it is the exercise of a power, by which the testatrix has successfully assumed to herself the entire dominion over the fund. From this dominion two consequences inevitably follow: first, her executors become liable to the additional duty, under the 18th section; secondly, the fund becomes assets available for her creditors. It appears to me so violently inconsistent with this state of things, to hold that there has been a default of appointment, that the proposition requires no further refutation.

Judgment for the Crown.

NEWALL v. ELLIOT AND ANOTHER. Jan. 29, 1863.—Proceedings in Chancery for the infringement of a patent, the validity of which was in question, were referred to an arbitrator, who awarded that the patent was not illegal and void: Held, that in an action between the same parties for another infringement, the defendant was not estopped from disputing the validity of the patent.

[S. C. 32 L. J. Ex. 120; 9 Jur. (N. S.) 359; 11 W. R. 438; 7 L. T. 758. Referred to, *Bedford v. Cowtan*, [1916] 1 K. B. 989. For former proceedings between the same parties see 4 C. B. N. S. 269.]

Declaration for the infringement of a patent for improvements in the apparatus employed in laying down submarine electric telegraph cables.

Pleas (inter alia). Third: that the plaintiff was not the first and true inventor of the said invention.

Fourth. That the plaintiff did not, within six calendar [798] months after the date of the alleged letters patent, cause to be filed a sufficient specification.

Fifth. That the invention in the specification described was not the invention for which the letters patents were granted.

Sixth. That the supposed invention was not new as to the public use and service thereof.

Seventh. That the invention was not an invention for the sale, working or making of any manner of manufacture for which letters patent could be granted according to the statutes in that case made and provided.

Replication to third plea. That, before the commencement of this suit, the plaintiff filed a bill in Chancery against the defendants, complaining that the defendants had infringed the patent right in the declaration mentioned, being another and

a different infringement from that in the declaration mentioned, and praying the said Court to grant an injunction against the defendants restraining them from infringing the said patent right; and thereupon, by an agreement in writing between the plaintiff and the defendants, it was agreed to refer the matter to an arbitrator. (The replication set out the agreement, by which, after reciting that the plaintiff charged the defendants with infringing his patent; that the defendants denied the validity of the patent, and that the parties had agreed to refer the whole matter to arbitration; it was agreed that, in case the arbitrator should be of opinion that there had been an infringement of the patent by the defendants, he should give the plaintiff such compensation as he thought should be paid for the articles in use; and it was further agreed that the arbitrator should, if necessary, state a special case for the opinion of one of the superior Courts.) And thereupon the arbitrator took upon himself the said reference, and the plaintiff and defendant attended and appeared before him; and the defendant, [799] amongst other things, contended before the said arbitrator that the plaintiff was not the first and true inventor of the said invention, and that the said letters patent were illegal and void on that ground. And thereupon the said arbitrator made and published his award in writing of and concerning the premises, and thereby awarded and decided that the said letters patent were not illegal and void; and in further pursuance of the said agreement of reference, being required by the defendants, the said arbitrator stated a case for the opinion of the Court of Common Pleas on certain points of law, and the said points of law were adjudged and decided by the said Court of Common Pleas in favour of the plaintiff.

There were similar replications to the fourth, fifth, sixth, and seventh pleas, alleging that the defendants had contended before the arbitrator that the letters patent were illegal and void on the grounds stated in those pleas respectively.

There was also a further replication to all the above pleas, alleging that the defendants contended before the arbitrator that the letters patent were illegal and void, and that the arbitrator awarded that they were not illegal and void.

Demurrer to each of the replications, and joinder therein.

Cleasby (Bidder with him) argued in support of the demurrers (Jan. 21st). There is no estoppel. Estoppels are by matter of record, by deed, or in pais. The subject-matter of these replications is not within either of those classes. An estoppel in pais can only arise from some act or conduct of the parties themselves, as in the case of landlord and tenant, drawer and acceptor of a bill of exchange, and not from the act of a third person. Here there is no deed. Then as to estoppel by record, the cases only go to this extent, that if issue be joined upon a particular fact, in a Court of record having competent jurisdiction, and the [800] finding is recorded, the parties to that record are estopped from disputing it, whether the finding is by the verdict of a jury or the award of an arbitrator. Here however, there is no record. The replications merely disclose matter arising inferentially from the award. He was then stopped by the Court.

Quain (with whom was G. Denman), contra (Jan. 26th). The replications shew that the matter in dispute between the parties is *res judicata*. The finding of an arbitrator upon the same point, between the same parties, might be said to be an estoppel in pais, for it is a finding by a person appointed by the parties themselves. But, at all events, it is an estoppel by matter quasi of record. In *Smith's Leading Cases*, vol. 2, p. 674, it is said that "decrees of the High Court of Chancery, which, although a superior Court, seems not to be, at least upon its equity side, a Court of record (see *Co. Litt.* 260), stand, nevertheless, on the same level with the judgments of the three superior Courts of common law." Then, after enumerating as instances of estoppels quasi of record, judgments of the Courts ecclesiastical, and Courts of Admiralty, the sentence of a college visitor, and a court martial, it is said (p. 682): "Sentence of deprivation by a visitor appears to differ from the other cases above touched upon in this respect, viz., that it is the sentence of a tribunal which has in many instances been created by a private individual. This does not, however, seem to alter the principle; for, though no private individual can create a Court whose sentence shall have operation on the persons or properties of others, yet there is no reason why he should not create one having operation on his own; unless, indeed, he introduce some term inconsistent with public policy. Thus, on the same ground on which a visitor's sentence is supported stands the case of the trustees [801] of a school dismissing the schoolmaster for misconduct: *Doe v. Haddon* (3 Doug. 310); see

Rea v. Darlington School Governors (6 Q. B. 682); and the ordinary case of an arbitrator, whose forum is a domestic one constituted by the parties themselves, who are bound by its award." [Martin, B. Suppose one officer strikes another, and is tried by a court martial and acquitted, surely that would not be an estoppel in an action for the assault? What is said in Smith's Leading Cases as to an award is no authority for saying that an award would be an estoppel in an action for another infringement of the same patent.] In *The General Steam Navigation Company v. Guillou* (11 M. & W. 877) it was assumed that a plea, in substance, that the cause of action has been already adjudicated upon, in a competent Court, against the plaintiffs, and that the decision is binding upon them, and that they ought not to be permitted again to litigate the same question, would have been good by way of estoppel, if it had been formally pleaded. [Martin, B. In Com. Dig., tit. "Estoppel" (E. 4), it is said, "So an estoppel ought to be certain to every intent: Co. Lit. 353 b. And therefore, if a thing be not directly and precisely alleged, it shall not be an estoppel: Co. Lit. 352 b." Pollock, C. B. In *Plummer v. Woodburne* (4 B. & C. 625) a plea of a judgment recovered in a colonial Court for the same cause of action was held bad for not shewing that the judgment was final and conclusive in the colony itself, so as to bar the plaintiff from another action here.] In *Lord Faversham v. Emerson* (11 Exch. 385) it was assumed that an award as to the boundaries of a manor would have been conclusive if it had been pleaded as an estoppel. [Wilde, B. This action is not in respect of the same matter upon which the arbitrator made his award; [802] and it is only by inference that the award can be made a decision upon the points now in dispute.] In order to make the award an estoppel between the same parties, it is not necessary that the action should be for the same infringement in respect of which the award was made. This is like the ordinary case of an action for mesne profits, in which, to a plea of not possessed, the plaintiff replies by way of estoppel the judgment in ejectment. [Martin, B. The reason is that the action for mesne profits is ancillary to the action of ejectment. Assuming that, in order to arrive at the conclusion which the arbitrator has come to in favour of the patent, it must necessarily be inferred that he decided the points now in dispute between the plaintiff and defendant, still that is not such a decision as to render the award an estoppel within the rule laid down in Com. Dig., tit. "Estoppel" (E. 4).] In *Boileau v. Rutlin* (2 Exch. 665) there are dicta in favour of the plaintiff. In *Doe v. Rosser* (3 East, 15) it was held that, although the award could not have the operation of conveying the land, yet it concluded the defendant from disputing the title of the lessor in ejectment. So, here, the parties having agreed that the validity of the letters patent shall be determined by an arbitrator, have agreed that his award shall be final. [Martin, B. The passage in Co. Lit. 325 b. is precisely in point: "Every estoppel, because it concludeth a man to acknowledge the truth, must be certain to every intent, and not to be taken by argument or inference."]

Quain then applied for leave to amend.

POLLOCK, C. B. The Court will take time to consider whether they ought to act in violation of the general rule, and allow the defendant to amend after so long an argument.

Cur. adv. vult.

[803] POLLOCK, C. B., now said,—In this case we expressed an opinion, at the time of the argument, that there was no estoppel, and the only question was whether we ought to allow the plaintiff to amend. After consideration, we think that we ought not to allow an amendment, and there will therefore be judgment for the defendant.

Judgment for the defendant.

HARDMAN AND OTHERS v. BOOTH. Jan. 12, 1863.—The plaintiff, a manufacturer, called at the place of business of "Gandell & Co." for orders for goods. At that time the firm consisted of Thomas Gandell only, and the business was managed by Edward Gandell, a clerk. On inquiring for Messrs. Gandell, the plaintiff was directed to a counting-house where he saw Edward Gandell, who led the plaintiff to believe that he was one of the firm of Gandell & Co., and under that belief, at the request of Edward Gandell, the plaintiff sent goods to the place of business of Gandell & Co., and invoiced them to "Edward Gandell & Co." Edward

Gandell, who, unknown to the plaintiff, carried on business with one Todd, pledged the goods with the defendant for advances *bonâ fide* made to Gandell & Todd, and the defendant afterwards sold the goods under a power of sale. Held, that there was no contract of sale, inasmuch as the plaintiff believed that he was contracting with Gandell & Co., and not with Edward Gandell personally, and Gandell & Co. never authorized Edward Gandell to contract for them; consequently no property passed, and the defendant was liable in trover for the amount realized by the sale.

[S. C. 32 L. J. Ex. 105; 9 Jur. (N. S.) 81; 11 W. R. 239; 7 L. T. 638. Followed, *Hollins v. Fowler*, 1875, L. R. 7 H. L. 757; *Cundy v. Lindsay*, 1878, 3 A. C. 467. Referred to, *Cole v. North Western Bank*, 1875, L. R. 10 C. P. 373; *Arnold v. Cheque Bank*, 1876, 1 C. P. D. 585.]

Trover for twenty-two pieces of serge and eighty-two pieces of woollen linings of the plaintiffs.

Pleas. First: Not guilty. Second: that the goods are not the plaintiffs'. Issues thereon.

At the trial, before Martin, B., at the London Sittings after last Trinity Term, the following facts appeared:—The plaintiffs were worsted manufacturers at Rowton-stall, near Manchester, and they employed Messrs. Hughes and Keighley as their London agents. In May, 1862, one of the plaintiffs being in London, and having heard of a firm of Gandell & Co., in Joiners' Hall Buildings, Upper Thames Street, called, with Keighley, at those premises and inquired for Messrs. Gandell. At that time the firm, which had been established eighty or ninety years, and was well known, consisted only of Thomas Gandell, who was old and in bad health; and his son, who was his clerk, managed the busi-^[804]ness. The firm of Gandell & Co. was only known to the plaintiff and Keighley by reputation, and, on their inquiring for Messrs. Gandell, one of the workmen directed them to the counting-house, where they found Edward Gandell. Keighley said, "I believe you are a buyer of the class of goods Mr. Hardman is making," and introduced the plaintiff to him. After some conversation, and when they were about to leave, Edward Gandell said, "We are government packers, but we have a shipping connection that we sometimes buy for, and I have no doubt we shall be able to do a little business together." On leaving, the plaintiff began to copy the name from the door-post, when Edward Gandell handed him a printed card, having on it: "Thomas Gandell & Co., Packers, Joiners' Hall Buildings, 79 Upper Thames Street." Keighley had two subsequent interviews with Edward Gandell, at the first of which he introduced him to one Todd. The goods in question were ordered by Edward Gandell, and sent at two different times in July. The first lot was sent to Joiners' Hall Buildings, and a receipt for it was given by one of Gandell & Co.'s men; the other lot was taken away in a cart of Gandell & Co., which Edward Gandell had offered to send for it. The plaintiff drew a bill of exchange for the first lot of goods on "Messrs. Thomas Gandell & Co.," but, at the request of Edward Gandell, the name was altered to "Edward." The invoice for both lots was headed: "Messrs. Edward Gandell & Co., Joiners' Hall Buildings, Upper Thames Street, London. Bought of Hardman, Brothers, per William Hughes & Co." Edward Gandell carried on business in partnership with Todd, whom he introduced to Keighley, and who had an office in Size Lane. Neither the plaintiff nor Keighley knew of the firm of Gandell & Todd. The goods were pledged by Edward Gandell to the defendant, who was an auctioneer, with a power of sale, as a security ^[805] for 300l. *bonâ fide* advanced by the defendant to Gandell & Todd. Shortly afterwards Gandell & Todd became bankrupt; and the defendant, in pursuance of the power, sold the goods by auction for 344l., and retained 300l. and paid over 44l. to the assignees.

It was submitted, on behalf of the defendant, that the action was not maintainable, inasmuch as there was a sale of the goods to Edward Gandell. The learned Judge nonsuited the plaintiffs, reserving leave to move to enter the verdict for them for 344l.

Ballantine, Serjt., in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that no property passed to Edward Gandell in consequence of his fraud, and therefore the defendant was liable for the value of the goods.

Hawkins now shewed cause. There was a sale of the goods to Edward Gandell. The dealing took place with him, and the invoice was made out in his name. No

doubt, the plaintiffs supposed that they were dealing with Gandell & Co., but where a person represents himself as belonging to a particular firm, and a party, believing that, contracts with him, though he may be liable to an action for a false representation the contract is nevertheless valid. The plaintiffs might have sued Edward Gandell for the price of the goods. Fraud does not vitiate a contract as against a bonâ fide purchaser without notice. In *Stevenson v. Newnham* (13 C. B. 285, 302) Parke, B., said that the effect of fraud "is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance, the property passes in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indefeasible title to it, though it is [806] voidable between the original parties. This was decided in the recent case of *White v. Garden*" (10 C. B. 919). *Kingsford v. Merry* (1 H. & N. 503) is no authority against the proposition contended for, because in that case there was no contract which could be disaffirmed. A vendor who seeks to avoid a contract for the sale of goods on the ground of fraud, must exercise his option before a transfer to a bonâ fide purchaser. He also referred to *Milne v. Leitter* (7 H. & N. 786).

Giffard and Poland, in support of the rule. No property in the goods ever passed from the plaintiffs. They only intended to sell to Gandell & Co., through their agent, Edward Gandell. At what period of time was there a contract between the parties? Never: for the one party did not mean to sell and the other did not mean to buy. There never were two consenting minds. It is not the case of a contract made by fraud, which the vendor had the option of rescinding, but the case of goods obtained by a trick without any property passing. *Kingsford v. Merry* (1 H. & N. 503) is an authority in favour of the plaintiffs.

POLLOCK, C. B. I am of opinion that the rule should be absolute. The first question is whether there was a contract. It is difficult to lay down any general rule by which, at all times and under all circumstances, it may be determined whether or no there is a contract voidable at the option of the party defrauded, but in this case I think it clear that there was no contract. Mr. Hawkins contended that there was a contract personally with Edward Gandell, the individual with whom the conversations took place. It is true that the words were uttered by and to him, but the plaintiffs supposed that they were dealing with Gandell & Co., the [807] packers, to whom they sent the goods; the fact being that Edward Gandell was not a member of that firm and had no authority to act as their agent. Therefore at no period of time were there two consenting minds to the same agreement. Then, what is the consequence? A person having no authority whatever over the goods sends them to the defendant, an auctioneer, who, supposing the goods belong to that person, bonâ fide advances money upon them, taking a power of sale; but that did not authorize him to sell another person's goods, and retain the proceeds to reimburse himself. I think that he is liable to the extent of the money realized by the sale, and that the rule should be absolute to enter the verdict for that amount.

MARTIN, B. I am also of opinion that there was no contract. I cannot doubt that the plaintiffs believed that they were dealing with Gandell & Co., the packers. The cases cited are quite correct; and if Gandell & Co. had obtained the goods by means of fraud, the plaintiffs might have been precluded from recovering. But the case is very different. The goods were obtained by the fraud of Edward Gandell, who pretended that he was a member of the firm of Gandell & Co., and led the plaintiffs to believe that they were dealing with Gandell & Co. The only doubt I have had was whether there ought not to be a new trial, in order that the question might be submitted to a jury; but I do not think it right to send down the case for a new trial, for it is clear that the plaintiffs believed that they were dealing with Gandell & Co., and therefore there was no contract.

CHANNELL, B. I am also of opinion that there ought not to be a new trial, but that the rule ought to be absolute to enter the verdict for the plaintiffs. I do not think that the defendant was in the position of a mere conduit-pipe, [808] as a carman would have been; but that he is responsible for the conversion of the goods, and the plaintiffs are entitled to recover provided the goods belong to them. There is no doubt they were originally the plaintiffs' goods, and they must still be theirs unless there has been a contract of sale to divest the property. It is not suggested that there was a sale to Gandell & Co.; and I do not think there was a sale to Gandell &

Todd, or either or them, so as to render a repudiation of the contract by the plaintiffs necessary, for it is evident that the plaintiffs believed that they were dealing with Gandell & Co., and never meant to contract with Gandell & Todd.

WILDE, B. I am of the same opinion. The defendant made advances to Gandell & Todd upon the security of the goods, and under a power of sale he sold them to recoup himself. The defendant now sets up a contract, voidable he admits, between the plaintiffs and Edward Gandell; and if there had been such a contract, and the defendant had sold the goods before the plaintiffs repudiated it, no doubt the defendant would have had a good defence. The real question therefore is, whether there has been such a dealing as amounts to a sale. It is clear that there was no sale to Gandell & Co., because they never authorized Edward Gandell to purchase for them; and it is equally clear that there was no sale to Edward Gandell, because the plaintiffs never intended to deal with him personally. The fact of his name being Gandell cannot affect the question, inasmuch as the dealing was not with him personally, but under the belief that he represented the firm of Gandell & Co. The result is that there was no contract, and the evidence is too strong to render it worth while to submit the case again to a jury.

Rule absolute.

[809] SULLY v. NOBLE AND ANOTHER. Jan. 30, 1863.—Where notice of trial has been given for a particular sittings, and at the request of the defendant the cause is made a remanet to a subsequent sittings, a countermand of trial by notice four days before such subsequent sittings is sufficient.

[S. C. 32 L. J. Ex. 145; 11 W. R. 344; 7 L. T. 720.]

This cause was entered for trial at the first sittings in Middlesex in the present term. On the 14th of January, and during the sittings, the cause was made a remanet to the third sittings, the 28th of January, on the application of the defendants, on the ground that a material witness was in Spain. On the 15th of January a telegraph message was sent to Spain to procure the attendance of the witness. On the 19th of January the plaintiff countermanded his notice of trial, and on the 21st withdrew the record. On the 23rd of January the witness arrived in London.

J. Brown now moved for a rule calling on the plaintiff to shew cause why he should not pay the defendants their costs of the day incident on his not going to trial pursuant to notice. By the 48th section of the Common Law Procedure Act, 1852, "a countermand of notice of trial shall be given four days before the time mentioned in the notice of trial, unless short notice of trial has been given, and then two days before the time mentioned in the notice of trial, unless otherwise ordered by the Court or a Judge, or by consent." The plaintiff having given notice for the sittings in term, could only countermand it by a notice four days before those sittings. The making the cause a remanet was a mere adjournment of it. [Martin, B. The defendant ought not to have the costs of the day, for he received a proper countermand before the third sittings, and by his own act he practically caused the notice of trial to be given for those sittings. Pollock, C. B. The defendant, by procuring the cause to be made a remanet, has substituted one sitting for another.]

Per Curiam.(a) There will be no rule.

Rule refused.

[810] HILARY VACATION, 26 VICT.

HODGSON v. WIGHTMAN. Feb. 4, 1863.—The 194th section of the Bankruptcy Act, 1861, applies not only to deeds which comply with and are framed under the 192nd section, but to every deed whatever which is or professes to be, or is obviously on the face of it, intended to be a deed of arrangement between a debtor and the whole body of his creditors.—Every such deed, therefore, which is not registered in the Court of Bankruptcy, under the provisions of the 194th section, is inadmissible in evidence.—A deed of composition purported to be

(a) Pollock, C. B., Martin, B., Channell, B., and Wilde, B.

entered into between a debtor and the creditors who executed the deed, and the said creditors (stated therein to be or represent, at the least, three-fourths in value of the creditors), in consideration of the payment of a composition, which the debtor covenanted to pay to them by two instalments on specified days, released their debts. It did not appear whether all the creditors, or what proportion of them in number and value executed the deed. In an action by one of the executing creditors against the debtor, the deed of composition being offered in evidence by the defendant in support of a plea of release: Held, that this was a deed intended to be executed by or binding on the whole body of creditors, and that being unregistered it could not be given in evidence.

[Followed, *Prichard v. Timothy*, 1866, 4 H. & C. 396. Referred to, *Ex parte Atkinson*; *In re Brooksbank*, 1870, L. R. 9 Eq. 745.]

Declaration by indorsee against acceptor of five bills of exchange, with counts for money received, for interest, and on accounts stated.

Plea (inter alia). That after the accruing of the said several causes of action, and before this suit, the plaintiff by deed released the defendant therefrom.

At the trial, before Bramwell, B., without a jury, at the London Sittings after last Trinity Term, the following facts appeared:—The action was brought to recover 288l. 16s. alleged to be due upon five bills of exchange, together with a balance claimed for interest. The defendant, in March, 1862, being in embarrassed circumstances, called a meeting of his creditors and offered them a composition of 6s. in the pound, payable by two instalments, which composition the plaintiff agreed to accept upon the sum of 288l. 16s., the amount of the bills which were then overdue. A deed of arrangement was accordingly drawn up, which (so far as material) was as follows:—

[811] “This indenture, made the 31st day of March, 1862, between George Wightman of, &c., of the one part, and the several persons whose hands and seals are hereto subscribed and affixed (or agents or solicitors of creditors) being creditors of the said George Wightman, of the other part: Whereas the said George Wightman hath for some years last past carried on business in the town of Nottingham; and whereas, owing to the badness of the trade, the said George Wightman hath contracted certain debts to the parties hereto of the second part, and which said respective debts are set opposite to their respective names, and which he is unable to pay in full; and whereas the said parties hereto of the second part, being or representing at the least three-fourths in value of the creditors of the said George Wightman, have agreed to take the sum of 6s. in the pound in full satisfaction and discharge of their respective debts, and to effectually release the said George Wightman from all liability in respect of such debts as aforesaid: Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the sum of 6s. paid by the said George Wightman for every pound due by him to them, the said parties hereto of the second part, they, the said parties hereto of the second part (being or representing, at the least, three-fourths in value of the creditors of the said George Wightman) so far as in them and each of them lies, do, and each of them doth acquit, release, and discharge the said George Wightman, his executors, administrators and assigns, from all liability whatsoever with regard to the said debts, or any part thereof. And the said George Wightman, for himself, his executors, administrators, and assigns, doth covenant, promise, and agree to and with the said several parties hereto of the second part, that he, the said George Wightman, will pay or cause to be paid to them, and each [812] of them, the said sum of 6s. for every pound due by him to them as aforesaid; such composition of 6s. in the pound to be paid by the said George Wightman by two instalments of 3s. each, the first on the 5th day of May, and the second on the 7th day of July now next ensuing. And they, the said parties hereto of the second part, do, and each of them doth, so far as in them lies, covenant, promise, and agree to and with the said George Wightman, his executors, administrators, and assigns, that they, or any of them, will not make, do or execute, or cause to be made, done or executed, any act, deed, matter or thing whatsoever, whereby the said George Wightman, his executors, administrators or assigns, shall be prejudiced or made liable with respect to the said deeds from which he is hereby released; and that they, the said parties hereto as aforesaid, do, each of them, accept the said sum of 6s. for every pound in full discharge of their respective debts.”

The deed was executed by the defendant and the plaintiff and by or on behalf of thirteen other creditors. The execution of the deed by the defendant was attested by a solicitor. The amounts of the creditors' debts (that of the plaintiff 288l. 16s.) were inserted in the deed opposite the signatures of the different creditors. It did not appear whether all the creditors, or if not all how large a proportion in number or value, in fact executed the deed. Conflicting evidence was adduced on the part of the plaintiff and the defendant as to whether there had been any tender by the defendant of the first instalment; and also whether he had refused to pay it unless the plaintiff would accede to new terms: but the learned Judge was of opinion that there had been neither offer nor refusal to pay the instalment.

The plaintiff's counsel objected to the admissibility of the deed, on the ground that, under the 194th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), it [813] required registration in the Court of Bankruptcy, and in default could not be received in evidence. The deed had not been registered, and the defendant, it was admitted, was not a bankrupt. The learned Judge was of opinion that the deed was not admissible, and directed a verdict to be entered for the plaintiff for the amount claimed; but reserved leave to move to enter the verdict for the defendant.

Archibald, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that the release of the 31st of March, 1862, was receivable in evidence, without registration, under the Bankruptcy Act, 1861, and supported the plea.

Hawkins (with whom was H. James) shewed cause.^(a)¹ First, the deed is not binding on the plaintiff. It was executed by him upon the understanding that the conditions imposed by the 192nd, 193rd and 194th sections of the Bankruptcy Act, 1861, would be observed, so that its provisions might bind the whole body of the creditors. It was in the nature of an escrow, only to become operative if the requisitions of the statute were complied with. But, secondly, the deed is inadmissible in evidence. The 194th section, in terms, enacts that "Every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys or covenants, or agrees to convey, his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge [814] of such debtor from his debts or liabilities, shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the Court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence." That is an express parliamentary prohibition against the admission in evidence of a deed of arrangement between a debtor and his creditors, if not registered within the period which the section specifies. [Bramwell, B. Is it contended that a deed of arrangement must be registered under the 194th section, although that was not the intention of those who executed it?] The comprehensive language of the section, "every deed whatsoever &c.," would warrant that view. The object of the legislature was that there should be a public record of all such instruments.

The Court then called upon

Archibald (with whom was Ballantine, Serjt.), to support the rule. The deed was admissible in evidence without registration under the Bankruptcy Act, 1861, and proved the plea. It does not, on its face, profess, nor are its provisions such as to enable it, to comply with the requisitions of the 192nd section; ^(a)² and the 194th

^(a)¹ Jan. 22. Before Pollock, C. B., Martin, B., Bramwell, B., and Wilde, B.

^(a)² Sect. 192. "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed."

Seven conditions follow, of which the first and fourth only are here material.

1. "A majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to ten pounds and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument."

section extends to no other [815] class of deeds. [Bramwell, B. The words of section 194 are not "every such deed," but "every deed whatsoever," &c.] If the plaintiff be right, every arrangement between a debtor and his creditors will, by the operation of section 197, (a) be brought under the control of the Court of Bankruptcy. If, on the other hand, sections 194 and 197 be confined to the class of deeds within section 192, the scheme of the Act is intelligible. [Wilde, B. There is nothing unreasonable in the view that the legislature intended to subject, not merely such deeds as comply with the 192nd section, but all deeds of arrangement between a debtor and the whole body of his creditors, to the jurisdiction of the [816] Court of Bankruptcy, to the extent which the 197th section contemplates.] This deed is not between the debtor and all his creditors. If a deed of arrangement with some of the creditors requires registration, that must be wholly irrespective of the number of them. If so, it follows that a deed which releases the debt of a single creditor must be registered. [Martin, B. This deed invites all the creditors to become parties to it.] The benefit of the covenant is confined to those who are parties. Express words of negation are unnecessary to prevent those who are not parties from participating. In *Walter v. Adcock* (7 H. & N. 541) the Court unanimously agreed that a deed, which was restricted in its operation to a particular class of creditors, did not comply with the 192nd section; and Bramwell, B., was of opinion that it should appear, from the terms of the deed, that all the creditors were to share in its advantages. In the subsequent cases of *Ex parte Rawlings* (32 L. J. N. S. Bank. 27) and *Ex parte Godden, In re Shettle* (32 L. J. N. S. Bank. 37) Lord Justice Turner expressed his concurrence in that view. [Wilde, B. Although this deed was never perfected under the 192nd section, it is manifest from its language that it was intended to operate under that section upon all the creditors.] The deed could not have been so perfected, since there was no obligation on the debtor to pay any one, except the parties to it. [Wilde, B. Where the conditions imposed by the 192nd section have been observed, creditors who have not executed are placed by the statute in the position of parties. The word "valid" must surely carry benefits as well as obligations.] That argument would, in *Ex parte Rawlings* (32 L. J. N. S. Bank. 27) and *Ex parte Godden, In re Shettle* (32 L. J. N. S. Bank. 37), have upheld the deed. [Wilde, B. The deed did not there state that the executing creditors were three-fourths in value of all the creditors, nor was [817] there any indication of an intention that the deed should operate under the 192nd section.] The deed contemplated by section 192 must, it is submitted, be entered into by the debtor either with all his creditors, or with a trustee, or with certain creditors on behalf of the whole body. [Bramwell, B. This deed may have been, in fact, executed by all the creditors. Why are we to assume the contrary? The words of the deed are, not "three-fourths of the creditors," but "three-fourths of the creditors at the least."] It is sufficient that it does not appear to have been so

4. "Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered."

(a) Sect. 197. "From and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate and effects in bankruptcy; and, except where the deed shall expressly provide otherwise, the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorised to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy."

executed. Lastly, no tender was necessary. The release is absolute in its terms, and there is no proviso avoiding it upon default in payment of the instalments. He referred also to *Tabor v. Edwards* (4 C. B. N. S. 1).

The Court intimated that they would call upon Hawkins to continue his argument if necessary.

Cur. adv. vult.

The judgment of the Court was now delivered (without hearing Hawkins further) by WILDE, B. This case was tried, without a jury, before my brother Bramwell, when the defendant, who was sued for a debt, offered in evidence a deed of composition, which the plaintiff had executed, releasing the debt. The deed was executed by many creditors, but whether they were in fact all the creditors, or a majority, or three-fourths in value, did not appear. The learned Judge held the deed inadmissible on the ground that it required registration in the Court of Bankruptcy, and that section 194 of the Bankruptcy Act prohibited its being given in evidence. On this point the rule was obtained.

We are of opinion that the rule ought to be discharged, [818] and the verdict stand for the plaintiff, and that the deed on which the defendant relied was not admissible in evidence. We construe section 194 of the New Bankrupt Act to apply to all deeds whatever, which are, or profess to be, or are obviously on the face of them, intended to be deeds of arrangement or agreement between the debtor and the whole body of his creditors. It was clearly, in our opinion, intended to include, not only deeds complying with and framed under the provisions of section 192, but all other deeds whereby a man may compound or arrange with the whole body of his creditors.

We cannot read the several sections of the Act relating to deeds of arrangement and avoid the conclusion that the scope of the new Act was to subject all such arrangements to the operation (to some extent at least) of the bankrupt laws, leaving it, however, open to the parties, by express provision in the deed, to qualify and restrain the application of such laws. Now, what is the deed in question? It is a deed professing, on the face of it, to be entered into between the debtor of the one part, and the creditors signing of the other part; and in the operative part of the deed the said creditors, "parties of the second part," are expressly said to be "or represent at the least three-fourths in value of the creditors of the said George Wightman." It is impossible to refer these words to any other intention than that of making the deed one of arrangement which should bind the whole of his creditors under the powers of section 192. If it were really intended to be only an arrangement with certain creditors who should sign the deed, as has been argued, what sense or reasonable meaning or purpose could the words I have quoted have borne? The conclusion as to the intention of the parties seems inevitable, and, as a deed intended to be executed by or binding on the whole body of creditors, it required registration.

Rule discharged.

[819] IN RE HARRISON. Feb. 14, 1863.—Where the Registrar of the County Court of the district in which a debtor is in gaol, upon being satisfied that his debts do not exceed 300l., has, under the 101st section of the Bankruptcy Act, 1861, made an order of adjudication in bankruptcy, and directed that it shall be prosecuted in the County Court for the district in which the debtor had resided for the previous six months, the latter Court has jurisdiction notwithstanding it should turn out that the debts in fact exceed 300l.

[S. C. 32 L. J. Ex. 159; 9 Jur. (N. S.) 338; 7 L. T. 829.]

Beasley, in last Michaelmas Term, had obtained a rule calling upon the Judge of the County Court of Northamptonshire, holden at Peterborough, and the Registrar of the same Court, to shew cause why the adjudication in bankruptcy, made against one Thomas Harrison (at the time of the order of adjudication a prisoner for debt in the gaol of the county of Cambridge) by the Registrar of the County Court of Cambridge-shire, holden at Cambridge, should not be prosecuted in the said County Court of Northamptonshire, holden at Peterborough.

It appeared by the affidavits that, on the 6th of February, 1862, Harrison was taken in execution upon a writ of ca. sa. and lodged in the gaol of the county of Cambridge. At that time, and for six months previously, he had resided and carried

on business at Whittlesea Fen, within the jurisdiction of the Peterborough County Court. On the 20th of February having been in prison for fourteen days, he was, in pursuance of the provisions of the 101st section of "The Bankruptcy Act, 1861" (24 & 25 Vict. c. 134), examined by the Registrar of the County Court of Cambridgeshire, who then and there adjudged him a bankrupt, and granted him protection from arrest until the 24th of February (when he was to present himself to the Registrar of the Peterborough County Court, and who ordered him to be discharged from custody, and directed that the bankruptcy should be prosecuted in the County Court at Peterborough. On the 24th of February, Harrison presented himself to the Registrar of the Peterborough County Court, who granted him a renewal of his protection for two days, [820] stating, however, that he had sent back the papers relating to the bankruptcy to the Registrar of the County Court of Cambridgeshire, being of opinion that he had no jurisdiction therein. The Registrar of the County Court of Cambridgeshire also refused to proceed further in the matter. On the 23rd of June, Harrison, being without protection, presented himself to the Judge, and also to the Registrar, of the Peterborough County Court, sitting in the said Court, with the said order of adjudication, and asked for an appointment for a meeting of creditors, and for the prosecution in his Court of the said adjudication of bankruptcy, but the Judge refused to proceed in the matter, stating that, in his opinion, the Cambridge County Court was the proper Court to act therein, and that he had no jurisdiction. Harrison was, in consequence, still without protection, and unable to obtain an order of discharge. His debts, at the time of his being adjudged a bankrupt, exceeded 300l.; but it did not appear by the affidavits that the Registrar of the County Court of Cambridgeshire knew this; and it was assumed, on the argument, that this only became known when Harrison presented himself to the Registrar of the Peterborough County Court.

Giffard shewed cause, in Hilary Term (Jan. 31st). The Judge of the Peterborough County Court had no jurisdiction to proceed with the bankruptcy, the debts of the bankrupt being above 300l. The 88th section (a)¹ of the [821] Bankruptcy Act, 1861, requires every petition for adjudication in bankruptcy to be filed and prosecuted in the Court of Bankruptcy within the district of which the debtor shall have resided or carried on business for the six months preceding the time of filing his petition. By sect. 94, (a)² where a debtor petitions for adjudication against himself, and knows

(a)¹ Section 88. "Every petition for adjudication of bankruptcy, except as herein-after provided, shall be filed and prosecuted in the Court of Bankruptcy within the district of which such debtor shall have resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months; but the Court in London may order any such petition to be prosecuted in any district, with or without reference to the district in which the debtor shall have so resided or carried on business, or may consolidate the proceedings or any part thereof under two or more petitions for adjudication of bankruptcy, or may impound any petition for adjudication of bankruptcy, or judgment debtor summons, and the proceedings thereunder, or any part thereof, upon such terms as the Court shall think fit, or may transfer any petition for adjudication of bankruptcy, or judgment debtor summons, and the proceedings thereunder, and the prosecution or further prosecution thereof, from the Court in any one district to the Court in any other district or to a County Court having jurisdiction in bankruptcy; and the Court to which any such transfer shall be made may remove the official assignee, and appoint a new official assignee to any such bankruptcy."

(a)² Section 94. "Where a debtor petitions for adjudication against himself, and knows or verily believes the debts justly due and proveable under the bankruptcy to amount in the whole to a sum not exceeding three hundred pounds, such fact shall be stated on oath, and if he be resident within the Metropolitan district as herein defined he shall file his petition in the London Court of Bankruptcy; and where such debts shall not exceed three hundred pounds, and the debtor shall not be resident in the Metropolitan district, he shall file his petition in the County Court for the district in which he shall have resided for the six months next before the filing of his petition, or for the longest period during those six months, unless he is in custody, and then in the County Court for the district in which he is in custody; but such Court, if it make adjudication, shall transfer the proceedings to the County Court in which the debtor, if not in custody, would have been required to petition."

or believes that his debts do not exceed 300l., if he shall not be resident in the Metropolitan district, and shall be in custody, he shall file his petition in the County Court for the district in which he is in custody; "but such Court, if it make adjudication, shall transfer the proceedings to the County Court in which the debtor, if not in custody, would have been required to petition." The Registrar professed [822] to act under the 101st section, (a) which provides that the Registrar "shall have power to make an order of adjudication in bankruptcy against every such prisoner," &c., "and shall also direct in what Court such adjudication shall be prosecuted, having regard to the amount of debts, and the place of trade or residence of the prisoner within six months next preceding his imprisonment." Those words shew that the 101st section must be construed with reference to the 88th and 94th sections, and that, where the debts exceed 300l., the Registrar has no power to direct that the adjudication in bankruptcy shall be prosecuted in a County Court. The 5 & 6 Vict. c. 116, s. 1, enabled a trader whose debts were less than 300l. to petition the Court of Bankruptcy for protection from process. By the 10 & 11 Vict. c. 102, s. 4, the jurisdiction of the Court of Bankruptcy under the 5 & 6 Vict. c. 116, was transferred to the County Courts. So that, at the time the Bankruptcy Act, 1861, passed the [823] County Courts had no jurisdiction to entertain a trader's petition if his debts exceeded 300l. The 94th section was framed with regard to that state of the law. In *In re Coombs* (3 B. & S. 296) the Court of Queen's Bench held that where the debts exceed 300l. the County Court has no jurisdiction under the 94th section. [Martin, B. It seems to me that, as regards the amount, the statute is only directory, and that the Registrar must exercise his discretion. Suppose the debtor owed 300l. and a penny, would the adjudication in bankruptcy be void?] Although the adjudication would be good, as soon as it appeared that the debts exceed 300l. the County Court should transmit the case to the Court of Bankruptcy. [Wilde, B. The 94th section gives absolute jurisdiction to the County Court where the debtor believes his debts do not exceed 300l.]

Beasley, in support of the rule. In the case of *In re Coombs* the prisoner petitioned in formâ pauperis, under the 98th and 99th sections, which contain no limitation as to the amount of debts. By the 98th, any debtor in prison is enabled to petition in formâ pauperis, upon making an affidavit that he has not the means of paying the usual expenses of a petition. By the 99th, the petitioner, if not previously discharged by a Registrar, is to be examined by the County Court of the district touching his estate and debts, and the Court, if satisfied, is to make an order of adjudication of bankruptcy; but nothing is said as to the Court in which it is to be prosecuted. But, by the 101st, the Registrar, having regard to the matters therein mentioned, is empowered to direct in what Court the adjudication shall be prosecuted. The real amount of the debts cannot be ascertained until a meeting of creditors. [Pollock, C. B. What is to be done if the proceedings go on for a length of [824] time under the belief that the debts do not exceed 300l., and at last it turns out that they do.] Here the Registrar has decided that the debts do not exceed 300l., and the Court will

(a) Section 101. "The Commissioner or County Court Judge, as the case may be, shall in every case on receiving such return make an order that a Registrar of the Court of Bankruptcy, or of the County Court of the district in which the gaol is situate, shall attend at the gaol on a day to be named, being at least seven and not more than twenty-one days from the date of such return. Notice of such order shall be forthwith given to the gaoler and also to the execution and detaining creditors of every prisoner included in such return. On the day named in the order the Registrar shall attend at the prison, and examine every prisoner included in such return who shall have been in prison, being a trader, for fourteen days, or, not being a trader, for two calendar months, touching his estate and effects, debts, dealings and transactions. The Registrar shall also ascertain the last place of abode and business of each such prisoner, within the six months next prior to his imprisonment. The Registrar shall have power to make an order of adjudication in bankruptcy against every such prisoner, and to grant him protection, and to make an order for his release from prison, and shall also direct in what Court such adjudication shall be prosecuted, having regard to the amount of debts and the place of trade or residence of the prisoner within the six months next preceding his imprisonment. The Registrar shall certify the particulars of each case to the Court of which he is Registrar."

not interfere with his order of adjudication, as it is good upon the face of it. By the 94th, the debtor may petition, if he "verily believes" that his debts do not exceed 300l. It may be that some of them are barred by the Statute of Limitations. In the case of *Re Bowen* (21 L. J. Q. B. 10) a similar question arose under the 5 & 6 Vict. c. 116.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILDE, B. The point made on the argument of the rule in this case was, that the order of the Registrar in directing the bankruptcy proceedings to be taken in the County Court of Northamptonshire was illegal and in excess of his powers.

The debtor was in custody in the gaol of the county of Cambridge, and the Registrar of the County Court of Cambridgeshire, acting under section 101, directed the bankruptcy proceedings to be taken in the County Court of Northamptonshire, being the County Court for the district in which the prisoner had resided for the previous six months.

It does not appear what the amount of debts appeared to be upon the examination of the bankrupt by the Registrar under this section. But it does appear that, upon proceeding with the bankruptcy before the County Court, the debts did not amount to more than 300l. Upon this ground it is contended that the County Court ceased to have jurisdiction. There are no direct words to that effect in the 101st section. But it is argued that the words "having regard [825] to the amount of debts" have that meaning. It is said that these words necessarily, or obviously, refer to the limitation of 300l. contained in section 94.

We much doubt the propriety of any such construction, for section 94 is not a general one limiting the County Court jurisdiction to bankruptcies of 300l., but only a special provision applicable to cases where the debtor petitions himself.

But if this reasoning be not correct, and if the argument were to prevail that the words above mentioned do refer to section 94, we are still of opinion that the County Court jurisdiction is not taken away by the fact of the debts turning out upon investigation to amount to more than 300l.

For in a case coming directly under section 94, the County Court, if the bankrupt swore that his debts were, or that he believed they were, under 300l., would have full jurisdiction whatever the debts might turn out to be. And it would be extremely inconvenient if the legislature had provided otherwise.

If, therefore, section 94 applies at all to this case, all that is necessary to found the jurisdiction of the County Court would be that the Registrar should be satisfied that the debts were not likely to exceed 300l.; and for aught that appears he has done so.

The rule will therefore be absolute.

Rule absolute.

[826] READ v. THE VICTORIA STATION AND PIMLICO RAILWAY COMPANY.

Feb. 14, 1863.—The verdict and judgment upon an inquisition under the compensation clauses of the Lands Clauses Consolidation Act, 1845, do not estop the Company, in an action upon the judgment, from denying that the lands in respect of which the damage has been assessed, and the plaintiff's interest therein, were damaged and injuriously affected by their works.—But where the damages claimed and awarded exceed 50l., the Company are estopped from denying that the claimant is entitled to compensation to an amount exceeding 50l.

[S. C. 32 L. J. Ex. 167; 9 Jur. (N. S.) 1061; 11 W. R. 1032. Followed, *Barber v. Nottingham and Grantham Railway*, 1864, 15 C. B. (N. S.) 726; *Duke of Buccleuch v. Metropolitan Board of Works*, 1870, L. R. 5 Ex. 227. Referred to, *Rhodes v. Airedule Drainage Commissioners*, 1876, 1 C. P. D. 396.]

Declaration. For that the defendants are the Victoria Station and Pimlico Railway Company, incorporated by the Victoria Station and Pimlico Railway Act, 1858. And for that, after the making and passing and coming into operation of the said act of parliament and under the powers and provisions thereof, and the other acts of parliament in that behalf, the defendants made and executed certain works upon a certain canal, called "The Grosvenor Canal," which canal was and is the canal

mentioned and referred to in the said first mentioned act of parliament as the Grosvenor Canal. And for that, at the time of the making and executing of the said works, and from thence continually hitherto, the plaintiff was lawfully possessed of certain messuages, lands, tenements and hereditaments, that is to say, all that piece or parcel of ground and wharf, situate, &c., abutting on the said Grosvenor Canal; and also the use of the said canal to the extent of forty feet south-east from the said wharf, and the liberty to moor and lay, and also to load and unload therein all sorts of vessels, barges and boats, and to make them fast to the south-eastern end of the said wharf; and also the right of free navigation with barges, boats and other vessels into and out of the said canal to and from the river Thames, with the appurtenances, that is to say, for the residue and remainder of a certain term of ninety-two years and three-quarters of another year, commencing from the Feast Day of St. John the Baptist, in the year of our Lord 1834, to come and unexpired therein. And for that, by the said making and execution of the said [827] works by the said first mentioned Act authorized to be executed, the said messuages, lands, tenements and hereditaments, with the appurtenances, and the plaintiff's said interest in the said messuages, lands, tenements and hereditaments, were, before and at the time of the giving of the notice hereinafter referred to, damaged and injuriously affected; and the plaintiff, by reason of the several premises aforesaid, sustained a damage and injury, and claimed to be and was entitled, under the statutes in that behalf, to compensation in respect thereof from the defendants to an amount exceeding 50l. And for that the defendants did not at any time make the plaintiff compensation or satisfaction for the said damage or injury. And for that afterwards the plaintiff being so entitled to compensation in respect thereof as aforesaid, and being desirous of having the question of the said compensation settled by a jury, he, the plaintiff, did, under the acts of parliament in that behalf, give a notice in writing to the defendants in due form of law; [and did thereby and therein state to the defendants the said nature of his interests in the said messuages, tenements, land and hereditaments in respect of which he claimed compensation; that he claimed from the defendants compensation in respect of the said damage and injury, and that 2000l. should be paid by the defendants to him, the plaintiff, for such compensation; and the plaintiff did also by the said notice state to the defendants that it was the desire of him, the plaintiff, that the question of the aforesaid compensation should be settled by a special jury, in the manner pointed out in that behalf by the acts of parliament in that behalf, unless the defendants should be willing to pay the aforesaid amount of 2000l. as compensation which the plaintiff thereby claimed, and enter, within the time limited by the said statute in that behalf, into an agreement for that purpose. And for that the defendants did not afterwards give to the plaintiff any notice [828] in writing, whereby they, the defendants, made known to the plaintiff that they, the defendants, were ready and willing, and thereby offered to pay to the plaintiff the sum of 2000l., or any other sum in satisfaction and discharge of the injury and damage alleged to have been sustained by the plaintiff, in respect of which the said sum of 2000l. was so claimed by the plaintiff as aforesaid. And for that the defendants did not nor would pay the amount of 2000l. compensation so claimed by the plaintiff as aforesaid; nor did nor would enter into a written agreement for that purpose. And for that the defendants, within twenty-one days of the receipt of the said notice to them so given as aforesaid, did, according to the form of the statute in that behalf, issue their certain warrant in writing under the common seal of the defendants, and directed to the sheriff of the county of Middlesex (being the proper sheriff in that behalf), whereby, after reciting and referring to the said notice, the defendants, pursuant to the powers and authorities given to them by the statutes in that behalf, required the said sheriff to nominate and summon a special jury to inquire of, assess and determine the sum of money, if any, to be paid by the said defendants as compensation for such alleged damage or injury as in the said notice or claim was mentioned; and the defendants did by their said warrant further require the said sheriff to issue such summons, and do all such things in relation to the said trial or inquiry as were authorized and required by the statute in that behalf. And the plaintiff avers that such proceedings were thereupon had and taken in due course of law, that afterwards, within the said bailiwick of the said sheriff in the county of Middlesex, a certain inquisition was taken, in pursuance of and in accordance and compliance with the last mentioned request, before the then sheriff of the said county (being the proper sheriff in that behalf), and twelve

honest, lawful, sufficient and indif-[829]-ferent men of the said county qualified to serve on juries for trials of issues in her Majesty's Courts of record at Westminster, who were duly impanelled, summoned, returned and drawn, pursuant to the provisions of the statute in that behalf, by the said sheriff, then being sheriff of the said county of Middlesex as aforesaid, and who were by and before such sheriff, at the time and place last aforesaid, duly sworn to inquire of and concerning the matters in the said warrant in that behalf mentioned, and thereby referred to be inquired of, assessed, ascertained and determined by them in manner therein mentioned; and the plaintiff and the said defendants by their counsel respectively having, at the time and place of holding of the said inquisition, appeared before the said sheriff and the said jurors touching the matters so in question as aforesaid, the said jurors, upon their oath, did find their verdict that the plaintiff had sustained damages to the amount of 500l. by means of the several matters mentioned in the said notice, and that the defendants should pay to the plaintiff the said sum of 500l. as and for the damages and compensation referred to in the plaintiff's said notice; and the said sheriff did then and there accordingly, pursuant to the statute in that behalf, give judgment for the said sum of 500l., so assessed by the said jury, to be paid by the defendants to the said plaintiff according to the provisions of the said statutes in that behalf; and the said verdict and judgment were then and there, to wit, at the time and place of holding the said inquisition as aforesaid, duly signed by the said sheriff. And the plaintiff avers that the said verdict and judgment being so duly signed as aforesaid were afterwards, and before the commencement of this suit, deposited and left by the said sheriff with the clerk of the peace of the said county of Middlesex to be by him kept, and the same are now by him kept among the records of the quarter sessions of the said county of Middlesex; [830] and the said verdict and judgment still remain in full force and effect, and in nowise satisfied, reversed or annulled. And the plaintiff saith that afterwards, and before the commencement of this suit, in accordance with the statutes in that behalf, the plaintiff's costs of the said inquiry (the plaintiff and the defendants differing as to the amount thereof) were duly settled on the application of the plaintiff by the proper officer in that behalf, then being one of the Masters of the Court of Queen's Bench at Westminster, at a certain sum, to wit, the sum of 287l. 18s., of all which the defendants afterwards and before the commencement of this suit had notice.] And the plaintiff saith that, before the commencement of this suit, all things had happened and occurred, and all times had elapsed, which it was necessary should occur, happen and elapse to entitle the plaintiff to have, receive and recover from the defendants the said sums of 500l. and 287l. 18s., and each of them, and to have and maintain this action for the recovery thereof. And the plaintiff saith that he has always been ready and willing to do all things which it was necessary he should be ready and willing to do to entitle him to sue the defendants in this action for the said sums of money, and each of them, and to have, receive and recover from the defendants the said sums of money, and each of them, and not anything has happened or occurred to prevent the plaintiff from maintaining this action as aforesaid, or recovering as aforesaid from the defendants the said sums of money, and each of them. By reason of which said premises, and by force of the statutes in that behalf, an action has accrued to the plaintiff to demand and have of and from the defendants the said sums of 500l. and 287l. 18s., and each of them; yet the defendants have not paid to the plaintiff the said sums of money, or either of them, or any part thereof.

Pleas. First: that by the said making and execution of [831] the said works, the said messuages, lands, tenements and hereditaments, and the plaintiff's said interest therein, were not damaged and injuriously affected as alleged.

Second plea. That the plaintiff was not entitled to compensation in respect of the said damages and injury to an amount exceeding 50l.

Demurrer to pleas, and joinder therein.

Replication to first plea. That the defendants ought not to be admitted or received to plead the said plea by them first above pleaded; because the plaintiff says that he being desirous of having the question of the said compensation settled by a jury, as in the first count mentioned, did, as alleged in the said first count, and at the time in that behalf in the said first count mentioned, under the said acts of parliament in that behalf, give the said notice in writing, in the first count mentioned, to the defendants in due form of law. (The replication then repeated all the allegations in the declaration which are above enclosed within brackets.) And the plaintiff saith that

the facts, statements and allegations made and alleged in the first count are true in substance and in fact; whereupon the plaintiff prays judgment if the defendants ought to be admitted or received, against the said record, to plead the plea by them firstly above pleaded in this suit.

Replication to second plea. That the defendants ought not to be admitted or received to plead the said plea by them secondly above pleaded; because the plaintiff says that all the facts alleged in the replication to the defendants' first plea are true in substance and in fact. And the plaintiff in this replication repeats all the allegations in the second replication to the defendants' first plea, and says that such facts occurred as and at the times in that behalf in the said replication alleged; and by the said verdict in the said replication mentioned the said jury did find their verdict [832] that the plaintiff had sustained damages to a larger amount than 50l., that is to say, to the amount of 500l., by means of the several matters mentioned in the said notice in the said replication and first count mentioned, and that the defendants should pay to the plaintiff the said sum of 500l., as in the said first count mentioned. And the said sheriff did accordingly, as in the said replication mentioned, pursuant to the statute in that behalf, give judgment as in such replication mentioned for a larger sum than 50l., that is to say, for the said sum of 500l., so assessed by the said jury to be paid by the defendants to the said plaintiff, according to the provisions of the said statutes in that behalf; and the said judgment and record in such replication mentioned and referred to still remains in full force and effect, and in nowise satisfied, reversed or annulled. And the plaintiff saith that the said facts, statements and allegations in the said first count are true in substance and in fact; wherefore the plaintiff prays judgment if the defendants ought to be admitted or received, against the said record, to plead the plea by them secondly above pleaded in this suit.

Demurrer to replications, and joinder therein.

Prentice (with whom was Hawkins) argued for the plaintiff in last Michaelmas Term (Nov. 19-21). The judgment is conclusive, not only as to the fact that damage has been sustained, but also as to the amount of damages. The 68th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), provides that if the compensation to which any party is entitled in respect of any lands, or of any interest therein, exceeds 50l., and he desires to have it settled by a jury, he may give notice of his desire to the promoters of the undertaking, and they must, within twenty-one days, issue their warrant to the sheriff to summon a jury for settling the same, and in default thereof be liable to pay [833] the amount of compensation claimed. In the case of *Regina v. The Lancaster and Preston Junction Railway Company* (6 Q. B. 759) it was held that it was the duty of the jury to inquire whether any damage had been sustained, and if so, to assess the amount. Lord Denman, C. J., there said: "The question whether any damage has been sustained or not is inseparable from the question, how much damage has been sustained." In *Regina v. The London and North Western Railway Company* (9 E. & B. 443) the question arose whether the jury could inquire into the title of the claimant. The majority of the Court held that they could not, but were bound to assess compensation upon the assumption that it existed. The question of title also arose in the case of *The East and West India Docks and Birmingham Junction Railway Company v. Gatlke* (3 Mac. & G. 155), but it became unnecessary to decide it. In *The London and North Western Railway Company v. Smith* (1 Mac. & G. 216) the proceedings under the notice were stayed by injunction until the title of the claimant had been tried. In *Jubb v. The Hull Dock Company* (9 Q. B. 443) it was held that the words of the Company's Act were large enough to include compensation to a landowner, parting with his premises, for loss which he would sustain by having to give up his business until he could obtain other suitable premises for carrying it on. In *Chabot v. Viscount Morpeth* (15 Q. B. 446) the sheriff had directed the jury to exclude from their valuation all of the land to which the plaintiff's title could be impeached, and it was held that the verdict and judgment were conclusive, although the direction was wrong. In *Corrigal v. The London and Blackwall Railway Company* (5 Man. & G. 219) the defendants pleaded, to an action on the judgment, that the jury had [834] assessed the damages on a wrong principle; but the Court held that the language of their Act was directory only. The Court of Queen's Bench has no power to review the Master's taxation of the costs of the inquisition: *Ross v. The York, Newcastle and Berwick Railway Company* (5 D. & L. 695); and upon the same principle the judgment is conclusive as to the damage. [Channell, B. The Master's

power is not delegated to him by the Court, and therefore they have no power to review it.] In *Chapman v. The Monmouthshire Railway and Canal Company* (2 H. & N. 267) the defendants pleaded that the plaintiff was not entitled to any compensation, and the Court, on the authority of *Regina v. The London and North Western Railway Company* (3 E. & B. 443), held that the inquisition was not conclusive evidence of that fact. The second plea is clearly bad, for it admits that the plaintiff has sustained some damage. By the 68th section of the Lands Clauses Consolidation Act, 1845, the jury are to assess the amount of compensation "claimed," and it is evident that the legislature intended that their assessment should be final.

C. Pollock, *contra*. The judgment is no estoppel. *Chapman v. The Monmouthshire Railway and Canal Company* (2 H. & N. 267) is an express authority that the defendants may shew that the plaintiff's interest in the land is not injuriously affected by their works. According to the argument for the plaintiff, he would be entitled to recover the amount of damage upon the mere production of the judgment. The defendants do not, by issuing their warrant, admit that the plaintiff has sustained any damage. There is no means of obtaining a new trial; therefore the defendants ought to have an opportunity of raising any objection to the verdict by plea to the action. The observations of the majority of the Court in [835] delivering judgment in *Regina v. The London and North Western Railway Company* (3 E. & B. 443, 466) support the view contended for. The 68th section provides that, if the promoters of the undertaking do not issue their warrant, "the party entitled" may recover by action the compensation claimed; so that the question of title would be in issue in that action, and, if established, the judgment must be for the amount claimed. But where the promoters issue their warrant the jury must assess the amount of compensation, and, assuming that they have no jurisdiction to try the title, that question may be raised in an action on the judgment. The judgment of Lord Cottenham, C., in *The London and North Western Railway Company v. Smith* (1 Mac. & G. 216, 223), proceeded on the ground that the finding of the sheriff's jury upon the question of title would not be conclusive, but would have to be established in an action on the judgment. In *The East and West India Docks and Birmingham Junction Railway Company v. Gatlke* (3 Mac. & G. 155, 170) Lord Truro, C., said: "It seems to have been doubted whether, by issuing the precept, the Company would not be taken to admit the existence of a right to some compensation: but I cannot see any ground for that conclusion. If the legislature has made it the duty of the Company to issue the precept upon being required to do so at the serious peril of paying the full amount of the claim in the event of the claimant being found entitled, the performance of that imperative duty cannot operate as any admission on the part of the Company. After the compensation jury shall have decided that the claimant has sustained a damage for which he was entitled to recover compensation, the claimant has to enforce judgment. Formerly, the proceeding for that purpose was by mandamus; and if the jury had no jurisdiction to decide upon the right, [836] it follows that the question of right might be raised by a return to the mandamus; but, since the decisions of *Corrival v. The London and Blackwall Railway Company* (5 Man. & G. 219) and *Williams v. Jones* (13 M. & W. 628), it seems that the remedy of the claimant is by action on the judgment; and the pleadings in *Corrival v. The London and Blackwall Railway Company* in such an action shew that the right might be wholly disputed, supposing, as before stated, a compensation jury had no jurisdiction to decide the question." In *Regina v. The Metropolitan Commissioners of Sewers* (1 E. & B. 694) it was held that the power in the Metropolitan Sewers Act, 1848 (11 & 12 Vict. c. 112), to resort to arbitration, was given in those cases only where the mere amount of compensation was in dispute, not where the liability to make any compensation was denied. Erle, J., there said that, in his opinion, the 68th section of the Lands Clauses Consolidation Act gave the power of referring to the ordinary Courts the question whether lands have been injuriously affected. In *Mortimer v. The South Wales Railway Company* (1 E. & E. 375) there were two pleas similar to those in the present case, and Lord Campbell, C. J., said that they were good as tending to shew that the judgment was a nullity. The second plea is a denial of a material allegation in the declaration, and without which it would be bad.

Hawkins replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

CHANNELL, B. This case comes before the Court upon several demurrers.

The declaration, in substance, states that, the defendants [837] having been incorporated by "The Victoria Station and Pimlico Railway Act, 1858," and the plaintiff being lawfully possessed of certain messuages, lands, &c., described in the declaration, his, the plaintiff's, interest therein was damaged and injuriously affected by the making and execution by the defendants of the works by the Act incorporating them authorized to be made. The declaration then states such formal proceedings as entitled the plaintiff to require the defendants to issue their warrant to the sheriff of Middlesex to summon a jury to assess compensation for such damage; that compensation was duly assessed at, and judgment given by the sheriff for, the sum of 500l., and that the plaintiff's costs were duly settled and ascertained at the sum of 287l. 18s. For the recovery of these two sums the present action is brought.

To this declaration the defendants pleaded (amongst other pleas): First, a denial that, by the making and execution of the works, the plaintiff's messuages, &c., and his interest therein, are damaged and injuriously affected as alleged: Secondly, that the plaintiff was not entitled to compensation in respect of the said damage and injury to an amount exceeding 50l.

The plaintiff joined issue on these pleas: he also demurred to them, and replied to them specially. The replication to each of these pleas alleges that the defendants ought not to be admitted to plead the said pleas, and, in effect, repeats the allegations in the declaration, and relies on the matters replied as creating an estoppel.

The defendants joined in the plaintiff's demurrer to the defendants' pleas, and they demurred to the plaintiff's replications. These demurrers were argued last term, before the Lord Chief Baron, my brother Bramwell and myself, by Mr. Prentice for the plaintiff, and by Mr. Charles Pollock for the defendant, and we took time to consider our judgment.

[838] The substantial question which arises on these demurrers is whether, the defendants having, in compliance with the 68th section of the 8 & 9 Vict. c. 18, and in consequence of a claim and notice served on them by the plaintiff to do so, issued their warrant to the sheriff to summon a jury to settle the compensation to which the plaintiff claimed to be entitled, and compensation having been assessed and judgment given by the sheriff, the defendants can now, when sued on that judgment, set up by way of defence that the plaintiff was not entitled to any compensation; in other words, that his interest in the messuages, lands, &c., in the declaration mentioned, was not in any way damaged and injuriously affected.

We are of opinion that the defendants are not precluded from setting up this defence. They were bound, on the plaintiff's notice and former compliance by him with the requisites of the 68th section, to issue their warrant within twenty-one days. Had they failed to do so, they would have subjected themselves to a liability to pay the plaintiff the whole amount claimed by him, and to be sued for the same in any of the superior Courts.

The question now before us, viz., how far the verdict of the sheriff's jury, and the judgment thereon, estop the Company from setting up the defence now relied on, is one which has been raised in several cases in Chancery, and opinions upon the point have been expressed by Lord Cottenham in *The London and North Western Railway Company v. Smith* (1 Mac. & G. 216); by Lord Truro in *The East and West India Docks and Birmingham Junction Railway Company v. Gatlke* (3 Mac. & G. 155), and in *The London and North Western Railway Company v. Bradley* (3 Mac. & G. 336).

The opinions so referred to are not express decisions [839] upon the point, seeing that the question in those cases appears to have been whether there was such an equity as ought to induce the Court of Chancery to restrain the claimant in each case from pursuing his legal remedy given him by the 68th section, until he had established his right to some compensation; and it was with reference to the inconvenience of going to a jury and assessing the compensation, and leaving the question of the plaintiff's right to be afterwards decided, that the point appears to have come under consideration of the Courts of equity (see *The East and West India Docks and Birmingham Junction Railway Company v. Gatlke*, before cited).

In the case of *Regina v. The London and North Western Railway Company* (3 E. & B. 443) a majority of the Judges of the Queen's Bench were of opinion that, in an action on the judgment given by the sheriff, the Company sued might, in such action, try the claimant's title to compensation, though the compensation had in fact been assessed,

and though some inconvenience might arise from such a course. Mr. Justice Coleridge's judgment in that case (in which Lord Chief Justice Campbell and Mr. Justice Wightman concurred) reviewed the cases in equity. The Court quashed the verdict of the jury, which had found that a right of way claimed by the claimant did not exist, and had not been proved, and that, on that ground, the plaintiff had not sustained any damage, but had also found a certain amount of damage, on the supposition that the jury were to assume the existence of the way. The Court held that the jury had no power to inquire into the right, but were bound to assess compensation upon the supposition that it existed. Mr. Justice Erle differed from the other Judges, and held that the jury had power to inquire into the right. In commenting upon the cases of *The East and West* [840] *India Docks and Birmingham Junction Railway Company v. Gatlke* (3 Mac. & G. 115) and *The South Staffordshire Railway Company v. Hall* (1 Sim. N. S. 373), Mr. Justice Erle observes, that in these cases "it is laid down that if the jury on the inquisition try a question of right over which they have no jurisdiction, the Company, in an action for the amount found by the verdict, may raise for trial that same question of right, and succeed if the judgment is in their favour;" and he adds, "that this principle so expressed is correct," but in his judgment required "further explanation to define what questions are within the jurisdiction of the inquisition, and what are not." In *Chapman v. The Monmouthshire Railway and Canal Company* (2 H. & N. 267) this Court decided in accordance with the decision of the majority of the Court of Queen's Bench in *Regina v. The London and North Western Railway Company* (3 E. & B. 443). In *Mortimer v. The South Wales Railway Company* (1 E. & E. 375, 382) Lord Campbell, speaking of the first plea in that case, which was in effect the same as the first plea in the present case, says that such plea was a good plea. That, however, cannot be treated as an express decision on the point, as in that case the issue on the plea was found in favour of the plaintiff, and the case turned upon an objection which was not properly raised by any of the pleas there pleaded.

After a consideration of the authorities, we have come to the conclusion that the defendants are not precluded from denying in this action that the plaintiff's interest in the messuages, lands, &c., was at all damaged or injuriously affected. Our judgment, therefore, will be for the defendants upon the first plea, and upon the issues in law consequent thereon.

[841] The issues in law raised on the second plea admit of a different consideration. That plea simply denies that the plaintiff was entitled to compensation in respect of the damage and injury to an amount exceeding 50l. But we think that that plea is bad. Such a plea could only be good, we think, where the compensation claimed does not exceed the sum of 50l.: see 8 & 9 Vict. c. 18, s. 68. Here the plaintiff claimed more than 50l. On that plea, and the issues in law consequent upon it, our judgment will, therefore, be for the plaintiff.

Judgment accordingly.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

WOODS v. FOOTE. Feb. 6, 1863.—A composition deed, under the Bankruptcy Act 1861, made between a debtor of the one part and his creditors whose names were thereunto subscribed and seals affixed of the other part, contained a clause that each of the creditors, covenanting for his acts only, should at all times thereafter indemnify the debtor from and against every bill of exchange, promissory note, and other negotiable instrument on which the debtor might have incurred any liability, or which might have been indorsed or put into circulation by any or either of the creditors. Held, that such a covenant was unreasonable, and therefore the deed was not binding on a creditor who had not executed or assented to it.

[S. C. 32 L. J. Ex. 199; 9 Jur. (N. S.) 178; 11 W. R. 383; 7 L. T. 836.]

Error on a bill of exceptions. The declaration contained a count by drawer against acceptor of a bill of exchange, dated the 10th January, 1862, for payment of 145l. 4s. 2d. two months after date; and also a count on accounts stated.

Plea. That after the making of the supposed contracts, and the accruing of the supposed causes of action, to wit, on the 10th March, 1862, the defendant then being a debtor unable to meet his engagements, a deed was made and entered into between the defendant and divers of his credi-[842]-tors relating to his debts and liabilities and his release therefrom, the same being a composition deed executed by the defendant, so being such debtor, within the true intent and meaning of the Bankruptcy Act, 1861; and all the conditions mentioned in the said Act in that behalf were observed so as to render the said deed as valid, effectual and binding on all the creditors of the defendant, including the plaintiff, as if they were parties to and duly executed the same; and a majority in number representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10l. and upwards, in writing assented to and approved of the said deed; and the execution of the said deed by the defendant was attested by an attorney, and within twenty-eight days after the execution of the said deed by the defendant, the same was produced and left, being first duly stamped, at the office of the Chief Registrar in bankruptcy for the purpose of being registered, and together with the said deed there was delivered to the said Chief Registrar such affidavit as by the statute in such case made is in that behalf required; and such deed before registration bore such ordinary and ad valorem stamp as in the said statute is in that behalf provided; and the said deed was, within twenty-eight days from and after the execution thereof by the defendant, duly registered in the Court of Bankruptcy, and notice of the filing and registration of the said deed was duly given as required by the said statute; and a certificate of the filing and registration of the said deed, under the hand of the Chief Registrar and the seal of the Court of Bankruptcy, was duly granted to the defendant, which deed was and is in the words and figures following, that is to say:—

“This indenture, made the 10th day of March A.D. 1862, between Adam Clarke Foote, of &c., grocer, of the one part, and the several persons whose names are hereunto sub-[843]-scribed and seals affixed, being creditors respectively of the said A. C. Foote, and who are hereinafter styled ‘the creditors,’ of the other part: Whereas the said A. C. Foote is justly and truly indebted to the said several creditors in the sums set opposite to their names in the schedule hereunder written, as he doth hereby admit and acknowledge. And whereas the said A. C. Foote, being unable to liquidate the amount of such several sums in full, hath proposed to the said creditors to pay them a composition of 7s. 6d. in the pound, payable by the under mentioned instalments, namely, 2s. 6d. in the pound on or before the 10th day of April next; the like sum of 2s. 6d. in the pound on or before the 10th day of June next; and the further sum of 2s. 6d. in the pound on or before the 10th day of September next, the payment of which said two last instalments respectively to be secured by the joint and several promissory notes of the said A. C. Foote, John Reed of &c., and John Fryer of &c., such promissory notes to be given to the said creditors at the time of the payment of the first instalment. And whereas the said several creditors have agreed to accept such composition at the days and in manner aforesaid in full discharge of their respective debts, and in testimony of such acceptance to enter into and execute these presents: Now this indenture witnesseth, that each of them, the said several creditors, doth hereby for himself, his heirs, executors and administrators, covenant and agree with the said A. C. Foote, his executors, &c., that if the said A. C. Foote shall pay to each of them, the said several creditors, the amount of their respective compositions of 7s. 6d. in the pound on their respective debts as appearing in the said schedule hereunder written, that is to say, the sum of 2s. 6d. within one month from the date hereof, and the two further sums of 2s. 6d. each within three and six months respectively from the date hereof; and also upon having secured to [844] them the payment of the two last instalments as herein before mentioned, each of them, the said creditors, shall and will accept the same in full satisfaction and discharge of all and singular their debts and claims against the said A. C. Foote, and will at any time after the last of such payments shall have been made, upon the request and at the costs of the said A. C. Foote, execute to him, his executors, &c., a good and sufficient release and discharge. And moreover that each of them, the said several creditors, each covenanting for his and their own acts only, shall and will from time to time and at all times hereafter save harmless and keep indemnified the said A. C. Foote, his executors, &c., of, from and against all and every bill of exchange, promissory note and other negotiable instrument on which the said A. C. Foote may have

incurred any liability, or which may have been indorsed or put into circulation by any or either of the said creditors. In witness whereof," &c.

Averments: that the defendant duly paid to the plaintiff and his said other creditors the said composition of 2s. 6d. in the pound, and delivered to them respectively such joint and several promissory notes, as in the said deed mentioned, for the remaining instalments of the said composition, such promissory notes being payable to the plaintiff or his order, and to the defendant's said other creditors respectively, or their order respectively, which notes have not yet become payable in pursuance of and according to the said deed. And that he, the defendant, has done all things necessary on his part to render the said deed binding on the plaintiff and a bar to this action, and the same was and is a bar to this action.

Replications. First: the plaintiff takes and joins issue upon the defendant's said plea.

Second. To the defendant's said plea so far as it relates to the alleged payment to the plaintiff of such composition, [845] and the alleged delivery to him of such promissory notes as in the said plea alleged: the plaintiff says that he has not in writing or otherwise assented to or approved of the said deed, and has not accepted the said composition and such promissory notes, or either or any of them.

Rejoinder to second replication. That the defendant did pay and deliver to the plaintiff the said money and notes. Issue thereon.

The cause was tried before Bramwell, B., at the London Sittings after last Trinity Term, when the defendant gave in evidence the above indenture, which was executed by a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10l. and upwards. All the requirements of the 192nd, 193rd, and 194th sections of the Bankruptcy Act, 1861, had been fulfilled. The plaintiff refused to sign the deed, or accept the composition or the promissory notes. The first instalment had been duly paid, and the promissory notes had been duly delivered to the creditors who had signed the deed.

The learned Judge ruled that there was no evidence for the jury to find a verdict for the defendant upon the issue joined on the first replication, or upon the issue joined upon the rejoinder to the second replication, and he directed the jury to find a verdict for the plaintiff. Whereupon the defendant's counsel tendered a bill of exceptions; and the case was now argued by (a)

Welsby (with whom was Gibbons), for the defendant. The question, in substance, is whether the composition deed is a bar to the action; and that depends upon whether it is a valid deed under section 192 of the Bankruptcy Act, [846] 1861 (24 & 25 Vict. c. 134). The questions on which its validity depends are, first, whether, under section 192, it is necessary that the deed should contain a transfer of the debtor's property; and, secondly, how far a deed in conformity with that section is binding on creditors who have not executed or assented to it. [Manisty said that, after the recent decisions in the Court of Chancery in *In re Shettle* (Cor. Lords Justices, Nov. 24 and Dec. 6, 1862), *In re Rawlins* (Cor. Lords Justices, Nov. 22, 24, and Dec. 6, 1862), and *In re Woodhouse* (Cor. Lord Chancellor, Jan. 21, 30, 1863), he could not support the point as to *cessio bonorum*.] The Bankruptcy Act, 1861, contains two sets of clauses relating to arrangements with creditors. The first begins with the 185th and ends with the 191st section, and is headed, "As to change from bankruptcy to arrangement." Those clauses only apply where there has been an adjudication of bankruptcy. The other set of clauses begins with the 192nd section, and ends with the 200th, and is headed, "As to trust deeds for the benefit of creditors, composition and inspectorship deeds executed by a debtor." These clauses apply where there has been no adjudication of bankruptcy. The 192nd section provides that the deeds therein mentioned "shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties thereto, and had duly executed the same," provided certain conditions are observed. All conditions necessary to the validity of this deed have been fulfilled; for the 2nd and 7th are inapplicable, there being no trustee and no *cessio bonorum*. This is a deed "entered into between a debtor and his creditors, or some of them;" and it relates to the debts or liabilities of the debtor, and his release therefrom. It is a deed which all the creditors might have

(a) Before Wightman, J., Williams, J., Crompton, J., Byles, J., Blackburn, J., and Keating, J.

executed; but if it were necessary that they should do so, it would not be [847] a deed within the statute, or one which is required to be registered; for the statute contemplates a deed which is not only not executed by all the creditors, but to which all are not parties. [Williams, J. Must not the deed be with respect to all the debtor's liabilities, though it may be with some of the creditors only? Wightman, J. The creditors covenant with the debtor that if he "shall pay to each of them the said several creditors," that is, the creditors who execute the deed, "the amount of their respective compositions," &c., they will accept the same in satisfaction of their debts. The engagement should be to pay all, not particular creditors.] The 197th section enables all the creditors to have the same benefit in the Court of Bankruptcy as if the debtor had been adjudged a bankrupt. [Blackburn, J. Suppose the plaintiff wanted the promissory notes of the sureties, and the defendant refused to give them, how could he obtain them by going to the Court of Bankruptcy?] In *Walter v. Adcock* (7 H. & N. 541) the objection to the deed was that there was no assignment of the debtor's property, but a mere covenant by him to pay his trade creditors a composition on their debts. There Bramwell, B., said "that a composition deed under the Bankruptcy Act, 1861, to be binding upon creditors who have not executed it, must appear, upon the face of it, to be a deed of which any creditor may have the benefit, and may execute without repugnancy." This deed satisfies that condition, for all the creditors may have the benefit of it by executing it. As observed by Parke, B., in *Larpent v. Bibby* (5 H. L. Cas. 481, 497), "in all cases of a conveyance for the benefit of creditors it is for the distribution of the estate amongst the creditors, parties to the deed." [Crompton, J. Where the debtor's estate is administered in bankruptcy, any creditor may have the benefit, but where there is only a covenant with particular [848] creditors, how is a creditor who is no party to the deed to obtain any benefit under it?] By the 197th section the Court of Bankruptcy would have jurisdiction over the estate and effects of the debtor, and might order payment of the instalments in the nature of dividends. In *Harris v. Pettit* (31 L. J. Chan. 552) Stuart, V. C., held that a deed of assignment of a debtor's effects, in trust for all his creditors who should assent thereto within a certain time, was valid, because, as soon as it was executed by the debtor and his trustees, all his creditors were entitled to come in and receive a dividend. [Blackburn, J. Suppose any creditor has put in circulation bills of exchange or promissory notes upon which the debtor has incurred liability, and he is sued upon them; by the covenant at the end of the deed every creditor who executes it becomes liable to indemnify the debtor. Crompton, J. It seems to me most unreasonable that a creditor should be called upon to execute such a deed. Byles, J. The effect of the covenant is that any creditor who executes the deed makes himself liable to any amount upon negotiable securities put in circulation by the creditors and to which the debtor was a party.]

Manisty (with whom was Murphy) appeared for the plaintiff, but was not called upon to argue.

WIGHTMAN, J. We are all of opinion that this covenant is one by which a creditor, even if willing to accept the composition, could not be expected to be bound; nor is it one to which he would naturally and reasonably expect that by executing the deed, he would render himself liable. The Act could never have contemplated that a deed containing such a covenant should be binding on the creditors who did not execute it, and it is unreasonable that [849] a creditor should be excluded from the benefit of the deed unless he becomes a party to such a covenant. Every creditor who executes the deed binds himself to indemnify the debtor against all bills of exchange, promissory notes and other negotiable securities on which he may have incurred any liability, or which may have been indorsed or put in circulation by any of the creditors; and it seems to us that a covenant by which a creditor is bound to indemnify the debtor against liabilities of an unknown and uncertain amount, whether arising from the failure of the acceptor or the indorsees, is utterly unreasonable. Upon that ground alone, without entering into the other questions which have been raised, we think that this deed cannot be supported.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

SMITH AND ANOTHER, Assignees of the Estate and Effects of Wherry, a Bankrupt v. TIMMS AND STANTON. Feb. 6, 1863.—An assignment, under pressure, by a trader to certain creditors, not of the whole of his property, but with a substantial exception, is not an act of bankruptcy. Therefore, where a trader, under pressure, assigned to two creditors who were aware of his insolvency, his household furniture, stock-in-trade, and goods, chattels, and effects in his dwelling-house, which on their sale realized 193l., and the trader also had book debts and tea in bond of the value of 93l.: Held, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the assignment was not an act of bankruptcy.

[S. C. 32 L. J. Ex. 215; 9 Jur. (N. S.) 1285; 11 W. R. 381; 7 L. T. 859.]

This was an appeal against the judgment of the Court of Exchequer in discharging a rule to enter the verdict for the plaintiff, pursuant to leave reserved at the trial. The case stated on appeal was as follows:—

Trover by the assignees of a bankrupt, with a count for money had and received.

[850] Pleas: to the first count, not guilty, and not possessed: to the second count, never indebted. Issues thereon.

1. The plaintiffs are the assignees of E. Wherry, a grocer, who was adjudicated bankrupt on a creditor's petition on September 10th, 1860.

2. The defendants are the assignees under a bill of sale, executed by the bankrupt on June 27th, 1860, of property claimed by the plaintiffs on the ground that the execution of the bill of sale was an act of bankruptcy, as a "fraudulent transfer," within sect. 67 of the Bankrupt Law Consolidation Act, 1849.

3. The defendant Timms had lent 50l. to the bankrupt in November, 1858, and in respect of that loan, and of goods supplied in the course of business, he was, at the time of the execution of the bill of sale, a creditor for the sum of 88l.

4. The defendant Stanton, on the 13th June, 1860, lent the bankrupt 80l., which was secured by a promissory note payable on demand, signed by the bankrupt and two other persons, the bankrupt at the same time stating that he would repay the money on the 19th of the same month.

5. Two or three days before the bill of sale was given, the bankrupt, being much pressed for money, applied to the defendant Timms for a further loan, and shewed him a statement of his affairs, by which he represented himself to be worth a considerable surplus, after payment of all his debts. Timms, however, before making any further advance, insisted on examining for himself into the state of the bankrupt's affairs; and, for that purpose, he, on the 26th June, came from London to Market Deeping, where the bankrupt lived. He there made an investigation which satisfied him that the bankrupt's affairs were in a different state from what he had represented them to be, and that there was a deficiency, which he estimated at 380l. He met Stanton [851] for the first time at the bankrupt's, and, from what passed at that interview between the two defendants and the bankrupt, Stanton came to the conclusion that the bankrupt's circumstances were in a state of hopeless insolvency. Timms then proposed that the bankrupt should give them a bill of sale, to secure the amounts owing to them respectively, to which, after some pressure, he assented. A solicitor was immediately instructed, and, on the following day, the bill of sale was drawn up, and executed, and put in force.

6. Before the bill of sale was prepared, Wherry and Timms and Stanton went over Wherry's stock and effects in his house, and were satisfied that there was sufficient upon the premises to satisfy their debts.

7. The bill of sale bears date June 27th, 1860, and is from the bankrupt to the two defendants. After reciting the sums owing to the defendants respectively as above mentioned, it witnesses that the bankrupt assigns to the defendants "All and singular the household furniture, stock in trade, goods, chattels and effects whatsoever, of or belonging to him the said Edward Wherry, and which are now in, about or upon the dwelling-house now in his occupation: To have, hold and take the same

unto the 'defendants,' their executors, administrators and assigns:" upon trust to sell the same forthwith, and out of the proceeds to pay the expences of preparing the bill of sale and registering same, and of the sale, and the rent due, and in the next place to pay themselves their respective debts, and to pay the surplus (if any) to the bankrupt.

8. The bill of sale is executed by all parties, and was duly registered.

9. The defendants immediately entered into possession of the property so assigned, which was sold by auction in the course of the following week. The sum realized by the [852] sale was (omitting fractions of a pound) 193l., which, after payment of the auctioneer's charges, yielded a net amount of 160l., which was received, and has been retained by or on behalf of the defendants.

10. Wherry was made a bankrupt on the 6th July, 1860, upon his own petition, but the bankruptcy was annulled, and a fresh adjudication made on petition of the plaintiff Smith.

11. The other property possessed by the bankrupt was his book debts, some tea in bond, and some fixtures. The book debts were, at the time the bill of sale was executed, represented by the bankrupt to amount to the sum of 162l.; the amount appearing on the balance sheet was 82l., and the amount subsequently got in or considered good was 68l. The tea was, at the time the bill of sale was executed, valued by the bankrupt as worth 45l. to sell in the shop, and would have fetched that amount if sold in a regular way; but it was subject to charges of 11l. and 4l. before it could be had out of the bonded warehouse, and it was sold by the assignees with the charges upon it for 25l. The balance sheet was put in evidence, and it appeared that, on the 17th October, 1859, the bankrupt had fixtures which he valued at 20l. It was also stated that the bankrupt was informed the defendants had left sufficient fixtures to pay the rent, and that under the bill of sale they sold the stock in trade, furniture, fixtures and effects, except certain fixtures which they left upon the premises to pay the rent.

12. Besides the sums of 88l. and 80l., owing to the two defendants respectively, the amount specified in the bankrupt's schedule, and sworn to by him as owing to other creditors, was 422l., consisting chiefly of small sums. The amount of debts proved under the petition was 203l.

[853] 13. At the trial, at the Nottinghamshire Spring Assizes, 1861, the learned Judge, Mr. Justice Crompton, nonsuited the plaintiffs, on the ground that, the execution of the bill of sale not being a sale of all the bankrupt's property, and there being a surplus, was not of itself an act of bankruptcy, but reserved leave to the plaintiffs to move to enter a verdict for a sum to be settled between the respective counsel, the Court to be at liberty to draw any inferences of fact.

Wills (with whom was Bristowe), for the plaintiffs. The bill of sale was an act of bankruptcy. It was a conveyance of all the bankrupt's property, for though the fixtures are not expressly mentioned in it they would pass under the words "goods, chattels and effects:" *Pitt v. Shew* (4 B. & Ald. 206). [Blackburn, J. Property which sold for 193l. passed under the assignment, and property to the amount of 93l. did not pass.] The excepted property consisted of book debts, which could only be realized by a garnishment process, and tea in bond, which could only be obtained by paying 15l. Even if the book debts were of the value stated, the necessary effect of conveying away all other available property was to defeat and delay creditors. Under the 67th section of the Bankrupt Law Consolidation Act, 1849, fraud in fact was not essential to constitute an act of bankruptcy; the test was whether the assignment necessarily tended to defeat or delay creditors. [Blackburn, J. Can it be said that it necessarily has that effect when the debtor assigns property of the value of 196l., and retains property of the value of 93l.?] The defendants, having ascertained that the affairs of the bankrupt were in a different condition from that which he represented, and that he was in a hopeless state [854] of insolvency, proceeded to examine the property on the premises, and having ascertained that there was sufficient to satisfy their debts, procured an assignment from him of everything that was tangible. [Blackburn, J. It was not an assignment of all the bankrupt's property, or all with a colourable exception of part.] In *Stanger v. Wilkins* (19 Beav. 627) Sir J. Romilly set aside an assignment of property *bonâ fide* made, upon pressure, by a trader to a creditor, the trader being either insolvent or in such circumstances that a sale of the effects comprised in the assignment would render him

insolvent, and both parties having actual or constructive notice of the state of his circumstances. In that case, substantially, all the debtor's property was assigned. In *Smith v. Cannan* (2 E. & B. 36) and *Graham v. Chapman* (12 C. B. 85) it was laid down that the necessary consequence of an assignment of what is substantially all the trader's property is to defeat and delay his creditors, and that the existence of a surplus does not prevent it having that effect. [Williams, J. *Smith v. Cannan* does not profess to alter the rule laid down by Lord Mansfield in *Worseley v. Demattos* (1 Burr. 467) and *Wilson v. Day* (2 Burr. 827). Wightman, J. Is there any case in which, where a real and substantial part of the trader's property has not been included in the conveyance, it has been held an act of bankruptcy?] In *Pennell v. Dawson* (18 C. B. 855) Jervis, C. J., in summing up, said that everything that was tangible was assigned over, except the book debts, and that by the difficulty in collecting them a judgment creditor would be delayed, instead of finding something on the premises on which he could levy. [Blackburn, J. In *Graham v. Chapman* the deed not only trans-[855]-ferred the whole of the trader's property, but it also gave a right to take all future-acquired property, even though it should be purchased with the money which was the consideration for the transfer, so that the deed must necessarily have had the effect of delaying creditors. But suppose a trader is in insolvent circumstances and contemplating bankruptcy, and a creditor by pressure obtains from him a portion of his goods, is that an act of bankruptcy?] It would be a question for the jury whether the necessary effect was to defeat and delay creditors. Wightman, J. The result of the authorities is, that where there is a conveyance of the whole of a trader's property, or of the whole with only a colourable exception, that is an act of bankruptcy; but where there is a conveyance under pressure of part, though only a small part remains, that is not an act of bankruptcy.] An assignment of a trader's property with the exception of a real and substantial part is not necessarily an act of bankruptcy, because it may be the means of enabling him to go on with his trade, and so the transaction may be beneficial for his creditors: *Pennell v. Reynolds* (11 C. B. N. S. 709). That cannot apply here, for no one could obtain any benefit from the assignment but the two creditors to whom it was made. The true criterion is not whether the necessary effect of the deed is to stop the trade, but to defeat and delay creditors: *Hall v. Allnutt* (18 C. B. 505).

Hayes, Serjt. (with whom was Bridge), for the defendant. Recent decisions establish this principle, that an assignment of the whole of a trader's property, or of the whole with only a colourable exception, which is, in effect, an assignment of the whole, is, of itself, an act of bankruptcy. But in the case of an assignment of a trader's property [856] with a substantial exception, in order to defeat the deed fraud must be proved. Where a trader in insolvent circumstances, under pressure, pays a creditor for a large amount, that must, to some extent, defeat and delay the other creditors; but, to invalidate the transaction, there must be actual fraud, or fraud as against the bankrupt law. No case can be cited in which an assignment, under pressure, of part of a trader's property has been held an act of bankruptcy. *Pennell v. Reynolds* (11 C. B. N. S. 709) is an authority in point. He was then stopped by the Court.

Wills, in reply, cited *Young v. Waud* (8 Exch. 221).

WIGHTMAN, J. We are all of opinion that, in this case, a substantial part of the trader's property was excepted from the operation of the deed of assignment. No doubt an assignment of the whole of a trader's property is an act of bankruptcy, because the necessary effect of it is to defeat and delay his creditors. For the same reason an assignment, with a colourable exception of part only, is an act of bankruptcy, for it is, in effect, an assignment of the whole. In the present case, however, the portion omitted was not merely a colourable exception, because it appears that it produced, when realised, about one-third of the whole of the trader's property. It must, therefore, be taken as an assignment of a part only of the property: and that was assigned under pressure. It has been decided in several cases that a bona fide assignment by a trader of part of his property in consequence of pressure, is not an act of bankruptcy. The case of *Pennell v. Reynolds* is a decisive authority on that point, for it was there laid down that, "if there be an assignment, not of the whole, but with a real [857] and substantial exception, in the absence of fraud that will not be an act of bankruptcy." That is a general proposition, and is in accordance with

the established rule of law, and therefore we think that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

MEMORANDA.

In last Michaelmas Vacation John Osborne, Esquire, of Lincoln's Inn, and James St. George. Burke, Esquire, of the Middle Temple, were appointed Her Majesty's counsel.

In the present Hilary Vacation George Stovin Venables, Esquire, of the Inner Temple, was appointed her Majesty's counsel.

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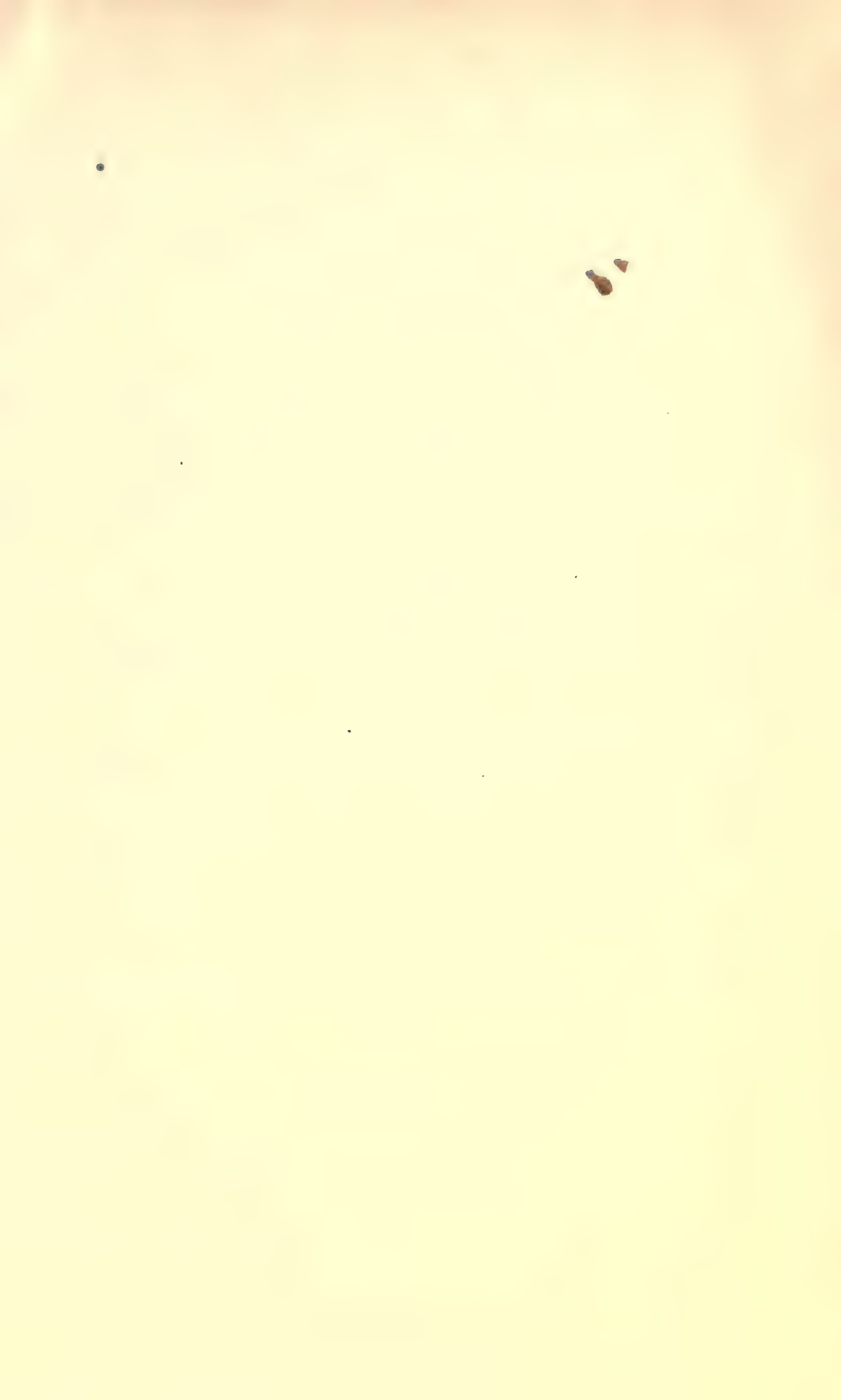
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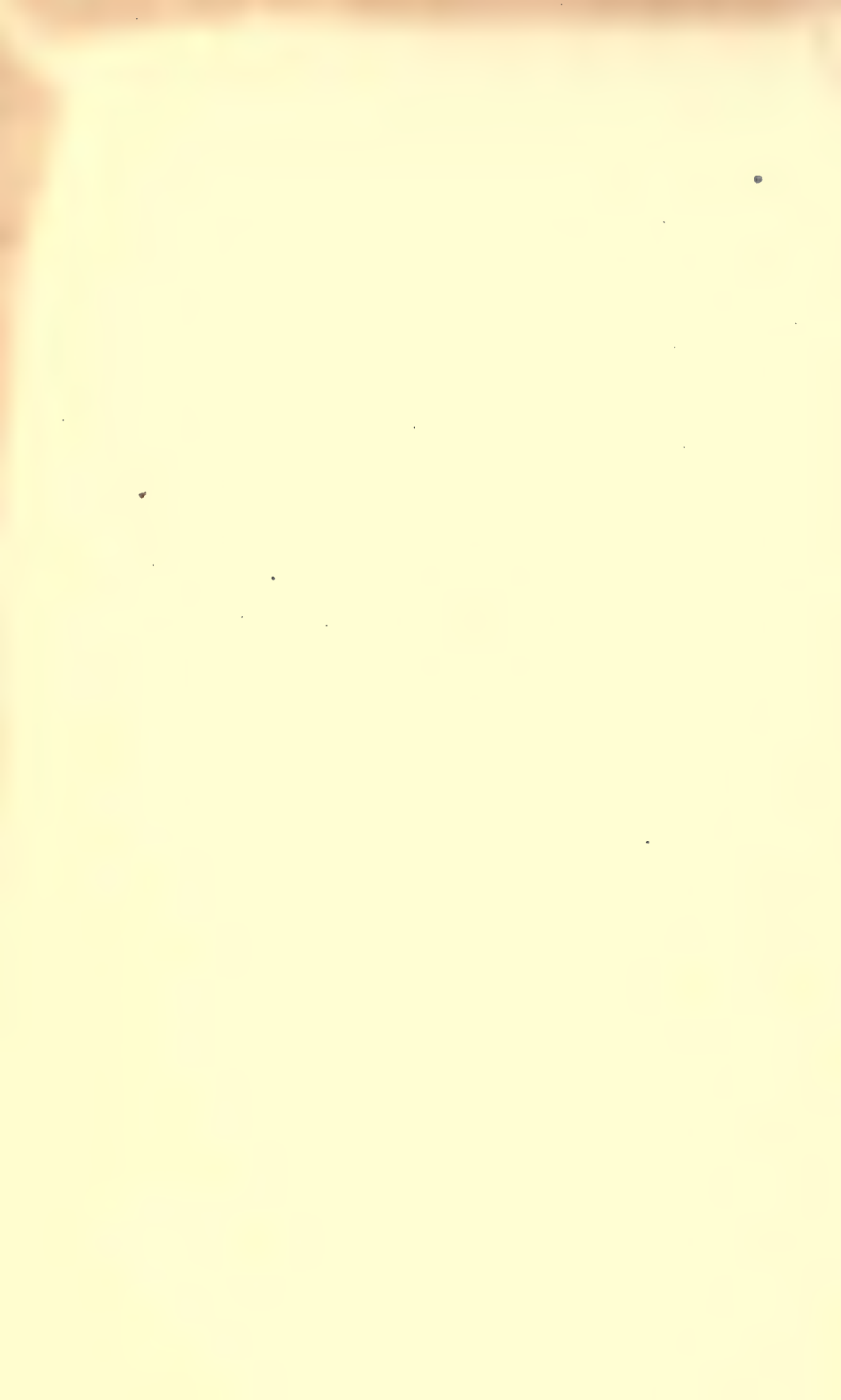
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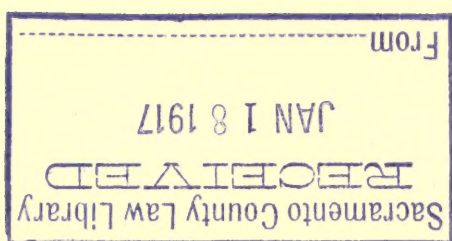
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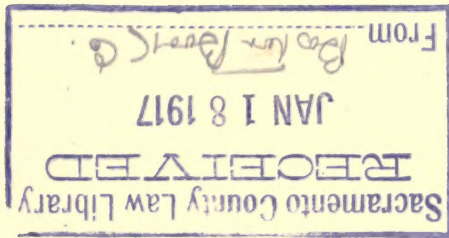




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